Oil, water and law don’t mix: environmental liability for offshore oil and gas operations in the UK

Part I: Liability in the law of tort/delict and under the petroleum licence

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Introduction

More than three years after Deepwater Horizon, the legal repercussions of that disaster continue to unfold. Transocean, the drilling contractor that owned and operated Deepwater Horizon, has pleaded guilty to a criminal charge brought under the Clean Water Act alleging the negligent discharge of oil into the Gulf of Mexico. It has accepted a criminal fine of $100 million and the payment of $300 million of criminal recoveries in a settlement ‘structured to directly benefit the Gulf region’. Transocean also accepted that it will be subject to a five year probationary period, during which key elements of its work will be monitored and reported upon by persons appointed by it for this purpose. The company has also settled a civil suit taken under section 311 of the Clean Water Act. The section provides for civil penalties of up to $25,000 per day of violation or an amount of up to $100 per barrel of oil discharged, penalties which may be increased (to $100,000 per day or $3000 per barrel) if gross negligence is established, but may also be reduced to take account of factors such as any attempt by the defendant to mitigate the effect of the spill. Transocean settled this suit at a cost of $1 billion. Although the terms of the settlement preclude the institution of further proceedings under the Clean Water Act and a range of other statutory provisions, they do not prevent Transocean being sued for natural resource damages under the Oil Pollution Act.

Criminal proceedings against BP have also been concluded, with a plea-bargain to a 14-count information alleging a range of offences being agreed to by the court despite strong opposition by family members of some of the workers who were killed in the disaster, who, unless they can show a pecuniary loss as a result of the deceased’s death, are precluded from claiming by the terms of the Death and the High Seas Act. BP agreed to the imposition of a fine of $1.256 billion, $2.744 billion of civil recoveries and a five year probationary period of a similar nature to that agreed by Transocean. At the time of writing, phase I of the three-stage civil proceedings against BP in the US District Court in New Orleans (which will inter alia determine the level of BP’s civil penalty for breaching the Clean Water Act) has come to an end. A judgment on the question of the extent to which parties other than BP were responsible for the disaster is due before the court embarks, in September 2013, upon the process of determining how much oil was spilled. Criminal prosecutions are also ongoing against a number of individual personnel alleged to have made serious errors and oversights which contributed to causing the disaster.

Additionally, the Deepwater Horizon disaster continues to prompt the industry, its regulators and commentators

2 Transocean’s admission of negligence is based upon its employees’ failure to take proper steps fully to investigate pressure anomalies seen during negative pressure testing of the well: see Guilty Plea Agreement entered into between the United States of America and Transocean Deepwater Inc on 3 January 2013 http://www.justice.gov/opa/documents/transocean-plea-agreement.pdf Exhibit A paras 7–11.
3 Department of Justice Press Release (14 February 2013) http://www.justice.gov/opa/pr/2013/February/13-ag-199.html. A sum of $150 million has been hypothesised to the National Fish and Wildlife Foundation for the purpose of acquiring, restoring, preserving and conserving the marine and coastal environment and ecosystem. A further $150 million has been allocated to the National Academy of Sciences to carry out a research and education programme aimed at improving oil-spill prevention and response. See the order: Annexed to the Guilty Plea Agreement (n 2).
4 See the Partial Consent Decree between the United States of America and Triton Asset Leasing and others (19 February 2013) http://www.laed.uscourts.gov/oilspill/Orders/2192013ConsentDecree.pdf.
6 The charges alleged II counts of manslaughter pertaining to misconduct of neglect by ship officers, one count of obstruction of Congress, one count of negligent discharge of oil into waters in contravention of Clean Water Act and one of breaching the Migratory Bird Treaty Act. See Guilty Plea Agreement entered into between the United States of America and BP Exploration and Production Inc on 29 January 2013 http://www.justice.gov/iso/opa/documents/transocean-plea-agreement.pdf. 11 T ranscripts of the day to day proceedings and copies of a range of documents including witness statements and expert reports are available at http://www.laed.uscourts.gov/OilSpill/OilSpill.htm.
9 See Reasons for Accepting Plea Agreement (n 7) 23.
10 Again, much of this is to be spent on projects supporting and conserving the marine and coastal environments, ecosystems and habitats in the Gulf area: Department of Justice Press Release (29 January 2013) http://www.justice.gov/criminal/vns/caseup/bpexploration.html.
11 Transcripts of the day to day proceedings and copies of a range of documents including witness statements and expert reports are available at http://www.laed.uscourts.gov/OilSpill/OilSpill.htm.
13 Department of Justice Press Release (n 10).
outside of the USA to consider and re-evaluate the adequacy of their own jurisdiction’s regulatory regimes and systems for the provision of compensation. In the UK, much of the debate has centred on offshore safety, with both the UK’s current regime and the EU’s legislative proposals receiving considerable attention. This article – which will be published in two parts, of which this is the first part – seeks to examine the UK’s laws bearing on environmental liability for oil pollution from offshore installations. Environmental liability will be construed broadly, so as to include both criminal liability and civil liability towards both the state and private persons.

