JAMAICA'S MARITIME LEGAL REGIME

INTRODUCTION

The Maritime Authority is a body corporate established under the Shipping Act of 1998. The Shipping Act consolidated the maritime legislation received into Jamaican law from the United Kingdom and implemented fourteen international conventions relating to the safety of shipping, the training, certification, and welfare of seafarers, salvage and the limitation of liability for maritime claims. The functions of the Maritime Authority are set out in section 8 of the Act and include:

♦ The Registration of Ships

Owners of ships are able to establish and transfer title to their ships by virtue of being registered on the register of Jamaican ships and mortgages secured against such ships are enforceable as legal mortgages when they are recorded in the register. The Maritime Authority also administers an international ship registry which was established with the passage of the Shipping (Amendment) Act 2000.

♦ Safety of Life at Sea

The Maritime Authority is responsible for ensuring the safe operation of ships by the inspection, survey and the administration of the collision regulations (otherwise known as the rules of the road for ships.) The events of September 11, 2001 has resulted in the extension of the definition of safety to include security and much of the Maritime Authority's attention is being focussed on the regulatory requirements governing inter alia, the prevention of the carriage of weapons of mass destruction by sea, using a ship as a weapon and the carriage by sea of persons involved in terrorist activities. A typical cruise ship lying in a Jamaican port is very likely to have on board 3,000 persons (passengers and crew) the majority of them being United States citizens and would therefore be a prime target for terrorists in the absence of adequate security.
Casualty Investigations

A major function of the Maritime Authority is to conduct investigations into casualties involving ships. At present the Authority is concluding the investigation into the circumstances leading to the capsizing of the M/V “Pieces of Eight” in which Dickie Coke (now deceased) was a passenger. The Authority also conducted an investigation into the capsizing of the “M/V Silvia” in the Old Harbour Bay with the loss of eight (8) teenagers in February 2000. Recommendations for improvement in the safety of life at sea are forwarded to the Minister of Transport and Works on completion of such investigations.

The Authority is also responsible for the prevention of pollution from ships and will be the agency administering the Shipping (Pollution Prevention and Control) Bill when it is promulgated.

Ship Source Pollution

Shipping casualties in many cases involve pollution of the marine environment and receive much media attention, although pollution from ships accounts for only ten (10) percent of marine pollution world wide.

Ship source marine pollution is commonly divided into two categories namely intentional (tank washings, dirty ballast, other discharges from machinery spaces) and accidental (collision, grounding, fire, explosion, structural failure etc). New sources of intentional pollution include, underwater noise, invasive aquatic species, and anti fouling paints which the international law is beginning to regulate.

The International Maritime Organisation (IMO), the United Nations agency which regulates shipping has reported that over 50% of the cargoes being carried on ships can be considered dangerous. Additionally the IMO has found that over 80% of all accidents are caused by human error. These facts combined indicate that vessel source pollution continues to be a major threat.
Jamaica and the Caribbean should be extremely concerned about vessel source pollution. The United States of America imports 3.3 billion barrels of oil annually and consumes 19 million barrels per day. After World War II the appetite for foreign oil increased dramatically and now a substantial amount of the 3.3B barrels is foreign oil carried in super tankers.

The Caribbean continues to provide three major routes for the carriage of oil by these supertankers and small island states like Jamaica with large Exclusive Economic Zones find themselves in the unfortunate position of bearing the risk of pollution by oil and other hazardous substances, accommodated for the benefit of distant states.

The collision between the two oil tankers Agean Captain & Atlantic Express in 1979 off the coast of Trinidad and Tobago is not well known but ranks as the world's largest oil spill. It has been reported that this incident is only eclipsed by the estimated one million tonnes of oil discharged allegedly by former President Saddam Hussein's army during the first Gulf war. The Caribbean has therefore not been spared from major incidents.

In relation to garbage and sewage there should be much cause for concern as 80% of cruise ship tonnage operates in the Caribbean. Each of the 3,000 passengers and crew carried on the new cruise ships is estimated to generate 2kg of garbage per day. Large amounts of sewage and grey water from kitchens and baths are generated and discharged in the most cost effective way which in many cases involve disposal in the waters of jurisdictions where there is low enforcement of environmental laws.

