Chapter 8

LAW ON RESPONSE SYSTEM AND LIABILITY FOR ACCIDENTAL POLLUTION

Maritime casualties are on the rise along the Indian coastal line. Total elimination of shipping accidents is impossible because the risk of natural perils of the sea is inherent in the transportation of goods. Lack of co-ordination between various authorities, willful and negligent violations of international and national safety rules, inept communication and signal systems, lack of commitment on the part of regulators and ship owners have contributed to the increase in the number of shipping casualties in the recent past. Accidents continue to occur irrespective of the technology advancements and capacity building measures to prevent it. Yet it remains a reality that the response measures and investigative and adjudicatory mechanisms remain the same as it was a hundred years ago.

A maritime casualty may result in loss of life, personal injury, loss of cargo and environmental degradation. In that case, only an effective and quick response system can minimize its impact on port environment. Whether this response system is in accordance with the IMO vision and comparable with similar systems world-wide is a significant question. When there is pollution in ports as a result of a maritime casualty, who should be held responsible, how to fix the liability and the quantum of compensation are some of the vital issues that the law should be able to address.

Controlling Pollution in Ports through Proper Salvage Operations

With the onset of monsoon maritime casualties are common along the Indian coastal line and so also, the wreck removal and salvage operations. There is always potential pollution risk associated with wreck, collisions and other forms of maritime casualties to the port environment irrespective of the
place of occurrence. The high tides may always carry the pollutants to the port area. During casualties, cargo handling poses serious challenges and may be the most complex and lengthy part of the salvage operations. The major considerations could be the risk of pollution from cargo and its potential hazard and value. With almost over 450 abandoned ship wrecks lying across the Indian sea bed, it is not possible to say whether safe navigation is possible along the Indian coastal line\(^1\).

Pollution in ports can be reduced considerably through proper salvage operations. A successful salvage intervention results in safe towing, repair and returning of the vessel to service. When successful salvage operations seem to be expensive and complex, the vessel will be declared as a total loss and the consequent costs for removing it would fall upon liability insurers. The coastal state plays a huge role in wreck removal and salvage operations. Political interferences also have vital impact on salvage activities. Multiple tiers of governmental and other agencies have a claim on their legitimate role, putting into forth, their perspectives, which can influence operational and commercial decisions on wreck removal and salvage.

When a maritime casualty such as collision occurs, “preventive response through salvage” is widely accepted as a successful method in combating port pollution. A good salvage operation may in either cases of giving or denying access to a ship in distress may help to reduce the risk of accidental port pollution. Often, clean-up after the incident may not be 100% successful but a salvage operation may keep the oil within the ship itself. Under the Lloyd’s Form salvage contract, the Salvor is bound to use their “best practices” to prevent or reduce the damage to the marine environment.

\(^1\) Economic Times Bureau, “India’s Long Shoreline is at Risk of Serious Ecological Disaster”, reported in the Economic Times, dated 26\(^{th}\) August 2013.
Under the Salvage Convention\textsuperscript{2}, the owner and master of the vessel or the owner of the property in danger may give all assistance to the salvor to reduce the damage caused to marine environment resulting from the maritime casualty\textsuperscript{3}. The rights of the coastal state are also being recognized under the convention to take every step in minimizing pollution risk to its coastal line during salvage operations, inclusive of giving directions to the salvors\textsuperscript{4}. The convention stresses on co-operation among state parties thereby rendering all assistance to salvors for the prevention of marine pollution\textsuperscript{5}.

Under the Indian law, wreck and salvage are dealt under of the Merchant Shipping Act 1958\textsuperscript{6}. Accordingly, the salvor is entitled to claim proportionate to the services rendered in saving the cargo and life of persons\textsuperscript{7}. Under the Act\textsuperscript{8}, the salvage operations inside the port area should be authorized by the port authority and will not ‘entitle any person to salvage in respect of any property recovered by creeping or sweeping in contravention of the Indian Ports Act, 1908’\textsuperscript{9}.

**Wrecks in Port Area**

If a wreck or stranding of vessel happens in the port area, enormous amount of oil and hazardous substances may pollute the waters. This occurred during the gulf war, Iran- Iraq war and the U.S attack on Iraq. Iraqi sea ports, which were busy gateways to international commerce, had to be closed down because of pollution from sunken vessels. The same scenario existed during the

\textsuperscript{2} The International Convention on Salvage, 1989

\textsuperscript{3} Id., ch. II, art.8 (2)(b)

\textsuperscript{4} Id., art.9

\textsuperscript{5} Id., art.11

\textsuperscript{6} The Merchant Shipping Act, 1958, Part XIII

\textsuperscript{7} Id., s.402

\textsuperscript{8} Id., s. 403(b)

\textsuperscript{9} The Indian ports Act, 1908, s.29
World War II. Therefore, the response and contingency planning should be
good enough to integrate salvage packages on wreck removal.

**The United States Law on Wreck Removal**

In the United States, the Abandoned Ship Wrecks Act, 1988\(^{10}\) made the
owners or operators responsible to mark a sunken vessel with a buoy or beacon
during day time and lighted lantern at night and to ‘diligently’ commence with
immediate removal of the wreck. Failure of such removal will be considered as
abandonment and the United States Army Corps Engineers on behalf of the
Federal government may remove, destroy or sell the wreck and the costs could
be reimbursed from the owner or operator after giving 30 days’ notice\(^{11}\).
During emergency situations 24 hour notice may be issued by the United States
Army Corps Engineers. The proceedings under the Wreck Act will be initiated
only when it happens in navigable waters. Under the OPA Scheme, the owner
of the vessel will have to bear the cost for raising or removing the wreck. The
provisions of the Abandoned Barge Act, 1992\(^{12}\) may be invoked if the wreck is
an abandoned barge located in navigable waters within 3 miles the coasts of the
United States.

The Oil Pollution Act, 1990 governs the removal of a sunken wreck if it
is causing or potentially polluting the U.S waters. In case of substantial threat
to public health, the Federal agency will take necessary action to remove it.
Otherwise the owner or operator will be given notice to remove the wreck. If
the owner or operator refuses to remove the wreck, the United States Coast
Guard will remove it and the expenses will be met from a fund created for the
purpose\(^{13}\). The fund is managed and operated by an independent agency.

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\(^{10}\) 33 U.S.C §§409

\(^{11}\) 33 U.S.C §§414

\(^{12}\) 48 U.S.C §§4701

\(^{13}\) The Oil Spill Liability Trust Fund
In case of hazardous substances removal, the proceedings under the Environmental Response, Compensation and Liability Act, 1980 will be initiated. Hence, the system is adequate to fix liability on the owner or operator of the vessel. By means of latest changes, the vessels are given port entry only when the ship carries a ship pollution response plan on board. In addition, the owner or master will have to make arrangements with an Oil Spill Response Organization classified by the United State Coast Guard. This step is mandatory under the OPA 90 to eliminate the risks of worst cases of oil spill on an emergency. These regulations were made mandatory under OPA 90 in response to the Exxon Valdez spill\textsuperscript{14}.

Under the Wreck removal convention, 2007\textsuperscript{15}, a wreck means, stranding or sinking of a vessel, any part thereof, any object that is lost from such a ship or its part and includes a ship that is reasonably about to sink or strand, where no rescue operations have started for it. The OPA incorporates this definition thus making the owner and operator liable for any potentially polluting wreck causing serious obstructions to navigation. The convention provides for locating, identifying and reporting wrecks to coastal states, warnings to seafarers and coastal state’s duty to locate and mark wrecks. The convention sets criteria for determining potential polluting wrecks, damage likely to result from wrecks, ship owner’s obligation to remove wrecks and circumstances warranting intervention by the state. The coastal states may extend their powers up to the Exclusive Economic Zone for removal of wrecks. It also provides for financial liabilities of the ship owner in marking and removing the wreck.