In a recently issued set of guidelines, Oil and Gas UK15 states that: “In the UK, there is no financial cap on the liability of oil and gas companies for the consequences of an incident for which they are legally liable.” While this is true, it does rather beg the question: in which circumstances will legal liability actually be incurred? The article will examine (in this part) liability in tort/delict (as well as the potential for criminal liability in public nuisance) and the relevant provisions in the petroleum licence. Part 2 of the article will address the relevant provisions of UK regulatory law, the Environmental Liability Directive (which, as we shall see, is of limited effect in this area, but should shortly be supplemented by the new provisions contained in the EU’s proposal for a directive on offshore safety and related matters17) and the OPOL scheme, a ‘voluntary system of strict liability’18 instituted and administered by the industry itself. The article will conclude with an overview of the current legal position and an evaluation of its effectiveness. It will be argued that the law in the UK suffers from a number of deficiencies. The law is, in many important respects, highly uncertain. It is fragmentary and unsystematic, meaning that while certain interests seem to be protected by multiple legal remedies, others are either wholly unprotected or protected to an unacceptably uncertain extent. There are also problems with the drafting of various legislative and other instruments. It will be concluded that while collectively these deficiencies are significant, some of them could be readily fixed, either by government or the industry itself, if the will to do so existed. This would leave the UK with a system which provided a firm basis for the reimbursement of remedial measures taken by the state and the payment of compensation for at least some of the losses most directly associated with a spill. It would, in addition, allow the imposition of criminal sanctions at least in circumstances where a significant spill occurred in circumstances disclosing serious blameworthiness. Such a regime would provide much of what is required, but would leave certain interests (both private and public) unprotected and would not provide for the kind of criminal and civil penalties that have led to such significant sums of money being recovered as a result of Deepwater Horizon.

Liability under tort/delict

Preliminaries: jurisdiction and the legal status of the territorial sea and the continental shelf

Offshore oil and gas operations may take place within the territorial sea, which extends for 12 nautical miles, the baseline determined by Order in Council19 or upon the continental shelf. The legal status of the two areas is markedly different. The crown has a right of property over the foreshore and in the seabed within the limits of the territorial sea.20 The crown can, and does, grant leases over these areas, and may even transfer ownership over them.21 Some oil and gas developments have taken place within the territorial sea;22 in practice, however, development is much more commonplace in the continental shelf (UKCS), for the simple reason that this is where the overwhelming majority of the economically-viable conventional deposits are located.

The legal character of the EEZ of the UKCS differs from that of the territorial sea. The UK enjoys, by virtue of Article 77(1) of the United Nations Convention on the Law of the Sea (UNCLOS), an exclusive ‘sovereign right’ to exploit natural resources located on or within the UKCS.23 The state does not, however, own either oil and gas as it lies in strata within the UKCS24 or the continental shelf itself. Neither does the state own wild fish, birds or any other species of marine life on the continental shelf.25 It is possible that the public right to fish might extend to the exclusive fishing zone of the continental shelf,26 but even if