Oil pollution incidents are extremely expensive which was patently demonstrated in the aftermath of the incident involving the M/V Exxon Valdez in Alaska in 1989. The incident resulted in 190 law suits with approximately 6,000 plaintiffs. Criminal fines of $125M were levied, and Federal and State Courts have ordered the Shipowner to pay 14.7B in punitive damages. Additionally three (3) billion dollars was paid for cleanup expenses and $300M for the compensation of affected fishermen.

Jamaica has had its fair share of incidents with two major oil spills in Montego Bay and Kingston respectively in 2001. Claims exceeding one million Jamaican dollars
were made in both cases. These incidents however did not adversely affect any major natural resource although in the case of the M/V Tradewind Spirit incident in Kingston there was fouling of the mangroves and a few seagulls.

In 1998 the M/V Starr 2 discharged a slurry of sugar and sea water which resulted in a massive fish kill in the Kingston Harbour. Claims amounting to over nine million were said to have been made although the amounts paid (if any) are not known.

The above mentioned local incidents have unfortunately “only” affected fishermen and natural resources and therefore the serious challenges and weakness in the legal framework have not been highlighted. It is very likely that a large oil spill on the north coast of Jamaica could devastate the tourism industry with little recourse for redress for the claimants including the Government of Jamaica.

The cases of Esso Petroleum Company Limited v Southport Corporation [1955 2 Lloyds Rep. 655 H.L] and Landcatch Ltd. v International Oil Pollution Compensation Fund [1998 2 Lloyds Rep. 552] provide an indication of what would happen if for instance a cruise liner in the Ocho Rios Bay discharged oil into the harbour which subsequently washed ashore on the beach or where there was a spill of pollutants in the conch fishing nursery in the Pedro Banks.

**Esso Petroleum Company Limited v Southport Corporation (the Inverpool)**

In this case the SS Inverpool a small oil tanker attempted to navigate a narrow channel in heavy seas, developed steering failure and ran aground. The master in an effort to save the vessel, jettisoned 400 tons of oil which was carried by wind and tides to the foreshore owned by Southport Corporation. The causes of action addressed by the court were nuisance, trespass and negligence.

**Private nuisance**

In addressing the nuisance claim Denning LJ whose comments at the Court of Appeal stage were accepted by the Law Lords, restated the elements of the tort of nuisance
namely the use of the defendants own land or some other land in such a way to injuriously affect he enjoyment of the Plaintiffs land.

The discharge of oil was held not to amount to a private nuisance as the activity did not emanate from a neighbouring parcel of land but resulted from the use of a ship at sea. Additionally nuisance required an element of foreseeability in order to be successfully claimed and this was not proven.

Public nuisance
The discharge of oil into the sea in circumstances where it likely to be carried onto the shores or beaches to the prejudice of persons was held to be a public nuisance. The nuisance action could however be maintained only by a person or class of persons who suffered damage over and above that suffered by the public.

Where fish are destroyed which are not part of a private operation, the public right to fish would have been affected and individual fishermen would not be able to successfully claim unless they suffered direct and substantial injury over and above that inflicted on the general public.

Currently licences are granted to fishermen to catch fish and harvest "conch" and it could be argued that fishermen make commercial use of a public right to take fish, which right the polluter's conduct would have adversely affected. The loss suffered by fishermen in these circumstances would be above that suffered by the public at large and they would be likely to recover damages for public nuisance. The foreseeability of the harm would however have to be proved under this cause of action.


Trespass
It was held in *the Inverpool* that in order to support an action in trespass to land, "the act done by the defendant must be a physical act done by him directly onto the Plaintiffs land." The claim against the owners of the SS Inverpool would fail in this instance as the oil was discharged outside the estuary and carried to the beach by wind and wave action. It was therefore not inevitable that it would have caused damage there. The pollution damage was consequential as opposed to the direct result of the master's action. Additionally the defence of necessity was available in trespass actions.

It was stated that *In actions between users of the highway, and between the occupier of premises adjoining the highway which have been damaged by a person lawfully using the highway, the person who has suffered damage cannot recover in trespass in the absence of negligence on the part of the person who has caused the damage.*

**Negligence**

It was claimed that the master was negligent in that he should not have proceeded to navigate a narrow channel knowing that the steering mechanism had developed a fault. This cause of action however failed as the steering failure was due to a fracture of the stern (rear) of the ship but no evidence was produced which indicated that the fracture was as a result of the negligence of the appellant shipowners.