\textsuperscript{14} See, the United States Vessel Response Plans, available at https://homeport.uscg.mil/mycg/portal/ep/channelView.do?channelId=-30095 \& channel Page=%252Fep%252Fchannel%252Fdefault.jsp\&pageTypeId=13489, last visited in December 2013

\textsuperscript{15} The Nairobi International Convention on Removal of Wrecks, 2007
As such the United States has the most refined wreck removal regime. In a survey conducted by the IMO, in connection with the drafting of wreck removal convention, around 30 domestic laws were analyzed. There were a number of countries with limited wreck removal regime. The survey identified that at least some features were common in most of the domestic laws. They defined wreck and when wreck constituted a hazard. The onus on the owner to remove the wreck was established. Failure of such an onus, the state would be responsible to remove it and the state could reimburse the costs from the owner or operator. Failure to comply with wreck laws would make the owner liable under civil and criminal laws.

**The Indian Law on Wreck Removal**

As per the provisions of the Merchant Shipping Act 1958, a wreck may happen not only in territorial waters or areas beyond that but also in the tidal waters or on the shores or the coasts. Yet, a harbour or port is exempted from the place of occurrence of wreck under the Act. Hence, if the wreck, stranding or sinking of the ship happens in the port, the provisions of the Indian Port Act, 1908 and the powers of the deputy conservator in preventing pollution will apply.

Under the Indian law, the abandonment of the vessel beyond any hope or intention is the criteria for treating it as a wreck. Hence, the vessel about to be stranded included under the Convention and OPA Scheme does not find application in India. The potentially polluting wreck is not a wreck as per the Indian law. Hence, if a vessel sinks or capsizes in the port area, unless the owner abandons it, the laws on wreck may not be applicable to it.

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16 The Merchant Shipping Act, 1958, s. 391

17 *Id.*, s. 2(49) reads, “‘Tidal waters’ has been defined in the Act to mean any part of the sea and any part of a river within ebb and flow of the tide at ordinary spring tides and not being a harbour”.

18 The Merchant Shipping Act, 1958, s. 2(55)
Wrecks include goods and vessels\textsuperscript{19}. It may happen in sea, tidal waters, shores or in the coast.

Under the Indian Ports Act, 1908, if a ship is wrecked, stranded or sunk within the port limits, the Conservator of the Ports or in the absence of such an office, the Harbour master may give notice to the owner of the vessel ‘to raise, remove or destroy the vessel within such period as may be specified in the notice and to furnish such adequate security to the satisfaction of the conservator to ensure that the vessel shall be raised, removed or destroyed within the said period’\textsuperscript{20}. If the owner does not comply and act upon the notice, the conservator may raise, remove or destroy the property and claim the compensation from the owner\textsuperscript{21}. Mostly, the salvage activity will be done by private salvors in agreement with the Port Trust. Within the port limits, the capacity of the party to carry out salvage, the methods used to raise or remove or destroy the vessel is subjected to the expert opinion of the deputy conservator of the port. Normally, the court will not interfere with these technical decisions\textsuperscript{22}.

For example, on 16\textsuperscript{th} June 2013, \textit{M.T.Pratibha Tapi}, which was anchored along the Mumbai coast drifted towards the Maldha Island and capsized, thereby raising considerable public outrage against the authority delay in initiating the response proceedings. The vessel was under financial distress and was allowed to operate with lesser number of required crew during the pre-monsoon season. The D.G. Shipping requested the shipping corporation of India to send emergency towage vessel to tow the tanker off the port area. The ship had 2000 tonnes of fuel oil on board.

Two years back in June 2011, \textit{M.V. Wisdom}, a vessel of 9000 tons of heavy fuel oil had run aground at the Juhu beach in Mumbai. By a joined effort by the

\textsuperscript{19} Id., s. 2(58)

\textsuperscript{20} The Indian Ports Act, 1908, s. 14 (1)

\textsuperscript{21} Id., cl. (2), (3) & (4)

\textsuperscript{22} Cochin Port Trust \textit{v} The Deputy Conservator, Cochin Port Trust \textit{v} Laxmi Cranes and Ors., W.A.No. 1803 of 2010, of the High Court of Kerala, decided on 16\textsuperscript{th} November, 2010.
Indian navy, coast guard and international salvor, the vessel was finally towed off the port area\textsuperscript{23}.

During the collision between \textit{MSC Chitra} and \textit{M.V. Khalija}, salvage operations were delayed because the equipments for salvage could not be brought inside the port area due to complex customs formalities\textsuperscript{24}.

When such incidents like collisions and grounding of vessels happen and when salvage operations are not possible, it may be treated as wreck under the international regime. But as under the Indian law it is not possible. Then how could the receiver intervene and raise, remove or clear the obstruction causing substantial pollution threats to the port environment and public health? All powers vested with the receiver to ensure safety of navigation and control of pollution becomes a myth only because of the deficiency in defining ‘wreck’ under the Indian law.

Mostly the ships capsized in the Indian waters are reported to have been registered either under the Indian registry or the registry of Flags of convenience countries. Once, abandoned, the owners may not be claiming the wreck. This makes the enforcement of the compensation regime extremely burdensome. If India wants to strictly enforce the wreck and salvage laws, clear legislative provisions on ship registration should be implemented.

\textbf{Preparedness and Response Capacities of the Port Administrations}

The OPRC Convention\textsuperscript{25} and the OPRC-HNS\textsuperscript{26} Protocol are the international legislations on the topic. The OPRC pertains to preparedness and


\textsuperscript{24}Recommendations of the Committee to examine the preliminary investigation report on the collision between MSC Chitra and M.V.Khalija, available at http://nsb.nic.in/upload/uploadfiles/files/analysis\%20of\%20MSC\%20Chitra\%20-%20Khalija\%203%20Collision.pdf, last visited in December 2013

\textsuperscript{25}The Convention on Oil Pollution Preparedness, Response and Co-operation (OPRC 90) was adopted by IMO in November 1990, entered into force in May 1995
response capabilities of port administrations in handling oil pollution incidents. The Convention gives details of the designing of oil pollution emergency plans by the ship operators, oil pollution reporting procedures and the actions to be taken by port administrations on receipt of such a report; the instituting of national and regional systems for preparedness and response; international cooperation in pollution response; research and development; and technical cooperation. The Convention is intended principally to help developing countries to prepare for and respond to major oil pollution incidents.

As per the requirements under the OPRC-HNS Protocol, ship operators, port administrations and any other facility handling HNS are required to have emergency plans for dealing with an HNS incident. The “Shipboard Marine Pollution Emergency Plan”, as required under the MARPOL, should also comply with the “Pollution Incident Emergency Plan” under the OPRC-HNS Protocol. Those administrations who are not a party to this convention should also co-operate to give confirmation of specific requirements under it.

Planning, Preparedness and Response to Oil Spills

The Coast Guard Act, 1978\(^\text{27}\), empowers the Coast Guard of India, to take measures to ensure the security of maritime zones of India, which includes control of marine pollution. The Director General of Coast Guard is the enforcement authority under the Act. He acts under the supervision of the central government. The coast guard has got the responsibility to prevent and protect the marine environment of the country and ensure safety in territorial waters\(^\text{28}\).

