

The “Commune de Mesquer” Case, the “Polluter Pays Principle”, and breaking Limits of Liability under the Civil Liability Convention 1992



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Summary / Core Points

- In light of numerous pollution incidents, Conventions signed whereby a trade-off achieved between Ship owners / oil transporters, and coastal states.
- Limited liability v ease of claim and guaranteed recovery
- Limited liability permits insurance of risk.
- What happens if environmental damage exceeds compensation available under Conventions?
 - Break limitation under Convention?
 - See ways of circumventing the cap on liability under the Conventions.
 - Effect on international law? Other problems?

Outline of Presentation

- Origin of liability conventions for oil pollution
- Purpose / way in which conventions function
- Main elements of Liability Conventions
- Factual background to Erika disaster.
- Different legal proceedings
- Claim by Commune de Mesquer – course of litigation
- Treatment of Preliminary Reference by CJEU
- Analysis.

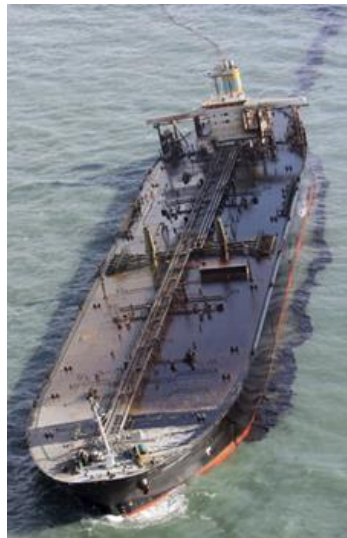
PART A: INTRODUCTION

- *Torrey Canyon* 1967 (UK/France)
- *Nestucca* (1988) (Canada/UK)
- *Kurdistan* (1979) (Nova Scotia)
- *Exxon Valdez* (1989) (Alaska)
- *Atlantic Empress* (1979) (T&T)
- *Castillo de Bellver* (1983) (South Africa)
- *Amoco Cadiz* (1978) (France)
- *M/T Haven* (1991) (Italy)
- *Sea Star* (1972) (Oman)



NOVA SCOTIA MUSEUM





Main Elements of Liability Conventions

- **The Liability Convention**
- The Liability Convention governs the liability of shipowners for damage caused by the spillage of oil from oil tankers
- The Liability Convention embodies the principle of strict liability but limited to an amount calculated by reference to the tonnage of the ship and establishes a system of compulsory liability insurance.
- Under Article II(a) of the Liability Convention, the Convention applies to **pollution damage caused in the territory, including the territorial sea, of a Contracting State, and in the exclusive economic zone of a Contracting State established in accordance with international law or, as the case may be, in an area beyond and adjacent to the territorial sea of that State determined by that State in accordance with maritime law and extending not more than 200 nautical miles from the baselines from which the breadth of its territorial sea is measured.**
- Under Article III(4) of the Liability Convention, **“no claim for compensation for pollution damage under this Convention or otherwise may be made against ... any charterer (howsoever described, including a bareboat charterer), manager or operator of the ship ... unless the damage resulted from their personal act or omission, committed with the intent to cause such damage, or recklessly and with knowledge that such damage would probably result”**. In the context of this case, that is an important provision because if Total was not guilty of conduct under the last limb of Article III(4) then it would have had no liability to the Commune – the question was therefore could Total (as charterer) be liable under the EU’s Waste Directive

Main Elements of Liability Conventions

■ The Fund Convention

- “Complements” the Liability Convention by establishing a system for compensating victims
- International Oil Pollution Compensation Fund (the “Fund”) can cover up to 135 million SDR (special drawing rights) for an incident before 2003
- Article 4 of the Fund Convention: victims may bring claims for compensation before the courts of the Contracting State where the damage has been caused, in particular where the Liability Convention does not provide for any liability for the damage in question or where the shipowner is insolvent or released from liability under that Convention
- Protocol of 2003 to the International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage, 1992, establishes an international supplementary fund for compensation for oil pollution damage, to be named ‘The International Oil Pollution Compensation Supplementary Fund, 2003’, which together with the Fund makes it possible to cover up to 750 million units of account in respect of any one incident after 1 November 2003