Additionally the evidence of the deteriorating weather conditions made any attempt to turn around hazardous and the master's decision to proceed and subsequently jettison the oil to save his ship and crew did not reveal any want of care or skill.

Lord Tucker summed up the common law by quoting Lord Blackburn in River Wear Commissioners v Adamson as follows:

“My Lords, the common Law is I think, as follows:- Property adjoining to a spot on which the public have a right to carry on traffic is liable to be injured by that traffic. In this respect there is no difference between a shop the railings or windows of which may be broken by carriage on the road and a pier adjoining to a harbour or a navigable river or sea, which is liable to be injured by a ship. In either case the owner of
the injured property must bear his own loss unless he can establish that some other person is in fault, and liable to make it good." ((1877)2 App. Cas. at p 767).

This position continues to hold today although in many jurisdictions strict liability provisions have been introduced in environmental legislation.

The Problem of Establishing Locus Standi

Another major hurdle to overcome in applying common law principles to ship source pollution is the Locus Standi requirement. Persons who would suffer the most as a result of a pollution incident would be the fishermen, hotel owners and those dependent on tourism related activities.

Fish are regarded as res nullius ie owned by no one until they are caught and therefore the fishermen would have no right to sue by virtue of having no proprietary interest in the property that has been damaged. The same would apply to the operators of hotels, restaurants, watersports and related activities who generally have no proprietary interest in the foreshore or floor of the sea.

Natural resources including fish are vested in the Crown under the Beach Control Act, 1956 and the Natural Resources Conservation Authority Act 1991 and it would seem that only the National Environment and Planning Agency would have locus standi to sue for damage to the fish, coral reefs and foreshore of Jamaica however recovery would be limited to the costs to remedial measures taken.

The common law causes of action have proven not only to be inadequate to deal with ship source pollution but tend to be reactive and not proactive, the latter being the accepted and required approach to environmental regulation.

Maritime Legislation
Existing Jamaican legislation appears not to have been developed to specifically address ship source pollution and can hardly be resorted to in order to provide redress in the criminal or civil courts.

The Natural Resources Conservation Act, 1991 is the major environmental legislation in the country and has a very wide scope of application. Marine pollution and vessel source pollution is not however given any significant attention as unlawful discharges of pollutants are closely linked to the grant licences under the Act. This would not apply to ships.

Where however, action is taken by the National Environment and Planning Agency to respond to an unlawful discharge or threatened discharge in "waters" the costs incurred can recovered as a civil debt. (Section 16). This seems to be the only legislative provision that allows for preventive action to be taken and for recovery of "clean up" expenses. The section however refers to pollution of "waters" and does not address action taken in relation to damage to natural resources found within those waters.

The Shipping Act of 1998 seeks to regulate all matters relating to merchant shipping in Jamaica. A careful search of the Act will reveal however that marine pollution prevention is not addressed in any detail.

Part XIII of the Act makes provision for a ship owner to limit his liability in accordance with the tonnage of his ship in certain circumstances and where a claim for pollution damage is made against him he may resort to these provisions to avoid paying the full amount of the claim.

The majority of the other pieces of legislation including the Port Authority Act, Solid Waste Management Act, Wild Life Protection Act, Petroleum Act, Public Health Act, and Fishing Industry Act give cursory attention to vessel source pollution with no provision for civil liability and very low fines for breaches of their criminal provisions. The Harbours Act of 1875 is the only Act that makes specific reference to vessel source
pollution however the maximum fine under the Act is an embarrassingly low two thousand Jamaican dollars.

It is recommended that the Fisheries Bill which should be passed shortly, make specific provision for holding polluters not only criminally liable but also liable for loss of income incurred by licensed commercial fishermen which would allow for more certainty in the admissibility of the claims of this class of persons.

The majority of the above mentioned laws preceded the United Nations Conference on the Law of the Sea (UNCLOS) signed in Jamaica in 1982 which establishes the legal basis for the regulation of marine pollution at the international and local level.