India is a party to the Oil Pollution Preparedness, Response and Cooperation Convention, 1990 and is under a duty to establish measures for

\(^{26}\) The Protocol on Preparedness, Response and Co-operation to Pollution Incidents by Hazardous and Noxious Substances, 2000 (OPRC-HNS Protocol), Entered into force on 14\(^{th}\) June 2007

\(^{27}\) The Coast Guard Act, 1978, ch. II, s.4

\(^{28}\) Id., Section 14 (1) and (2) (a)- (f)
dealing with pollution incidents, either nationally or in co-operation with other countries. Major cargo handled by Indian ports is oil and therefore, the coast guard has developed a National Oil spill Contingency Plan\textsuperscript{29} to mitigate the effects of oil pollution casualties, in response to the call of OPRC\textsuperscript{30}. “Under this plan, the Direct General of Indian Coast Guard is the central coordinating authority for enforcing NOS-DCP. The President of India has further strengthened the plan by issuing a directive to the coast guard to enforce NOS-DCP by an amendment to the Union of India Business Rules, 1961.

Under the Allocation of Business Rules, 1961, functional responsibilities of the Indian coast guard include “surveillance of maritime zones against oil spills, combating oil spills in various maritime zones except in the waters of major ports, central coordinating agency for combating of oil pollution in the coastal and marine environment of various maritime zones of the country, implementation of national contingency plan for oil spill disaster, controlling activities in various maritime zones except within the limits major ports which includes inspection of oil record books and detentions of violators of the section 356 g (1) and of the Merchant Shipping Act, 1958\textsuperscript{31} and checking of vessels for carrying necessary Insurance certificates against oil pollution damage”\textsuperscript{32}.

\textsuperscript{29} Herein after to be referred to as the NOS-DCP

\textsuperscript{30} Under the directions of Government of India, approved by the Committee of Secretaries on 4\textsuperscript{th} November 1993 and from 2003 under the purview of National Disaster Management Authority, Marine Oil spill Management in India, Ministry of Home Affairs

\textsuperscript{31} The Merchant Shipping Act,1958, s.356 g (1)

\textsuperscript{32} Contingency Plan of Indian Coast Guard, see, at http://www.indiancoastguard.nic.in/Indiancoastguard/NOSDCP/Contingency%20Plan/DHQ%202.pdf, last accessed in June 2013
Within the port area, the port trust has got functional jurisdiction to enforce the plan\textsuperscript{33}. The coast guard is the central coordinating agency for the implementation of the plan. The Ministry of Shipping acts through the port trust in discharging its functional responsibility to “prevent and control of pollution arising from ships all over the sea including the major ports areas, enactment and administration of legalization related to prevention, control and combating of pollution arising from ships. It functions through ports authorities within port limits regarding the inspection of oil record books, apprehending of violators of anti- pollution provisions mentioned under the Merchant Shipping Act, 1958 and monitoring and combating of oil pollution in the port areas”\textsuperscript{34}.

The Ministry of Environment and Forests is the nodal agency to conserve “environment and ecology, including environment in coastal waters, in mangroves, coral reef but excluding marine environment on the high seas”\textsuperscript{35}. It has functional responsibilities relating to the “enactment of legislation for prevention and control of marine pollution from land and sea based source, prevention and control of marine pollution at source, on land or the sea, monitoring of pollution up to the shore, cleaning of beaches affected by oil pollution through coastal states and union territories”\textsuperscript{36}.

Hence, multiple numbers of ministries and departments are given concurrent jurisdiction to combat accidental spills in ports. The primary responsibility is with the port administration but only a co-ordinated effort may help in mitigating the disastrous effects of accidental pollution. In the present

\textsuperscript{33} Union of India, the Allocation of Business Rules 1961
\textsuperscript{34} Supra n.30, functional responsibility of the Ministry of Shipping
\textsuperscript{35} Supra n. 30 at Appendix A, Functional Responsibilities allocated to Ministries / Department as per Decision Taken at a Meeting of the Committee of Secretaries on 04 Nov 93
\textsuperscript{36} Ibid
political situation prevailing in India, it will be extremely difficult to co-ordinate these functionaries. This can make the response system very slow and inefficient.

All ports in India and oil handling agencies are to establish this Contingency Plan and Tier- I Oil Spill response. Beach and shoreline clean ups are allocated to respective port administrations and State Pollution Control Boards. The Coast Guard would take up the operation if the spill were beyond the capability of the stakeholders concerned or for regions where the facilities have not been well developed by initiating the Tier II and Tier III response systems.

The maritime zones of India are divided into four Coast Guard Zones: the North West, West, East and Andaman and Nicobar, which are further divided into 11 Coast Guard districts. In each district, the Regional Commanders are responsible for combating Oil Spills in their respective areas of responsibility and have Regional Oil Spill Disaster Contingency Plan. There are three pollution response team located in Chennai, Mumbai and Port Blair—with qualified personnel and well-stocked inventory of response equipment. Each region has got specific contingency plans to deal with spills in their area.

The response policy is mechanical recovery. The Coast Guard has issued guidelines for the use of dispersants, which require its prior approval. The recovered oil is put to Bioremediation and in situ burning arrangements. The recovered oil has to be put in temporary pits until it can be safely transferred to the reception facilities. For the successful implementation of the plan, the recovered oil should be received at the port reception facilities. As the port reception facilities in India are very limited that the recovered oil remains

37 The Coast Guard NOS-DCP. Also See the Directives of the Ministry of Shipping and Department of Oil Industry Safety Directorate of the Ministry of Petroleum and Natural Gas, available at http://www.itopf.com/_assets/country/india.pdf, last accessed in June 2013

38 See, www.indiancoastguard.nic.in/oilpollution last accessed in June 2013
in the pits and may subsequently pollute the shores\textsuperscript{39}. For example, in Cochin Port, five private firms jointly operate MARPOL Annex I Oil reception facility and the total capacity is around 45,500 KL/annum\textsuperscript{40}. Annex II facilities are totally absent. The port argues that there is limited transportation of noxious liquid substances within its limits. Similarly, private contractors arrange for sewage and garbage reception from vessels for a limited capacity. When the existing reception facility is not adequate for receiving oil from routine vessel operations, how could it receive oil due to major spills is a significant question.

The Tier I oil response system may not be adequate to eliminate the risk of accidental chemical pollution and pollution from hazardous cargoes. When \textit{MSC Chitra} collided near the Mumbai port, around 800 tonnes of IFO 380 and 300 containers carrying dangerous goods spilled into the ocean. The Indian Coast Guard started the response system using oil dispersants but the oil subsequently stranded along the shoreline of Mumbai destroying mangroves and mudflats. International assistance was called upon to mitigate this. Hence, Tier I response system is inadequate when responding to a dangerous spill and there is urgency in equipping the Coast Guard and nodal agencies under it with advanced response systems.

India has not ratified the OPRC-HNS protocol. There is an urgent necessity to legislate on the topic and to implement a contingency plan for chemical spills. India witnessed another chemical spill in the year 2006 when the LPG Tanker \textit{Kew Bridge} laden with 8798 tonnes of Butane gas ran aground near the Finolex terminal in Ratnagiri, Maharastra. The terminal had to be closed down, surrounding villages had to be evacuated and a fishing ban was imposed.