12 December 1999 : *Erika* sinks in Bay of Biscay
60 nautical miles off Brittany (French EEZ)

The ship

- single hull tanker
- 24 years old
- Maltese flag

owner : Tevere Shipping

manager : Panship Management Services

classification society : Registro Italiano Navale (RINA)

voyage charterer : Total Transport Corporation (TTC)

Voyage Dunkirk / Livorno with a cargo of 31,000 tons heavy fuel oil sold by Total International Ltd (TIL) to ENEL

Producers of Waste?

Holders of Waste?



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Background

■ FACTS

■ Introduction

- » 1975 Maltese-registered Japanese-built tanker
- » 1999 Sinking
- » ENEL needed oil which it bought from Total
- » Oil needed to be shipped from France to Italy
- » 31,000 tons of heavy fuel oil on board – about two-third spilled
- » 400 kilometres of French coast affected
- » Clean up took a number of years
- » About two-thirds of the 31,000 tons of oil spilled but some 250,000 of waste oil collected
- » Small vessel so cap of liability of 135m SDRs (\$200m) but...
- » 7000 claims totalling \$600m....alternative route

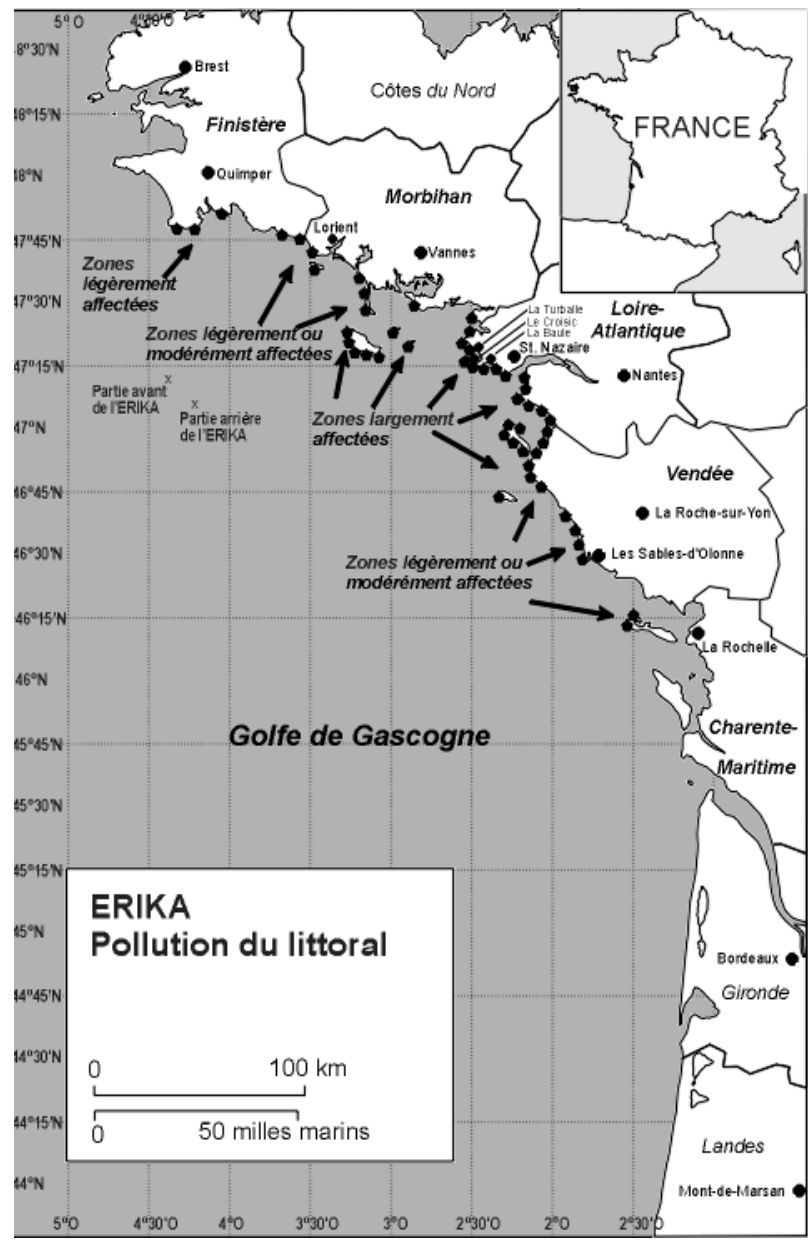


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■ The Incident at Issue

- » ENEL needed oil for one of its power plants
- » Total Raffinage Distribution
- » Total International Limited
- » Total R sold the oil to Total I
- » Producer v Holder
- » *Erika* chartered by Total I
- » Dunkirk in France to Milazzo in Sicily
- » Set sail on 8 December 1999





20 000 ton oil spill along 400 km of French West Coast

International Compensation Regime

- France party to 1992 CLC and 1992 Fund Convention

1992 Civil Liability Convention(CLC) :

- strict but limited liability for shipowners
- compulsory insurance

1992 Fund Convention :

- compensation of victims through an international fund (the "1992 Fund")



INSURANCE

Shipowner's limitation under
1992 CLC :

€ 12.8 million

March 2000: P&I Club sets up
limitation fund for this amount.



STEAMSHIP MUTUAL



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Compensation

- Amount available under 1992 Fund Convention
- € 172 million