The influence of UNCLOS has been most evident in the expansion of Jamaica's maritime jurisdiction. The Maritime Areas Act, 1996 establishes Jamaica as an Archipelagic State as well as the outer limit of Jamaica's Territorial Sea which is twelve nautical miles from where the Archipelagic baselines are drawn. Subject to limited conditions, Jamaica has sovereignty over this area and may exercise criminal and civil jurisdiction in respect of marine environment protection.

Section 3 of the Exclusive Economic Zone Act, 1991 establishes Jamaica's 200 nautical mile zone within which Jamaica may exercise jurisdiction in respect of the preservation and protection of the marine environment and the prevention and control of marine pollution. (Section 4(d)).

Regrettably neither Act addressed vessel source pollution which was left to regulations. No regulations have been passed nor does there appear to be any incentive for the status quo to change.

The major weaknesses of the existing maritime legislation are as follows:

1. Very low fines which cannot serve as a deterrent to would be polluters
2. The absence of civil liability and financial responsibility provisions
3. The relegation of vessel source pollution control to regulations which have not been passed.

**Draft (Shipping Pollution Control) Bill**

The Draft (Shipping Pollution Control) Bill which is being finalised at this time will provide significant improvement in the protection of Jamaica's marine environment from ship source pollution. The Bill will incorporate a number of International Conventions dealing with the areas of prevention of pollution, response to pollution incidents and civil liability and compensation for pollution damage.

Three international conventions namely the International Convention on Civil Liability for Oil Pollution Damage 1992, (CLC) the International Convention on the establishment of an International Fund for Compensation for Oil Pollution Damage 1992 (FUND) and the International Convention on Civil Liability for Bunker Oil Pollution Damage 2001, will address civil liability and compensation in the Bill.

The requirement for fault in assessing liability for pollution will be removed and replaced with a strict liability regime. Additionally direct action against the ship owner's insurer and compulsory liability insurance for ships over a certain size will facilitate prompt recovery of damages by claimants. The shipowner will however be entitled to certain defences as well as to limit his liability in accordance with the tonnage of the ship.

Where claimants are unable to receive adequate compensation under the CLC for the reasons set out in the convention, the Fund provides a supplementary form of compensation in the form of the International Oil Pollution (IOPC) Fund which will pay in excess of US$300M for any one incident. The Fund allows claims for pure economic loss by persons who depend heavily on earnings from coastal and ocean related activities provided there was a reasonable degree of proximity between the contamination and the loss suffered. Successful claimants under the FUND include
hotels and restaurants at and outside the contaminated area, travel agents and tourism promotion organisations.

One of the issues that will arise when the Bill is passed is the Court's interpretation of the definition of pollution damage. The interpretation given will determine whether and to what extent environmental damage and pure economic loss claims will be accepted, if at all.

In relation to the CLC, the owner will be held liable for pollution damage which is defined under the Convention as

"A Losses or damage caused outside the ship by contamination resulting from the escape or discharge of oil from the ship, wherever such escape or discharge may occur, provided that compensation for impairment of the environment other than loss of profit from such impairment shall be limited to costs of reasonable measures of reinstatement actually undertaken or to be undertaken:

B the costs of preventive measures and further loss or damage caused by preventive measures."

There is a dearth of authorities governing the application of the Civil Liability Conventions in national legislation however the matter came up in Landcatch Ltd. v International Oil Pollution Compensation Fund [1998 2 Lloyds Rep. 552].

In June 1993, the M/V Braer grounded off the Shetland islands in the United Kingdom spilling approximately 86,000 tonnes of oil into the sea. Affected coastal interests included fisheries, beaches, wildlife, tourism and the local economy. Fish farmers and related industries and tourism interests suffered significant losses which were of a purely economic nature.

The case involved a claim brought by a smolt supplier who suffered economic loss resulting from the loss of supply contracts with salmon farmers whose
marine farms were located in the contaminated area and had to be closed down. The smolt however was not contaminated nor was the property of the claimant damaged.

Actions were brought against the owners of the M/V Braer and their insurers and the issue turned upon the interpretation of legislation incorporating the CLC.

The material words were found in the definition of pollution damage namely "where as a result of an occurrence persistent oil escapes from a ship, compensation may be brought for pollution damage or contamination resulting from the escape" and the question arose as to whether those words admitted a claim for pure economic loss.