\textsuperscript{39} See, Cochin Port, Facilities at CPT, at \texttt{http://www.cochinport.com/index.php?opt=facilities &sub=52&tab=5}, last accessed in June 2013

\textsuperscript{40} Circular No.02/MMPC/Reception/2008, issued by the Office of Deputy Conservator Cochin-682009, dated 20th November 2008 under authorization from the Central and State Pollution Control Boards
In salvage operations and wreck removal, India follows a government-alone approach. The response operations are carried out under the coordination of the Indian Coast Guard and subsequently maritime claims are invoked against the owner or master of the ship. In this regard, the United States and the People’s Republic of China have followed an innovative enforcement measure. Accordingly, every vessel in a Chinese port should have a pollution response contract with a government recognized Ship Pollution Response Organization\(^{41}\). The Maritime Safety Agency of China recognizes a few agencies and have conferred them valid Ship Pollution Response Unit Qualification Certificate for clean-up response\(^{42}\). In the absence of the Pollution Response Contract, the ship will be denied port entry or if it is within the port area, clearance to next port of call will not be allowed\(^ {43}\). These organizations are approved to contract with the owner or operator for pollution response for either level 1, 2, 3 or 4 as per the Maritime Safety Agency directions.

It is suggested that Indian law should also incorporate mandatory provisions for ship pollution response contracts authorized by the port authority as a port entry requirement. In India certain ports are providing Tier II response systems by making private arrangements with oil spill response agencies. For example, the Mumbai Port Trust had invited tenders to set up Oil Spill Response facilities in its ports by appointing private agencies on contract for five years\(^ {44}\). This agency will set up a 24x7 Oil Spill Response Center, at the

\(^{41}\) Regulations of the People’s Republic of China on the Prevention and Control of Marine Pollution from Ships, 2010. Also See, the Detailed Rules of the Maritime Safety Authority of the PRC on the implementation of the Administration Regime of Agreement for Ship Pollution Response, art.10

\(^{42}\) Ibid

\(^{43}\) Ibid

Marine Oil Terminal on Jawahar Dweep, an island to the south of Elephanta Islands. The centre will be monitored by trained personnel and specialists and will be responsible for oil spill incidents including collisions and grounding of vessels, in Mumbai and Jawaharlal Nehru port limits. Yet, these efforts are in no way comparable with those existing in the United States, Canada or the UK. If the ship pollution response contracts are made mandatory for the port entry, it would be highly effective in eliminating the procedural formalities for salvage operations and the response measures could be initiated at once. Also, the response agencies should be equipped well to handle major maritime casualties. India needs to enter into agreement with advanced countries for technology sharing and implement it at all major ports. Port authorities should have sufficient man power for supervising and maintaining navigational and safety aids.

The South Asian Co-Operative Environment Programme

United Nations Environment Programme has a regional seas programme for the South Asian Seas Region including India. The South Asia Co-operative Environment Programme\(^\text{45}\) and the IMO have jointly funded the development of South Asian Region Oil Spill Contingency Plan. The plan was submitted to a high level meeting which approved it in December 2000, prior to formal acceptance by the respective governments. The plan envisages mutual aid and co-operation among the participant countries for any contingency which may affect all or some of them.

The Law of Liability for Carriage of Oil

The International Convention on Civil Liability for Oil Pollution Damage, 1969\(^\text{46}\) imposes strict liability on tanker owners for causing pollution damage to the coastal line of any member state. An important deficiency of this

\(^{45}\) Herein after to be referred to as the SACEP

\(^{46}\) Adopted by the IMO on 29\(^{\text{th}}\) November 1969, replaced by the Protocol in 1992, here in after to be referred to as the CLC
convention was that it was applicable only to all sea going vessels carrying oil in bulk as cargo. This exempted owners of other ships from its purview. To cure this deficiency the Protocol of 1992 was adopted which covered ‘spills from sea-going vessels constructed or adapted to carry oil in bulk as cargo’. In this way the convention was extended to both laden and unladen tankers, including spills of bunker oil from such ships. In spite of the remedies available under the CLC, the 1992 Protocol provides for additional compensation to the victims of oil pollution damage. The Law on civil liability for oil pollution damage is provided under Part X B of the Merchant Shipping Act, 1958. The Merchant Shipping Act, 2002 amended these provisions and introduced Part X C for international oil pollution compensation fund.

The Act defines a ‘ship’ as any sea going vessel and sea borne craft of any type whatsoever constructed or adapted for the carriage of oil in bulk as cargo. This definition is verbatim adopted from the parent convention. The clear meaning is that this definition includes only ‘tankers’, and does not include vessels of any other category including container ships. The deficiency of this provision is that it exempts from its purview spilling of oil used as fuel on board by ships like container carriers. These bunker fuels are capable of causing disastrous oil spills and the Indian law has no control for spills caused by ships other than tankers.

The same section again states that oil includes “…oil whether carried on board a ship as cargo or in the bunker of such ship.” This would mean that only ships adapted for carriage of oil in bulk as cargo and other ships that use oil or bunker as fuel on board and not as cargo would not fall within the ambit of the Act. Thus, in practice, the provisions are not adequate to include ships other than tankers for fixing the civil liability for oil pollution damage.

Under the MSA, pollution damage include, “…loss or damage caused outside the ship by contamination resulting from the escape or discharge of oil

\[47\] The Merchant Shipping Act, 2002, s.352H (h)
from the ship, wherever such escape or discharge may occur, provided that compensation for impairment of the environment other than losses of profit from such impairment shall be limited to costs of reasonable measures of restoration actually undertaken or to be undertaken; and the costs of preventive measures and further loss or damage caused by preventive measures. This would mean that pollution damage is applicable only in cases where there is an actual discharge and not in cases where there is potential pollution risk. This provision is not in tune with the international law and domestic laws in advanced maritime countries. Pollution damage could be given when preventive measures are taken by the authorities and to potential victims of the consequences of such measures. The Act provides only for the costs incurred in restoration of environmental damage. This would again mean that no compensation is payable for irreparable damage caused to the environment. The definition is vague as to the meaning of ‘restoration measure’. It is not clear whether the compensation regime covers the damages incurred to the port authorities because of the closing down of port until the spill is put under control. It is also not clear whether it covers the lives and means of living of fishing folks and coastal community. In that way, whether there is any scope for invoking parens patriae doctrine as in the cases of other environmental disasters is not clear.

**Ship Owner’s Liability under Tort**

The common law doctrines of public nuisance, trespass, negligence, rule of strict liability and absolute liability and the riparian

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48 Id., S. 352(H)(f)

49 The Indian Penal Code, 1860, ss.268-294 A

50 Esso Petroleum v. Southport Corporation, (1956) A.C. 218

owner’s rights\(^{54}\) are incorporated into Indian law but invoked very rarely in air and water pollution cases. Those doctrines created by the common law is meant to fix liability for the escape of the noxious objects, careless use of noxious articles and pollutants and the infringement of property rights in water.

The liability for pollution damage is strict on ship owners, irrespective of their nationality\(^{55}\). As per the law, “…the owner is a person registered as owner of the ship; in the absence of registration the person owning the ship; or in the case of a ship registered in foreign state, the person registered in that state as the operator of the ship”\(^{56}\). He may be exempted from the liability in cases of war, hostilities, civil war, insurrection and such other unforeseen emergencies. He is also exempted in cases where the pollution damage is caused entirely by a third party intervention or negligence by the government authority in providing proper navigational aids\(^{57}\). Exemptions are also granted to war ships and other government ships used for non-commercial purposes based on the doctrine of sovereign immunity. When two or more ships are involved in the tort, all the owners are jointly and severally liable for the loss incurred\(^{58}\). The ship owner is also exempted from liability if the plaintiff himself had contributed to the pollution damage or loss\(^{59}\).