International Oil Pollution Compensation Funds (IOPC Funds)



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Payments under Conventions

Amount available under 1992 CLC
+ Fund Conventions :

€ 184.8 million

7131 victims claim € 390 million

1992 Fund and P&I handle claims
and settle most of them out of
court. 700 victims bring actions in
courts. Recourse actions between
main actors

Finally € 129.7 million paid to
victims under this regime

Claims in Court / insufficient funds



Different Legal Proceedings and their stages.

- Criminal Proceedings
 - Criminal Liability
 - Civil Liability
- Different Stages
 - Criminal Court, Cour d'Appel, Cour de Cassation
- Civil Claims – Commune de Mesquer
 - Small claim – Cour de Commerce
 - Cour d'Appel
 - Cour de Cassation
 - CJEU

Commune de Mesquer



Claim by Commune de Mesquer

- **French Court Proceedings**



- Commune instituted proceedings against the Total companies to recover its costs in the **Tribunal de commerce de Saint-Nazaire** relying on French Law No.75-633. Commune claimed that Total was liable for the consequences of the damage caused and be ordered to pay the costs incurred by the municipality for cleaning and anti-pollution measures: €69,232,42 Commune lost its claim
- Appealed to the **Cour d'appel de Rennes** which confirmed the decision. The Cour d'appel believed that the heavy fuel oil did not constitute waste but was a combustible material for energy production manufactured for a specific use. The Cour d'appel did accept that the heavy fuel oil did spill into the water and was therefore mixed with water and sand but the court nonetheless believed that there was no basis under which Total could be held liable since they could not be regarded as “producers” or “holders” of the “waste”
- Commune appealed to the **Cour de cassation** – France’s final court of appeal. Net issue was whether Total was liable for pollution under the Waste Framework Directive (i.e., Directive 75/442/EEC on waste). French court said it needed the assistance of the CJEU under the preliminary reference regime because the case “raised a serious problem of interpretation of Directive 75/442”.