It was held that the provision accommodated costs for preventing further damage and remedial costs, however the losses suffered as a result of the loss of supply contracts were not allowed.

As a result of the incident the local fishermen were not able to fish and suffered a loss of income due to the closure of the fishery. It was held that the damage to their livelihood was a direct and immediate result of the contamination arising from the discharge or escape of oil from the ship. They were described as having "a direct economic interest in the damaged resource" and "the damaged resource could be regarded as having a direct impact on their economic interest." There claims would therefore be allowed.

The fishermen were however distinguished from persons such as the Plaintiffs who supplied the fishing industry with equipment etc. Their interest was in the fishing industry itself rather than the resource which the industry harvested. The loss was not caused by the pollution but directly caused by the traders decision not to buy what persons such as the smolt supplier (Plaintiff) had to sell.

It was held that the test of remoteness was too well established to be excluded except by express and unambiguous enactment and that the statute creating the
liability had not displaced these principles. The claim for pure economic loss therefore failed.

Based on the above decision businesses who receive, process and export conch although affected by the inability to harvest conch, would not be able to claim for economic loss. This may be also be the case for hotels which are not directly located on the beach, as well as restaurants and other businesses.

The IOPC Fund did not entertain the claims for pure economic loss as compensation is limited to claimants who had a legal right to claim under national law.

The judgment was however a departure from established common law principles as it identified a special relationship of fishermen to the sea. The absence of property in the fish was held not to be a bar to their claims against the ship owner.

Losses which are found to be direct and immediate were held to be compensable. The judges cited with approval the principles set out in Dorset Yacht Co. Ltd v Home Office [1970] A.C. 1004 that the elements of foreseeability and proximity as well as considerations of fairness, justice and reasonableness are relevant to all cases whatever the nature of the harm suffered by the plaintiff.

As a result of a pollution incident in Jamaican waters, Judges may find themselves with the challenge of distinguishing claims from a fish farmer with a proprietary interest in the damaged stock from those of persons who conduct traditional offshore fishing activities involving wild fish. Distinctions may also have to be made between claims of a hotel with a private beach and that of a hotel which does not own the beach on which it located. It has been commented that the time when the court will avoid the opening of the flood gates will be based on policy rather than logic.
The claims manual produced by the IOPC Fund could be used as a guide to allowing claims and setting boundaries for economic loss claims.

These guidelines are:

1. Geographical proximity between claimants activity and contamination
2. Degree to which claimant was economically dependent on an affected resource.
3. The extent to which the claimant had alternative means of supply
4. Extent to which a claimant's business formed a part of economic activity within the area affected by the spill.

The assessment of damages in the case of Jamaican fishermen will prove very challenging in the absence of catch and tax records.

In relation to claims for environmental damage it is not likely that courts will allow claims for “compensation for impairment of the environment”. This will be primarily due to the absence of proprietary interest and the challenges attendant with attaching values to natural resources of the marine environment.

The FUND will allow claims for impairment of the environment but not when such claims are based on "an abstract quantification of damage calculated in accordance with theoretical models".

Compensation is also limited to claimants who had a legal right to claim under national law and who had suffered quantifiable economic loss. Several claims have been paid under the regime of the FUND over the past years for damage to natural resources.

As indicated above natural marine resources are vested in the Crown and it would be the NEPA who would have the locus standi to bring such actions before the courts. The FUND’s pre condition for a legal right to claim under national law will make it extremely difficult if not impossible for such claims to be made to the FUND unless there is some legislative intervention.
In the USA claims for impairment of the environment are allowed under the Oil Pollution Act 1989 and designated Federal, State or Indian tribe officials are required to identify a range of restoration actions, select the most cost effective and circulate same for public comment. A final plan is thereafter developed which will become the basis of a claim for damages. It is yet to be seen whether the FUND will accept that method as the basis of assessing damages for the impairment of natural resources.

Conclusion

The current law in Jamaica governing ship source pollution is wholly inadequate and with the country’s heavy dependence on the marine environment for national revenues and the increased risk of a pollution incident, the passage of the legislation incorporating the international regime for civil liability and compensation should be given the highest priority before it is too late.

Bertrand Smith
Maritime Authority
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