\(^{52}\) Becharam Choudhury v Pubbbrath, (1869) 2 Beng. L.R. 53; M.Madappa v K. Kariapa, A.I.R. 1964 Mys. 80

\(^{53}\) M.C. Mehta v. Union of India, A.I.R. 1987 SC 1086; Union Carbide Corporation v Union of India, Civil Revision No. 26 of 1988

\(^{54}\) M.C. Mehta v. Union of India, A.I.R 1988 SC 1115.

\(^{55}\) Id., s. 352 I

\(^{56}\) Id., s. 352 (H) (c )

\(^{57}\) Id., s.352 I (2)

\(^{58}\) Id., s.352 I (3)

\(^{59}\) Id., s. 352 I (4)
Under the provisions of the MSA, only the ship owners can be held liable for the pollution damage. The liability cannot be imposed on the master and crew, operators and salvors unless there is proven negligence or recklessness by these persons who have contributed to the pollution damage. The Act excludes certain persons from the strict liability regime. In cases of oil pollution damage the ship owner cannot limit his liability.

**Compulsory Insurance as a Requirement for Port Entry**

Compulsory insurance scheme is prescribed under the Merchant Shipping (Regulation of Entry of Ships into Ports, Anchorages and Offshore Facilities), 2012. “Any vessel of 300 GRT or more, other than Indian Ship, entering into or sailing out of ports, terminals, anchorages or seeking port facilities or Indian offshore facilities in Indian territorial waters shall be in possession of insurance coverage against maritime claims and established policies and procedures for their supervision.” The oil or chemical tankers

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60 *Id.*, s. 352 I (6)

61 *Ibid.*, These persons are:

“(a) the servant or agents of the owner or the members of the crew;
(b) the pilot or any other persons who, without being a member of the crew, performs services for the ship;
(c) any charterer (howsoever described, including a bare boat charterer), manager or operator of the ship;
(d) any person performing salvage operations with the consent of the owner or on the instructions of a competent authority;
(e) any person taking preventive measures;
(f) all servants or agents of persons mentioned in sub-paragraphs (c), (d) and (e).”

62 *Id.*, s. 352 (A) (3)

63 G.S.E 311(E) on 20th April 2012, the Merchant Shipping (Regulation of Entry of Ships into Ports, Anchorages and Offshore Facilities), 2012

64 *Id.*, s.3
which are more than twenty years old; general cargo and passenger vessels of more than 25 years old; and LNG tankers of more than 30 years old should have a class certification by a classification society which is a member of the International Association of Classification Societies duly authorized by Indian maritime administration\(^{65}\). The operators of all foreign vessels in Indian waters should have a valid P & I insurance coverage against all maritime claims as mentioned under the LLMC\(^{66}\). No ship shall be permitted to enter respective port without having P & I insurance to cover a maritime adventure\(^{67}\).

**Pollution Damages under General Environmental Laws**

The liability and damages relating to pollution from hazardous substances is dealt primarily under the Manufacture, Storage and Import of Hazardous Chemicals Rules, 1989 made under the EPA, 1986 scheme and also under the Public Liability Insurance Act, 1991 and the National Environmental Tribunal Act, 1995. The Public Liability Insurance Act, 1991 gives immediate relief to persons affected by an accident occurring while handling of hazardous substances and matters related thereto. The handling of hazardous substances includes ‘transportation by vehicle other than railways’ and thus maritime transport and incidents in connection thereto are coming under the purview of the Act\(^{68}\). The ship owner’s strict liability includes providing immediate relief under the Environmental Relief Fund and from the insurance coverage\(^{69}\). The central government can exempt any public or state corporations from taking out insurance policies. This is the greatest deficiency of the Act as it may dilute the adjudication proceedings.

\(^{65}\) Id., s.4

\(^{66}\) Id., s.5

\(^{67}\) Id., s. 352 N; *M.V. Sea Success I v. L. & L.S.P & Indemnity Assn. Ltd.*, A.I.R. 2002 Bom. 151

\(^{68}\) The Public Liability Insurance Act, 1991, s. 2(c) and 2(j)

\(^{69}\) Id., s. 2(g) and 3
Any excess quantum of damages and as above those prescribed under the Public Insurance Scheme is enforceable under the National Environmental Tribunal Act, 1995. In case of environmental damage resulting during the handling of hazardous substances and also for destruction of bio diversity, compensation may be claimed under this Act and the liability of the ship owner is strict.

Even though the provisions of LLMC, 69 are incorporated under the MSA scheme, India has not ratified the HNS Protocol. Strict enforcement of the provisions of general environmental law is possible only if the HNS is ratified and MSA is amended thereby adopting its provisions.

**Ship Detentions and Release**

If the ship owner violates any of the provisions mentioned under the Merchant Shipping (Amendment) Act, 2002, regarding strict liability, the ship may be detained\(^{70}\). It has to be released after sufficient security is provided. In *Videsh Sanchar Nigam Ltd., (VSNL) v. Kapitan Kud*\(^ {71}\) the Supreme Court pointed out that the arrest of the vessel effected under provisions of the MSA and the admiralty rules can be lifted only on deposit of security in the Court by the vessel owner.

“The vessels or property will be ordered to be released if the limitation fund has been constituted, in the port where the occurrence took place, or, if it took place out of port, in the first port of call thereafter; in the port of disembarkation in respect of claims for loss of life or personal injury; or in the port of discharge in respect of damage to cargo”\(^ {72}\).

The court also held that,

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\(^{70}\) The Merchant Shipping (Amendment) Act, 2002, s.352

\(^{71}\) A.I.R 1996 SC 516

\(^{72}\) The Merchant Shipping (Amendment) Act, 2002, s.352 D
“If damage has been caused to property belonging to the Government or to any citizen of India or an Indian company by a foreign ship, by reason of unauthorized acts or negligent conduct on the part of the ship owner or his agents or servants, wherever the cause of action has arisen, or wherever the ship is registered, or wherever the owner has his residence or domicile or place of business, such a ship, at the request of person aggrieved, is liable to be detained when found within Indian jurisdiction”\(^\text{73}\).

**Civil Jurisdiction in Maritime Claims**

In India, Admiralty jurisdiction was originally vested only with the Recorder’s Court at Bombay, which was established by the Charter dated 20\(^{th}\) February, 1778. Later on, the Recorder’s court was superseded by the Supreme Court of Judicature by means of the Letters Patent issued by the Charter of 1823 and admiralty powers were retained on it. In 1862, the High Court of Bombay was established by the Letters Patent. Thereafter, by virtue of the powers under the Colonial Courts of Admiralty Act, 1891, the High Courts at Calcutta and Madras were also vested with Admiralty jurisdiction. There was a view that only the High Courts of Bombay, Calcutta and Madras were having admiralty jurisdiction.