15 Oil and Gas UK (OGUK) is the principal trade association for the upstream oil and gas sector in the UKCS. For further information see http://www.oilandgasuk.co.uk/index.cfm. OGUK Guidelines to assist licensees in demonstrating financial responsibility to DECC for the consent of exploration and appraisal wells in the UKCS (2012), para 1.3. See also eg OSPRAG ‘Strengthening UK prevention and response: Final Report’ http://www.oilandgasuk.co.uk/publications/viewpub.cfm? FrmPubID=412 at 33.
16 At the time of writing, the proposal has not passed through all of the EU’s legislative processes. An informal working draft is available at http://register.consilium.europa.eu/pdf/en/13/st06/st06904-ad01en13.pdf.
19 Territorial Sea Act 1987 s 1.
21 Stair Memorial Encyclopaedia, Landlord and Tenant (Reissue) para 105.
22 The geographical location of all oil and gas fields and infrastructure is shown on the map which can be downloaded from https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/197082/Infrastr__Off.pdf. Note, however, that some of the fields that are closest to shore have been drilled, using directional drilling techniques, from onshore locations. This is true of eg the Lystby field; see http://www.caithnesspetroleum.com/operations/northsea.aspx.
23 In national law, this right is vested in the crown by virtue of s 1(1) of the Continental Shelf Act 1964. For a discussion of what is meant by ‘sovereign rights’ see eg G Gordon Petroleum licensing in G Gordon, J Paterson and E Usenmez Oil and Gas Law: Current Practice and Emerging Trends (2nd edn Dundee University Press Dundee 2011) para 4.8 and the sources and authorities cited therein.
24 The position is different for deposits located onshore or within the territorial sea. Property in these was vested in the crown by s 1(1) of the Petroleum Act 1934.
25 UNCLOS art 77(4) provides that sovereign rights are enjoyed over sedentary species; but this does not confer ownership.
26 The right to fish is fit for purpose? Journal of Water Law 16 (6) 201–05.
this is so, this would seem to provide the public with a right to obtain or take fish with original ownership being acquired at the point of capture, not a right in ownership over uncaught fish. These factors would seem to be relevant in at least two important respects. First, the question of whether damage has arisen as a result of a release from a person’s ‘land’ may be relevant to the question of whether a release satisfies the constituent elements of certain torts. This issue would seem to arise most acutely in the context of Rylands v Fletcher liability. Secondly, the distinction is also relevant from the standpoint of whether damage has occurred to a legally-protected interest. The law of tort/delict is primarily focused upon the protection of the person and his or her property. As such, it does not emerge as a promising basis for allowing damages to be sought for ownerless things.

Although the UKCS is not legally owned, it is nevertheless subject to legal control. Sections 10 and 11 of the Petroleum Act 1998 make provision for the extra-territorial application of the criminal and civil law relative to offshore oil and gas operations. The details of the provisions vary: while the criminal provision is directed towards acts or omissions taking place on an installation under or above relevant waters in connection with ‘the exploitation of the natural resources of the shore or bed of waters . . . or the subsoil beneath it’, it specifically applies to activities carried on from, by means of or on, or for purposes connected with, offshore oil and gas installations. The Civil Jurisdiction (Offshore Activities) Order 1987 divides the UKCS into three areas: the Scottish area; the Northern Irish area; and the English area. The order provides that the law of the relevant jurisdiction will apply within each area. These provisions have the effect of (among other things) applying the general rules of tort (in England, Wales and Northern Ireland) and delict (in Scotland) to offshore oil and gas operations. It is therefore appropriate to consider what the effect of these rules may be in this particular context.

The tort/delict of negligence

Where industrial accidents occur offshore, the injured party (or, if the accident is fatal, his family) will be able to advance a claim, either for negligence or, if appropriate, breach of statutory duty, in the same way as if the accident had occurred onshore. Where property damage has occurred as a result of a careless release of oil,22 an action will lie in the tort or delict of negligence. For such an action to be successful, the claimant must establish that the defendant owed him a relevant duty of care, demonstrate that this duty has been breached and prove that this breach caused him to suffer a type of damage which was not so foreseeable as to be too remote for liability to be established.33 Depending on the factual circumstances, these criteria may be difficult to satisfy. Counter-intuitively, the task may be simpler in the case of a large-scale event than a more localised spill as the larger event is more likely to necessitate an inquiry at which important details about the cause of the accident will enter the public domain. Where liability is established, the claimant will be able to obtain damages both in respect of the property damage itself and for any derivative economic loss that is not too remote to be recovered.35