The Questions Referred

Reference from the Cour de cassation in France to the CJEU

- “1. Can heavy fuel oil, as the product of a refining process, meeting the user’s specifications and intended by the producer to be sold as a combustible fuel, and referred to in [Directive 68/414] be treated as waste within the meaning of Article 1 of [Directive 75/442] as...codified by [Directive 2006/12]?”**
- 2. Does a cargo of heavy fuel oil, transported by a ship and accidentally spilled into the sea, constitute – either in itself or on account of being mixed with water and sediment – waste falling within category Q4 in Annex I to [Directive 2006/12]?”**
- 3. If the first question is answered in the negative and the second in the affirmative, can the producer of the heavy fuel oil (Total Raffinage [distribution]) and/or the seller and carrier (Total International Ltd) be regarded as the producer and/or holder of waste within the meaning of Article 1(b) and (c) of [Directive 2006/12] and for the purposes of applying Article 15 of that directive, even though at the time of the accident which transformed it into waste the product was being transported by a third party?”**

Applicable Legal Instruments

Liability Convention	International Convention on Civil Liability for Oil Pollution Damage adopted at Brussels on 29 November 1969, as amended by the Protocol signed in London on 27 November 1992 (the “Liability Convention”)	OJ 2004 L78/32
Fund Convention	International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage adopted at Brussels on 18 December 1971, as amended by the Protocol signed in London on 27 November 1992 (the “Fund Convention”)	OJ 2004 L 78/40

European Law Provisions

Directive 75/442: Waste Directive

- The essential objective of all provisions relating to waste disposal must be the protection of human health and the environment against harmful effects caused by the collection, transport, treatment, storage and tipping of waste
- **Article 1 of the Waste Directive (Directive 75/442) provides:**

“For the purposes of this Directive:

- (a) “waste” shall mean any substance or object in the categories set out in Annex I which the holder discards or intends or is required to discard....The Commission ... will draw up ... a list of wastes belonging to the categories listed in Annex I ...
- (b) “producer” shall mean anyone whose activities produce waste (“original producer”) and/or anyone who carries out pre-processing, mixing or other operations resulting in a change in the nature or composition of this waste;
- (c) “holder” shall mean the producer of the waste or the natural or legal person who is in possession of it;...
- (e) “disposal” shall mean any of the operations provided for in Annex II, A;
- (f) “recovery” shall mean any of the operations provided for in Annex II, B;
- (g) “collection” shall mean the gathering, sorting and/or mixing of waste for the purpose of transport.”

Take note of the word “discard” used in Article 1. This word will be very significant in the ruling.

The specific provisions

Article 8 of the Waste Directive provides:

“Member States shall take the necessary measures to ensure that any holder of waste:

- has it handled by a private or public waste collector or by an undertaking which carries out the operations listed in Annex II A or B, or
- recovers or disposes of it himself in accordance with the provisions of this Directive.”

Article 15 of the Waste Directive embodies the “polluter pays” principle.

It provides:

“In accordance with the “polluter pays” principle, the cost of disposing of waste must be borne by:

- the holder who has waste handled by a waste collector or by an undertaking as referred to in Article 9,

and/or

- the previous holders or the producer of the product from which the waste came.”

The specific provisions

- **Categories Q4, Q11, Q13 and Q16 in Annex I to Directive 75/442, ‘Categories of waste’, read as follows:**

“Q4 Materials spilled, lost or having undergone other mishap, including any materials, equipment, etc., contaminated as a result of the mishap...

Q11 Residues from raw materials extraction and processing (e.g. mining residues oil field slops, etc.)...

Q13 Any materials, substances or products whose use has been banned by law...

Q16 Any materials, substances or products which are not contained in the above categories.”

Other Relevant Instruments/provisions

- **Minimum Oil Stocks Directive: Directive 68/414/EEC**
- **Environmental Liability Directive: Directive 2004/35/EC**
- Recital 10 in the preamble:
 - » “Express account should be taken of the Euratom Treaty and relevant international conventions and of Community legislation regulating more comprehensively and more stringently the operation of any of the activities falling under the scope of this Directive. ...”
- Article 4(2) of Directive 2004/35 provides:
 - » “This Directive shall not apply to environmental damage or to any imminent threat of such damage arising from an incident in respect of which liability or compensation falls within the scope of any of the International Conventions listed in Annex IV, including any future amendments thereof, which is in force in the Member State concerned.”
- Annex IV to Directive 2004/35 reads as follows:
 - » “INTERNATIONAL CONVENTIONS REFERRED TO IN ARTICLE 4(2)
 - » (a) the International Convention of 27 November 1992 on Civil Liability for Oil Pollution Damage;
 - » (b) the International Convention of 27 November 1992 on the Establishment of an International Fund for Compensation for Oil Pollution Damage;