In *M.V.Elizabeth v. Harwan Investment and Trading Company*\(^\text{74}\), the issue was “whether any court in the State of Andhra Pradesh or in any other State in India (including the High Courts and Supreme Court) had admiralty jurisdiction to proceed *in rem* against an arrested ship on a cause of action concerning carriage of goods from an Indian port to a foreign port”. The Supreme Court held that even though the Indian high courts are established like

\(^{73}\) *Id.*, s. 443 and 444

\(^{74}\) A.I.R 1993 SC 1014
their British counterparts, ‘the high courts in India never acquired the supreme civil jurisdiction on all matters including admiralty for being a court of record. Unlike, the English statute, the Colonial Courts of Admiralty Acts, 1890 and 1891 never conferred on Indian high courts separate and distinctive admiralty jurisdiction’. The Supreme Court, observed that,

“…the High Courts of India being courts of unlimited jurisdiction, and the repository of all judicial power under the constitution, except what is excluded, are competent to issue directions for the arrest of a foreign ship in exercise of a statutory jurisdiction or even otherwise to effectuate the exercise of its jurisdiction”75.

But this jurisdiction of High Courts is strictly confined to its territorial limits only.

The main issue in World Tanker Carrier Corporation v SNP Shipping Services Pvt. Ltd.76 was that when a collision happens in international waters, whether the foreign owners of a foreign vessel could apply to an Indian High Court to set up a limitation fund. The Supreme Court held that

“the unintentional presence of the ship in Bombay harbour would not entitle the owner to file a limitation action in the High Court in the absence of any claim being made against the vessel or the vessel being in the custody of the court”.

It was also held that as per the existing law,

“…if damage has been caused to property belonging to the Government or to any citizen of India or an Indian company by a foreign ship, by reason of unauthorized

75 Ibid.

76 A.I.R 1998 SC 2330
acts or negligent conduct on the part of the ship owner or his agents or servants, wherever the cause of action has arisen, or wherever the ship is registered, or wherever the owner has his residence or domicile or place of business, such a ship, at the request of person aggrieved, is liable to be detained when found within Indian jurisdiction”

In Mayar (H.K.) Ltd. and Others v. Owners & Parties, Vessel M.V Fortune Express and Others, the Supreme Court held that unless the bill of lading has an exclusion clause suggesting proper forum for litigation, the High Court of Calcutta had jurisdiction to decide the case. In this case, a recovery suit for damages was filed before the Calcutta High Court for short landing of certain wooden logs for which the appellants had chartered a vessel from Malaysia to Calcutta. The appellants had demanded arrest of the vessel when it was in Calcutta port.

One step forward, the High Court of Kerala in MV Free Neptune V. D.L.F. Southern Towns Pvt. Ltd., had issued an arrest warrant for the ship which was anchored in Chennai port. It was held that the High Court of Kerala has inherent powers to adjudicate admiralty cases under its civil jurisdiction. Since the High Court had not framed admiralty rules, it imported the admiralty rules of the Madras High Court for adjudicating admiralty cases in the state. Now, as a result of this judgment, any civil suit may be filed before the High Court of Kerala by invoking its admiralty jurisdiction.

In India, under the Admiralty Jurisdiction Act, 1860, an action for claim can be brought ‘in personam or in rem’. In this way, the claimant can proceed

77 The MSA, 1958, s.2(1)
78 [2006] 3 SCC 100
79 2011 (1) KLT 904
80 The Admiralty Jurisdiction Act, 1861
either against the ship involved in cause or against the owner. On this aspect, literally, the Indian law is in tune with the law in other major maritime countries. The major deficiency is the absence of clear statutory provisions supporting such claims. In India, the usual practice in maritime claims is to obtain an order for the arrest of ship. The owners will provide bank guarantee and the ship sails into the next port of call.

Under the existing law, *in personam* proceedings against the owner are very difficult and impractical. As per the prevailing circumstances, the owner of the foreign ship is most unlikely to be available for prosecution, within the Indian jurisdiction. Hence, the master can be prosecuted for his physical presence and for the reason that a personal prosecution is more likely to bring home to the master his individual responsibility and thus to make him more careful in future. An issue when prosecuting the master rather than the owner is that, “the fine on the master must be relevant and proportional to his personal responsibility”, while the fine on the owner can relate to the nature and extent of pollution. In order to impose monetary penalties upon the captain, crew or agents of the ship owner, there should be a proven act or omission committed with an intention to cause such damage, or recklessly with full knowledge that such a damage is the probable result of such acts or omission. The law gives an option to proceed either against the ship or the owner or master. But at the same time, to proceed against the master, it insists on strong evidentiary requirement to prove the willful negligence of the master or crew, causing pollution. In effect, the claimant can proceed only against the ship involved in cause.

Hence, during *in personam* proceedings, the power of the court is limited, only to hold the master and thereafter imposing fine on him proportionate to his responsibility, thus not placing the owner under direct liability. Unless the owner cannot be made responsible, the entire purpose of compensation regime will be futile. The law does not address this.
The British law has undergone radical changes but in India the provisions are the same, in spite of the dynamic changes in shipping operations. A committee appointed by the Central government had opined that admiralty jurisdiction in India is out dated and requires a comprehensive legislation, defining the scope of admiralty jurisdiction of the courts is an immediate requirement\textsuperscript{81}. Because of the inadequate provisions in law that has actually weakened the civil liability regime, there is increase in criminal prosecutions against seafarers worldwide.

**Criminalization of Seafarers for Maritime Accidents**

On 24\textsuperscript{th} March 1989, the *Exxon Valdez* had grounded on the Bligh reef causing the greatest crude oil spill that the world had ever witnessed. The spill had caused massive environmental pollution of the Alaskan waters. Consequently, Captain Joseph Hazelwood was prosecuted along with the Exxon shipping company and the Exxon Corporation. For the first time in the history, the captain, ship owner and ship operator were criminally prosecuted for accidental pollution. This trend slowly spread into other legal systems. For example, when the *Prestige* disaster occurred, the Captain Apostolos Mangouras of the tanker was arrested by the Spanish authorities on grounds of not cooperating with salvage crews and for harming the environment. His release was allowed on a bail of 3 million Euros by the European Court of Human Rights\textsuperscript{82}.

In April 2004, eight crew members of the tanker *Tasman Spirit* were arrested and detained for eight months for an oil spill near the Karachi port resulting from a collision. They were released upon discussions between the Pakistan authorities, Greek government and the IMO\textsuperscript{83}. In September 2009, the

\textsuperscript{81} The Parveen Singh Committee Report, 1986

\textsuperscript{82} Justin Stares, “Industry Shocked by Mangouras Verdict”, *Lloyd’s List*, January 9, 2009

Indian captain Jasprit Chawla and chief officer Syam Chetan of the tanker *Hebei Spirit* were prosecuted and punished by the South Korean Maritime Safety Tribunal for a collision incident and oil spill resulting from it in the Korean port of Daesan\(^84\). In 2011, following the collision between the Indian warship INS Vindhyagiri and the German vessel M.V.Nordlake near the Mumbai port, the captain of the vessel was arrested for negligent and rash navigation and investigations were done by the Mumbai police.

At the behest of monsoon, Indian coastal line is becoming extremely dangerous for safe navigations due to heavy traffic congestions. When a marine casualty happens within the territorial waters, preliminary investigations are conducted and if there is ample evidence for willful violations, criminal prosecutions are initiated against the captain of the vessel and crew responsible for the incident. A writ petition can also be filed before the concerned High Court for detaining the vessel under the provisions of the MSA. The intention is to make the owner responsible and get his presence available for the trial. This has been a practice followed by many countries across the globe.