Outside of these areas, it is very difficult to envisage liability being incurred in negligence. A claimant who has, as a result of an oil spill from an offshore installation, suffered only economic loss will not be able to maintain a claim under the law of negligence. Pure economic loss is not generally recoverable in this area of law36 and, although some exceptions have been cut into this general rule, oil pollution cases are far removed from the circumstances in which the courts have been willing to impose a duty of care.38 Quite apart from the difficulties which might arise in satisfying the need for proximity, recognising the existence of a duty of care in relation to the pure economic loss caused by oil pollution would involve the imposition of ‘liability in an indeterminate amount for an indeterminate time to an indeterminate class’.39 For policy reasons, the courts are generally unwilling to impose a duty of care in such circumstances.40

29 SI 1987/2197 (Civil Jurisdiction Order).
30 This area should more properly be called the English and Welsh area, but this article follows the wording used in the instrument.
31 Civil Jurisdiction Order (n 29) art 2.
32 eg where a fisherman’s catch has been rendered unmarketable as a result of becoming tainted by oil, or his net has been contaminated.
33 See eg M Jones ‘Negligence’ in M Jones (ed) Clerk and Lindeal on Torts (20th edn Sweet & Maxwell 2010) para 8–04.
34 The claimant will not, at least initially, have any detailed knowledge about how the oil came to be released; unless he is able to obtain this, make sense of it and demonstrate that, had reasonable care been taken, the release would not have occurred, he has no prospect of being able to prove fault. This would be a tall order for most private individuals or small businesses. Indeed, even well-resourced and expert public authorities may struggle to deal with the complexities involved. Difficulties may also arise in eg proving the source of oil, although a claimant who is able to recover a sample and has sufficient funds to allow it to be analysed may, by its chemical composition, be able to resolve this issue.
35 See eg Spartan Steel & Alloys Ltd v Martin & Co (Contractors) Ltd [1972] 3 All ER 557.
36 See eg Hamble Fisheries Limited v L Gardner & Sons Limited (The Rebecca Elaine) [1999] 2 Lloyd’s Rep 1 at para 4 (Mummery LJ).
38 The courts imposition of a duty of care for pure economic loss has generally required extremely close proximity, evidenced by factors such as a relationship between the parties which is so close as to be akin to a contract or an assumption of responsibility for the economic interests of the claimant.
39 Utartoros v Touch EM 441 (1922) at 444 (Cassoo DJ).
40 See eg Spartan Steel & Alloys Ltd v Martin & Co (Contractors) Ltd [1972] 3 All ER 557 at 563–64 (Lord Denning); Coparo Industries plc v Dickman [1990] 2 AC 605 at 620–21 (Lord Bridge).
Conclusion on liability for negligence

Following an oil spill, the tort/delict of negligence plays a potentially significant but tightly-circumscribed role. Negligence will allow a claim to be advanced relative to personal injury and to damage to the claimant’s property. The fact that the bed of the territorial sea, the foreshore and land including the coastline is owned means that this may be a not-insignificant remedy in the context of an oil spill which reaches or approaches the coast. However, the continental shelf outside of the territorial sea is not the property of either the crown or anyone else. Negligence, therefore, will not provide a reliable means for the state or interested members of the public to seek compensation for damage to the marine environment on the continental shelf or for damage to its overlying waters. Neither will the law of negligence permit a claim for pure economic loss.

Rylands v Fletcher liability

In Rylands v Fletcher, it was held that a person who makes non-natural use of his land for his own purposes by bringing into it and collecting and keeping there ‘anything likely to do mischief if it escapes’ must keep it at his peril, and, if he does not do so, is prima facie answerable for all the damage which is the natural consequence of its escape. Subsequent case law has clarified that the rule does not apply only to land owners; it has been applied to tenants and parties possessing a licence to occupy land, as long as the dangerous thing is under their control, a fact which might suggest liability on the part of the operator of an offshore installation. Neither does the rule require that the harm must be suffered only by an adjacent owner of land; once there has been an escape ‘those damned may claim. They need not be the occupiers of adjoining land or indeed of any land’. This might suggest that liability can arise when oil has passed through ownerless water and contaminated property some distance away from the offshore installation.

At first sight, therefore, Rylands v Fletcher might appear a promising basis for civil liability for environmental damage for oil pollution from an offshore installation or infrastructure: a prospect which might seem particularly appealing, as Rylands v Fletcher provides a rare instance of strict liability at common law. On closer analysis, however, there is a variety of difficulties emerge.