The relevant French Law

- NATIONAL LAW

- Article 2 of Loi n° 75-633 relative à l'élimination des déchets et à la récupération des matériaux (Law No 75-633 on the disposal of waste and the recovery of materials) of 15 July 1975 (JORF, 16 July 1975, p. 7279), now Article L. 541-2 of the Code de l'environnement (Code of the Environment), provides:
 - » 'Any person who produces or holds waste under conditions likely to produce harmful effects on soils, flora and fauna, to damage sites or landscapes, to pollute the air or water, to cause noise and odours and, in general, to harm human health or the environment, is obliged to dispose of it or have it disposed of in accordance with the provisions of this Chapter, under the conditions required to avoid the above effects.
 - » The disposal of waste includes the operations of collection, transport, storage, sorting and treatment required for the recovery of reusable elements and materials or energy, and for the deposit or discharge into the natural environment of all other products under the conditions required to avoid the harmful effects mentioned in the previous paragraph."

The Answers by the CJEU

FIRST QUESTION:

- IS HEAVY FUEL OIL
- SOLD AS A COMBUSTIBLE FUEL
- “WASTE” WITHIN THE MEANING OF ARTICLE 1(a) OF DIRECTIVE 75/442?
- CJEU’s response: “The answer to the first question must therefore be that a substance such as that at issue in the main proceedings, namely heavy fuel oil sold as a combustible fuel, does not constitute waste within the meaning of Directive 75/442, where it is exploited or marketed on economically advantageous terms and is capable of actually being used as a fuel without requiring prior processing.”
- In other words, where the oil had not been discarded but was actually being transported to be delivered to a customer then it was not waste.

The Answers by the CJEU

- **SECOND QUESTION:**
- **IS HEAVY FUEL OIL**
- **THAT IS ACCIDENTALLY SPILLED INTO THE SEA**
- **FOLLOWING A SHIPWRECK**
- **WASTE WITHIN THE MEANING OF CATEGORY Q4 IN ANNEX I TO DIRECTIVE 75/442?**
- **CJEU's response:**
 - “63 Consequently, the answer to the second question must be that hydrocarbons accidentally spilled at sea following a shipwreck, mixed with water and sediment and drifting along the coast of a Member State until being washed up on that coast, constitute waste within the meaning of Article 1(a) of Directive 75/442, where they are no longer capable of being exploited or marketed without prior processing.”

The Answers by the CJEU

- **THIRD QUESTION:**

- **WHETHER, IN THE CASE OF A SINKING OF AN OIL TANKER,**
- **THE PRODUCER OF THE OIL SPILLED AT SEA AND/OR THE SELLER OF THE OIL AND CHARTERER OF THE SHIP**
- **MAY BE REQUIRED TO PAY FOR THE DISPOSING OF THE WASTE GENERATED**
- **EVEN THOUGH THE SUBSTANCE WAS BEING TRANSPORTED BY A THIRD PARTY?**

Submissions by Parties to reference 1

Party	Argument
Commune de Mesquer	For the purposes of the application of Article 15 of Directive 75/442, the producer of the heavy fuel oil and the seller of that fuel oil and charterer of the ship carrying it must be regarded as producers and holders, within the meaning of Article 1(b) and (c) of that directive, of the waste resulting from the spillage into the sea of that substance
Total	In the circumstances of the case, Article 15 of Directive 75/442 does not apply to the producer of the heavy fuel oil or to the seller of the oil and charterer of the ship carrying that substance, in that, at the time of the accident which converted the substance into waste, it was being carried by a third party. Furthermore, that provision also does not apply to the producer of the heavy fuel oil simply because it produced the product from which the waste came