**International Laws on Coastal State’s Right to Investigate on Marine Casualties**

The SOLAS Convention 1974 prescribes duty upon the flag states to conduct investigations into any casualty suffered by a ship of its flag, if the investigation is to assist in identifying legal issues as a contributing factor. This provision is incorporated in many other conventions such as the Load Line Convention, 1966. The duty sprouts out from the UNCLOS\(^85\). Coastal States

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\(^85\) The UNCLOS 1982, art. 94(7) reads, “Each State shall cause an inquiry to be held by or before a suitably qualified person or persons into every marine casualty or incident of navigation on the high seas involving a ship flying its flag and causing loss of life
can adopt any measure to prevent pollution in the territorial waters. In the EEZ, the coastal states can adopt such laws in conformity with the international rules and standards. Under the MARPOL, coastal states can impose sanctions severe enough to dissuade its non-compliance. The MARPOL does not empower imposition of criminal liability in accidental pollution except when the incident had happened intentionally or recklessly. The UNCLOS further restricts criminal prosecutions against seafarers. Accordingly, if the incident happens beyond the territorial waters, or if inside the territorial waters but without any intention to cause it, only monetary penalty can be imposed.

The coastal states sovereignty within the territorial waters and its jurisdiction or sovereign rights up to the EEZ empowers it with an inherent right to investigate into marine casualties affecting its coasts. All major countries have incorporated these provisions and the MSA also recognizes India’s right to investigate into marine casualties affecting its territory. The International Labour Organization’s Maritime Labour Convention, 2006 provides a provision for investigation of serious marine casualties as well as setting out working conditions for seafarers. India has not ratified this convention.

**International Instruments for the Protection of Seafarer’s Right**

The IMO Guidelines on the Fair Treatment of Seafarers in the event of a Maritime Accident are frequently violated by many countries and there is

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86 *Id.*, art.230

87 The MSA 1956, Part XII, ss. 358-361

88 The Maritime Labour Convention 2006

89 The IMO Guidelines on the Fair Treatment of Seafarers in the event of a Maritime Accident, 2006
widespread concern among seafarers upon this crucial issue. These concerns are detrimental to the existence of the industry itself and it was promptly addressed by the IMO by means of a Resolution in 2011\textsuperscript{90}. These guidelines were aimed to ensure fair treatment to seafarers, who are facing criminal prosecutions in a coastal or port state following a maritime accident. It addresses the coastal states to protect the basic human rights of the seafarer and to give them fair trial without any discrimination and in due process. The flag states are asked to co-operate with the coastal state and take necessary steps in ensuring fair treatment to mariners. The state to which the crew is a national is also recommended to conduct necessary interactions with the coastal state and co-operate with the investigations. The mariner is directed to reveal all necessary information and to co-operate with the coastal state authorities in finding out the root cause of the incident.

In 2008, the Casualty Investigation Code\textsuperscript{91} was adopted as a result of the disparity in national laws about fair treatment to seafarers and to promote co-operation among nations in this regard. This Code is meant to establish the best practices in marine casualty and marine incident investigation. It incorporates the recommendations of the IMO Resolution\textsuperscript{92}. The code specifically states that “Marine safety investigations do not seek to apportion blame or determine liability. Instead a marine safety investigation, as defined in this Code, is an investigation conducted with the objective of preventing marine casualties and marine incidents in the future”\textsuperscript{93}. The code describes pollution damage or potential damage to the environment as a marine

\textsuperscript{90} The IMO res. A.1056(27), 2011

\textsuperscript{91} The Code of the International Standards and Recommended Practices for a Safety Investigation into a Marine Casualty or Marine Incident, 2008

\textsuperscript{92} The IMO res. A.849 (20)

\textsuperscript{93} The Code of the International Standards and Recommended Practices for a Safety Investigation into a Marine Casualty or Marine Incident, 2008, ch.1, See the objectives
casualty. Marine incident include any incident or chain of events which may harm the environment or the safety of the ship. In the event of any casualty, the coastal states are obligated to notify the incident immediately to all interested states. It should ensure due process, unbiased and independent investigation, mainly focusing on safety and not on liability. It obligates states to facilitate co-operation and give priority to marine casualty investigation in the same way as being done in criminal prosecutions.

**Challenges to Implement Fair Treatment to Seafarers**

In spite of all these legal measures at national and international levels, criminalization of sea-farers is increasing at an alarming rate for reasons best known to the nations involved. Recently, an Indian captain Sunil James was arrested in Togo and detained for 6 months when he tried to anchor the ship M.T. Ocean Island Centurion, flagged Marshall Islands, at one of the ports of the country to escape from a pirate attack. At least in some of the cases, the detentions extended up to 10 or more years, as in the case of the *prestige* and *Hebei Spirit*. This shows the blatant violation of the international law on the topic. In an attempt to safeguard national interests, many countries are incorporating stringent arrest and detention provisions in their national laws.

For example, the United States has no jurisdiction over foreign vessels for discharges happening in international waters. “In spite of this legal constraint, the Coast Guard aggressively investigates and prosecutes violations of the Act for Prevention of Pollution by Ships and other environmental..."

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94 Id., s. 2.9 (7)
95 Id., s. 2.10
96 Id., ch. 5, notification, ss. 5.1 -5.4
97 Reported in the Economic Times, 19th December 2013
99 Ibid
The USCG charges crewmembers and corporate entities for presentment of a false ORB, for obstruction of justice, conspiracy and witness tampering; often using these offenses as a means to extend its reach beyond U.S. territorial waters. The USCG has a dual role to play in cases of maritime accidents. It is the supervising agency in clean up and response measures. At the same time, it supports the law enforcement agencies by handing over any valuable pieces of evidence, which has been identified during preliminary investigations to the Department of Justice for trial purposes. Environmental cases are dealt under the Public welfare statutes and strict liability will be imposed irrespective of the fact whether the pollution damage was caused intentionally or negligently. The Coast Guard investigations thus play a pivotal role in deciding the future of the mariner. Under the OPA 90 scheme, the USCG has been vested with immense powers to impose civil penalties.

If a party negligently causes oil spill, the U.S. federal government can also assess criminal fines of US$25,000 per day and also with one year imprisonment. Fines up to US$50,000 per day along with or three years imprisonment may follow if a spill is caused “Knowingly”. If OPA 90 regulations are violated with the knowledge of seriously endangering another person penalties up to US$250,000 may be imposed along with imprisonment up to 15 years for individuals and up to US$1 million for corporations. With the second offense, the maximum penalties may double.

In addition to the federal civil and criminal penalties for OPA 90 violations, the same proceedings may follow at the state level. The OPA scheme allows states to set out their penalty limits, which may sometimes be even higher than those set by the federal laws.

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Indian Position

In India, the captain or crew of the ship cannot be held liable for pollution damage unless “…the incident causing such damage occurred as a result of their personal act or omission committed or made with the intent to cause such damage, or recklessly and with knowledge that such damage would probably result”\(^{101}\). Hence, to impose monetary penalties upon the captain, crew or agents of the ship owner, there should be a proven act or omission committed with an intention to cause such damage, or recklessly with full knowledge that such a damage is the probable result of such acts or omission.

In India, when pollution damage occurs as a result of some marine casualty within the port area, the master of the ship should first inform the port authorities and side by side activate the ship board oil pollution emergency plan or the ship board marine pollution emergency plan to mitigate its effect. The port authority should handle the pollution as per the crisis management plan for the port, considering the gravity of the pollution. The ports, maritime boards and concerned agencies should send the report to the D.G. Shipping. The deputy conservator for port is the preliminary investigating agency to conduct investigation about the marine casualty. He submits the report to the judicial first class magistrate before whom will follow the criminal prosecutions\(^{102}\).

The preliminary investigating agency should be an independent agency. This will make the enquiry speedy and reports accurate. In this manner the trial could be made more expeditious.