There are perhaps four principal problems. First, while the overwhelming majority of oil production comes from within the Scottish sector of the UKCS, the rule in Rylands v Fletcher has been held by the House of Lords not to apply in Scots law. Thus, if Rylands v Fletcher does give rise to potential liability, it will do so only in the English or Northern Irish sector.

Secondly, Rylands v Fletcher relates to dangerous substances brought onto the defender’s land and collected and kept there. This would plainly apply in a situation where oil leaks from an onshore storage facility and, subject to what is said in the next paragraph below, may embrace a situation where oil leaks from an offshore pipeline. It is, however, questionable if it would apply to a situation where oil leaked directly from a wellhead. There are strong policy reasons for the rule to apply in such situations, but it is arguable that, at the point where oil previously held within the pore-space in porous rock in subterranean strata is brought to the surface of the ground above where it was previously captive, it is not being ‘brought onto’ a geographic area under the effective control of the defender. If all goes well and it does not escape from the wellhead, and is merely moving within that area, it is certainly being ‘collected’ there. But if initial attempts to collect fail, must Rylands v Fletcher liability fail too? And is the oil being ‘kept’? This word might suggest a degree of retention that is more than fleeting. But as oil is generally kept moving throughout an infrastructure system, this might be problematic too. If the point were to be litigated, much may depend on whether the court was willing to dispense with or moderate some or all of the qualifying criteria.

Thirdly, while Rylands v Fletcher liability does not apply only to land owners, it has hitherto extended only to situations concerned with what one might term the use of land by a person having some kind of proprietary interest in it. An oil company producing oil or gas offshore will usually own the movable property that is used to construct the well. However, it is not granted a real right over the geographical area within which the works take place or to occupy particular premises, but merely an exclusive personal licence to ‘search and bore for and get’ petroleum within the licensed area. Indeed, as noted in

41 (1866) LR 1 265 at 279 (Blackburn); affirmed by the House of Lords (1868) LR 3 HL 330.
42 Rainham Chemical Works v Belvedere Fish Guano Co [1921] 2 AC 465 at 479.
44 R Buckley ‘Nuisance and Rylands v Fletcher’ in Clerk & Linseed on Torts (20th edn Sweet & Maxwell 2010) para 20-44.
45 In 2010, the Scottish share of oil production was over 95%. For gas, it was 58%. The Scottish share of total hydrocarbon production was 80%. See A Kemp ‘North Sea oil and gas’ in A Goudie (ed) Scotland’s Future: The Economics of Constitutional Change (Dundee University Press Dundee 2013) 243–65 at para 11.5.
47 (1866) LR 1 265 at 279.
48 Rylands v Fletcher liability was held to be an actionable head of claim following the Buncefield oil depot fire: Colour Quest Ltd v Total Downstream UK plc [2009] EWHC 540 (Comm).
49 The issue relates to the legal status of the UKCS. If the UKCS is not owned, could a release from a pipeline on or in it be seen as a ‘release from land’?
50 However, this is not certain. As well as the problem identified in n 49 above, there is the question of whether oil in constant transit within a pipeline system could be said to be being stored.
51 If the law required only ‘collection’, for instance, or interpreted ‘brought onto’ in such a way as to encompass the process of moving oil from a position within subterranean strata to the surface of the same geographical area, and interpreted ‘kept’ in such a way as to embrace a situation where oil is continuously entering a transportation system, albeit the individual molecules of hydrocarbon within that system are continually passing through it, then this problem could be resolved. But this does seem to be a significant deviation from the rule in its current form.
52 Petroleum Act 1998 s 3(1). For a discussion of the legal basis of the UK petroleum licensing regime and its key features see Gordon (n 23) paras 4.6–4.17.
above, the state itself does not own either the oil and gas in strata or the continental shelf, outside of the territorial sea; it instead possesses ‘sovereign rights’ to exploit the natural resources within it. Thus the acreage within cannot be seen as ‘land’ in any conventional sense. It would be a bold step – although one for which it could be argued that policy grounds provide ample justification – for a court to dispense with the requirement for a proprietary interest in land and found Rylands v Fletcher liability on an offshore production licence. Where a claim for private nuisance is founded in strata or the continental shelf, outside of the territorial sea, the court must consider whether the claim is based upon undue interference in the comfortable and convenient enjoyment of land, whether the inconvenience and interference is sufficient to constitute a nuisance will be a matter of degree. A few streaks of oil on a private beach will not constitute a nuisance. Also in relation to interference claims, Lord Goff held in Hunter v Canary Wharf Ltd that these ‘will generally arise from something emanating from the defendant’s land’. At first sight this might suggest that the discussion, above, about the nature of the right granted by the petroleum licence and its relevance for the prospects for Rylands v Fletcher liability is also relevant here. It is submitted, however, that this is not the case. Lord Goff’s purpose was not to argue that the causation of the nuisance must be associated with ‘land’ per se, but to distinguish between the situation where the very existence of a building, rather than something ‘emanating’ from it, is alleged to constitute a nuisance and to note that the claim is more likely to succeed in the latter case.