Submissions by Parties to reference 2

Party	Argument
France Italy Commission	The producer of the heavy fuel oil and/or the seller of the oil and charterer of the ship carrying that substance may be regarded as producers and/or holders of the waste resulting from the spillage at sea of that substance only if the shipwreck that converted the cargo of heavy fuel oil into waste was attributable to various actions capable of making them liable
Commission	The Commission added however that the producer of a product such as heavy fuel oil may not, merely because of that activity, be regarded as a 'producer' and/or 'holder' within the meaning of Article 1(b) and (c) of Directive 75/442 of the waste generated by that product on the occasion of an accident during transport. Such a person is none the less obliged under the second indent of Article 15 of that directive to bear the cost of disposing of the waste, in his capacity as 'producer of the product from which the waste came'

Submissions by Parties to reference 3

Party	Argument
Belgium	The application of Directive 75/442 is excluded because the Liability Convention applies
United Kingdom	The CJEU should not answer this question, in that the case at issue in the main proceedings relates to issues of liability for the spillage of heavy fuel oil at sea

The Answers by the CJEU

THIRD ANSWER:

- “89 In the light of the above considerations, the answer to the third question must be that, for the purposes of applying Article 15 of Directive 75/442 to the accidental spillage of hydrocarbons at sea causing pollution of the coastline of a Member State:
 - the national court may regard the seller of those hydrocarbons and charterer of the ship carrying them as a producer of that waste within the meaning of Article 1(b) of Directive 75/442, and thereby as a ‘previous holder’ for the purposes of applying the first part of the second indent of Article 15 of that directive, if that court, in the light of the elements which it alone is in a position to assess, reaches the conclusion that that seller-charterer contributed to the risk that the pollution caused by the shipwreck would occur, in particular if he failed to take measures to prevent such an incident, such as measures concerning the choice of ship;...

The Answers by the CJEU

THIRD ANSWER Continued:

— if it happens that the cost of disposing of the waste produced by an accidental spillage of hydrocarbons at sea is not borne by the Fund, or cannot be borne because the ceiling for compensation for that accident has been reached, and that, in accordance with the limitations and/or exemptions of liability laid down, the national law of a Member State, including the law derived from international agreements, prevents that cost from being borne by the shipowner and/or the charterer, even though they are to be regarded as ‘holders’ within the meaning of Article 1(c) of Directive 75/442, such a national law will then, in order to ensure that Article 15 of that directive is correctly transposed, have to make provision for that cost to be borne by the producer of the product from which the waste thus spread came. In accordance with the ‘polluter pays’ principle, however, such a producer cannot be liable to bear that cost unless he has contributed by his conduct to the risk that the pollution caused by the shipwreck will occur.”

Analysis of Judgment

- Serious Implications for those transporting hydrocarbons by sea
- Places a new duty of care upon shippers / Sellers etc oil
- On a Public International Law level, it evinces a clear intention by CJEU to prefer EU law obligations over treaty obligations of member states.
- Potential difficulties regarding the Insurance of ships and transportation of hydrocarbons / similar pollutants
- Principle only applicable where the compensation fund exceeded and an element of responsibility by producer / holder

Subsequent Cases

- Case C-358/11 Lapin elinkeino-, liikenne- ja ympäristökeskuksen liikenne ja infrastruktuuri –vastuualue. (Adv Gen Kokott)
- Joined Cases C-241/12 and C-242/12 Shell Nederland Verkoopmaatschappij BV and Belgian Shell NV. (Advocate General Jääskinen) 18 June 2013
- 28 February 2012 - CJEU in Inter-Environnement Wallonie ASBL, Terre Wallonne ASBL v Région Wallonne
- EPA v Neiphin Trading and Ors [2011] 2 IR 575
- Brownfield v Wicklow Co Co [2017] IEHC 375
- Usk and District Residents Association Ltd v An Bord Pleanála, Ireland and the Attorney General, Kildare County Council (Notice Party) and Greenstar Recycling Holdings Ltd (Notice Party [2010] 2 I.L.R.M. 235 (MacMenamin J.).

Conclusion



Conclusion



MANY THANKS

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