If it is proved that the incident was because of reckless act or willful violations, criminal penalties may be imposed under the Indian Ports Act, 1908\(^{103}\).

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\(^{101}\) The MSA 1958 as amended in 2002. S.352I (6)

\(^{102}\) The MSA 1958, ss.358-361

\(^{103}\) The Indian Ports Act, 1908, s.21
Prosecutions are also possible under the Water (Prevention and Control of Pollution Act), 1974 and the Environmental Protection Act, 1986. The person who is found to be responsible for pollution of coastal waters may be given imprisonment for a maximum period of 6 years with additional fine. For repeating offences, the imprisonment can extend up to 7 years along with additional fine.

For rash and negligent navigation of the vessel, the captain may be imprisoned for a period of 6 months and with a fine of Rupees 1000 under the Indian Penal Code. If the marine casualty results in hurt or grievous hurt to the person or personal safety of others, criminal prosecutions could be initiated under the Penal Code.

Hence, the Indian law permits criminal prosecution of seafarers under the provisions of the Merchant Shipping Act, the Indian Ports Act and the general environmental laws and the Indian Penal Code. One of the deficiencies identified is that, the sea farer involved in the marine casualty should face double trial—one under the shipping legislations and the other under the Penal code. This has created delay in closing the investigation proceedings on time and there are instances when mariners had to undergo trial for several years. For example, the mariners of *M.T.Dadabhai Naoroji* and *MT Bhagat Singh* had to face criminal trial for over 15 years, following the death of 5 persons from two separate fire incidents on board of the vessels while it was anchored in Cochin port. Finally they were acquitted of all charges. This incident throws light upon the inadequacy of national laws in adjudicating cases relating to marine casualties.

The major difficulty is that the enquiry under the MSA, 1958 and the Indian Ports Act, 1908 are administrative enquiries. It is not final as such.

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104 The Indian Penal Code, 1860, s. 280
105 *Id.*, ss. 337 & 338
106 Such incidents are beyond the scope of Part XB, Part XC and Part XIA of the MSA, 1958
Therefore, marine casualties in India face huge investigative delays. To overcome this difficulty, the Government of India had constituted a Marine Casualty Investigation Cell in 2010. The Cell was constituted to undertake investigation into marine casualties, such as groundings, sinking, or collision of vessels or death or grievous injury or missing reports of seafarers. It has not started functioning. At least, a dozen marine casualties are reported to have occurred along the Indian coastal line during the monsoon season every year. Yet, no one knows about the status of investigations made into them. If any Oil spill happens in USA, decisions are quick and investigations are conducted and closed at the earliest. Litigations can follow later. It is hoped that once the new agency starts functioning, time bound investigations will be conducted in an efficacious manner.

Conclusions

The Contingency Planning and Response system in the USA is based upon the ‘potential polluter pays’ principle whereas in India it is the Government-only Approach\textsuperscript{107}. The main drawback of the Indian system is that the ability to deal with major spill is contingent on the happening of the incident. In the USA and Canada, the system has adopted new techniques and standards to deal with major oil spill catastrophe, which is primarily based on a long term commitment to the problem posed by oil spills. These countries by means of legislation have integrated the salvage operations with the contingency plan. Therefore, expert towing arrangements are readily available. The vessels in distress are given safer options or at least helped to find other alternatives. The USA under the OPA 90 scheme follows a proactive response approach and hence is far more capable in controlling spills when compared to the European counterparts.

When it comes to the implementation of the NOS-DCP plan, there has been a strong prominence in the co-ordination roles and practically nil

responsiveness to command and control procedures. The Port authorities have not developed expertise in risk management procedures. Little effort is being made to evaluate the effectiveness of the policies and regulations on a regular basis. Practically no research and development projects in the field of oil spill prevention and response has been attempted so far. Functional responsibilities have been allocated to various stakeholders, yet no feedback is attempted or at least there is not an established mechanism to ensure effective participation of them in the definition and implementation of preparedness and response policies. Thus, more comprehensive and elaborated guidelines need to be developed for the regional and local contingency and response plans. With regard to contingency planning, India has weaker legislation compared to that implemented in the US and Canada. This situation can be mainly attributed to the fact that India has not implemented an intelligible and regular structure to evaluate the ability, competence and usefulness of the measures taken. India should enter into regional co-operation and bilateral agreements with neighbouring countries so as to implement the contingency planning and response envisaged under the OPRC. The OPRC-HNS Protocol need to be ratified and immediate legislation is required in this behalf so as to eliminate the risk of accidental spill of hazardous goods.

The Indian law when defining a wreck is not in tune with the international regime. Therefore, it creates ambiguity as to the scope and extent of powers of the receiver in marking, raising, removing or selling of wrecks without any liability to the owner. The ‘government alone approach’ is the rule regarding removal of wreck at present. Even if the wreck is not affecting environmental or public safety because of the current statutory provisions, compensation claims cannot be strictly enforced against the owner as the wreck should be an abandoned vessel or goods. Also, Salvage laws are not integrated with the NOS-DCP Contingency Plan. Thus, there are potential pollution risks while salvage operations are going on for removing wrecks. The Indian Law does not address this issue.
Across the globe heavier penalties are imposed in accidental oil pollution cases under the civil liability regime. The MSA, 1958 is inadequate in fixing the quantum and liability in marine casualties. Collision is dealt under a separate part and the Act completely ignores collisions leading to pollution. The Act has no provisions to be applied in such cases. Moreover, all vessels other than tankers are left out from its purview for civil liability in oil pollution damages. In cases of marine casualty, the provisions of MSA are inept for representing community interests collectively. Under the Act pollution damage is restricted to reasonable costs involved in reinstatement but it is not clear about as to what constitute the “reasonable measures of reinstatement”?

If the owner can prove that the pollution damage has occurred because of the willful negligence of any other person he may easily escape from the liability under the Act. This may put the master directly responsible. Criminalization of seafarers is not at all the best practice of reinstatement. Unless the owner cannot be made responsible, the entire purpose of compensation regime will be futile. The law does not provide adequate provisions.

The Indian law permits criminal prosecution of seafarers under the provisions of the Merchant Shipping Act, 1958, the Indian Ports Act, 1908 and general environmental laws and the Indian Penal Code, 1860. One of the deficiencies identified is that, the seafarer involved in the marine casualty should face double trial—one under the shipping legislations and the other under the Penal code. This has created delay in closing the investigation proceedings on time and there are instances when mariners had to undergo trial for several years. The enquiry under MSA and Indian Ports Act are administrative enquiries. Therefore, marine casualties in India face huge investigative delays and nothing is put to the ordeal of the court finally.

India lacks a consolidated law for dealing with marine pollution from collisions at sea. The existing law is too inadequate to deal with marine casualty incidents. The MSA is not enough to fix the quantum and liability in
marine casualty cases. Vessel detentions are temporary solutions since, the ship owner may abandon the vessel and the government will be left with the job of cleaning up the shores.

Hence, it is suggested that there is an urgent need to amend the law on collisions and civil liability regime under the MSA and the investigative proceedings under the Indian Ports Act, 1908 to keep it in tune with the international regime. It is suggested that Indian law should also incorporate provisions for ship pollution response contracts as between the ship owner and the recognized pollution response agencies as a condition for entry into ports. It is also suggested to make arrangements with advanced countries for technology sharing to combat major spills. Port authorities should have sufficient manpower for supervising and maintaining navigational and safety aids.