Although claims of private nuisance are commonly founded upon ongoing states of affairs rather than one-off situations, clear authority does exist to confirm that a private nuisance can be founded upon a one-off event, if its consequences are sufficiently acute to trigger liability. Unlike Rylands v Fletcher liability, nuisance is not a tort of strict liability; some manner of fault is always required before liability can adhere, although the precise nature of the fault will depend on the circumstances of the case.

Nuisance is, both historically and in modern times, often conceived of as part of the law of neighbourhood. The overwhelming majority of cases involve disputes between people who share a contiguous boundary or are neighbours in the broader sense of being located within the same neighbourhood. Depending on sea conditions, serious oil spills may be carried a great distance and may do harm at a place far removed from their point of origin. It is submitted that this should have no bearing upon the availability of a remedy under nuisance. An analogy could be drawn with riparian owners. If an upstream owner contaminates a stream, he or she will apparently be liable in nuisance to all downstream riparian owners.

The law of nuisance in England, Wales and Northern Ireland

Private nuisance

The essence of private nuisance may be described as a condition or activity which unduly interferes with the use or enjoyment of land. This may occur in a number of ways: by encroachment; by causing physical damage to another’s land; or by unduly interfering with another in the comfortable and convenient enjoyment of his land. The first possibility is not relevant to the present discussion and will not be considered further. The other two, however, may potentially arise as a result of an offshore oil spill which reaches and impacts upon owned property. Where a claim for private nuisance is founded upon ‘damage’, this must constitute a ‘material injury to property’. Where the claim is based upon undue interference in the comfortable and convenient enjoyment of land, whether the inconvenience and interference is sufficient to constitute a nuisance will be a matter of degree. A few streaks of oil on a private beach will not constitute a nuisance. Also in relation to interference claims, Lord Goff held in Hunter v Canary Wharf Ltd that these ‘will generally arise from something emanating from the defendant’s land’. At first sight this might suggest that the discussion, above, about the nature of the right granted by the petroleum licence and its relevance for the prospects for Rylands v Fletcher liability is also relevant here. It is submitted, however, that this is not the case. Lord Goff’s purpose was not to argue that the causation of the nuisance must be associated with ‘land’ per se, but to distinguish between the situation where the very existence of a building, rather than something ‘emanating’ from it, is alleged to constitute a nuisance and to note that the claim is more likely to succeed in the latter case.

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61 St Helens Smelting Co v Tipping (1865) 11 HLC 642 at 650 (Westbury LC).
62 Buckley (n 44) para 20–10.
64 Hunter (n 63) was concerned with interference with television signals suffered by a large number of residents in the Isle of Dogs area of London, which interference was alleged to have been caused by the construction of One Canada Square.
65 For a careful review of the relevant authorities on this point, see Colour Quest Ltd & Ors v Total Downstream UK plc & Ors (n 48) paras 408–421 (David Steel J).
66 Buckley (n 44) para 20–31.
67 For an account of the development of the Scots law of nuisance which emphasises this point, see Cameron (n 46) paras H.01–H.02.
68 For an example of a broader neighbourhood case see Hunter v Canary Wharf Ltd (n 63).
70 Wood v Wood (1843–60) All ER Rep 894 at 896 (Pallock CB) where the plaintiff ‘had a right to the natural stream flowing through the lands in its natural state as an incident to the land on which the weir was built’.

53 Allowing Rylands v Fletcher liability would satisfy ‘the impulse to do practical justice’ (as described by Lord Goff in White v Jones (1995) 46 All ER 691 at 698 in the admittedly different context of providing a remedy for disappointed beneficiaries). Strict liability would provide a convenient means of implementing the polluter pays principle.
54 Buckley (n 44) para 20–46.
55 Quite apart from any particular reticence that may exist relative to Rylands v Fletcher, the Supreme Court has recently signalled an intention to exercise greater caution in expanding or changing the common law than has been shown over the last couple of decades. See R (on the application of Provincial plc & Anor) v Special Commissioner of Income Tax & Anor [2013] UKSC 1 at paras 47–50 (Lord Neuberger).
56 Cattle v Stockton Waterworks (1874–80) All ER Rep 220.
57 Anglian Water Services Ltd v Cranshaw Roberts Co Ltd [2001] BLR173 at para 149.
58 Franco v Stockport MBC [2003] UKHL 61 at para 9 (Lord Bingham) and at para 33 (Lord Hoffmann).
59 Buckley (n 44) para 20–01.
60 ie dry land, the foreshore or the territorial sea.
There would seem to be no reason in principle for an especially restrictive approach to be taken to geographical proximity: the law’s provisions regarding the need for materiality of damage and relative to the degree of interference required to constitute a nuisance would seem to provide the polluter with adequate protection against excessively wide-ranging liability.

Private nuisance is a tort which focuses intent upon land and its enjoyment. It is clear that compensation is payable for damage to land and its accretions. Compensation is also payable in respect of damage to chattels upon property71 and, in cases involving interference with amenity, for the intangible loss associated with such interference.72 Economic losses deriving from damage to or undue interference with the claimant’s land would seem to be recoverable if a natural consequence of the defendant’s wrongful act.73 A claim for economic loss in other circumstances would seem to be anathema to the wrong. Claims for personal injuries74 are irrecoverable.

Public nuisance

Public nuisance is not recognised in Scots law.75 In the law of England and Wales and Northern Irish law, public nuisance has a dual aspect, being both a common law criminal offence and a tort. Dealing first with the criminal dimension, the currently-accepted definition76 of the actus reus of the offence has been adapted from Archbold on Criminal Pleading, Evidence and Practice:

> A person is guilty of a public nuisance (also known as common nuisance), who (a) does an act not warranted by law, or (b) omits to discharge a legal duty, if the effect of the act or omission is to endanger the life, health, property... or comfort of the public, or to obstruct the public in the exercise or enjoyment of rights common to all Her Majesty’s subjects.77

The requirement of a common injury means that the offence cannot be committed in situations involving the targeting of a particular individual.78 A ‘simultaneous interference with the rights of a significant section of the public’ is required.79

Even if one accepts that a particular interference with the rights of a significant section of the public is required, one might still be left wondering whether the local community within that sphere comprises a sufficient number of persons to constitute a class of the public.80

[...]

A large-scale oil spill which affected the rights of one or more categories of citizen84 would seem to be sufficiently ‘public’ to satisfy this criterion.

The mens rea for the offence is that the accused is responsible for a nuisance which he knew, or ought to have known (because the means of knowledge were available to him), would be the consequence of what he did or omitted to do.85 The crime is triable either way and if tried under solemn proceedings can result in a sentence of life imprisonment or an unlimited fine. The offence has been criticised for its vast breadth and unpredictable application.86 It has, however, survived a relatively recent attempt to declare it too uncertain to satisfy the requirements of the common law or Article 7 of the European Convention on Human Rights, albeit the House of Lords indicated that the offence should not be used where an alternative basis for prosecution existed.87

Could an oil spill from an offshore installation located within the English or Northern Irish sector of the UKCS give rise to a criminal prosecution for public nuisance? It is submitted that as a matter of theory, it could; however, this would be possible only very exceptionally. The spill would have to occur in circumstances which constituted a breach of licence; moreover, it would have to be proved that the party causing the spill knew, or ought to have known (because the means of knowledge were available to him), that the nuisance would be the consequence of its conduct. Depending on the circumstances proving this state of knowledge this might be a difficult

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71 Hunter v Canary Wharf Ltd [n 63] at 706.
72 Jon de Nui (UK) v NK Royal Belge [2000] 2 Lloyd’s Rep 700 at 716.
73 Grosvenor Hotel Co v Hamilton [1894] 2 QB 836 at 840.
74 Hunter v Canary Wharf Ltd [n 63] at 696 (Lord Lloyd).
75 The availability of nuisance as an actio publicis in Scots law is discussed in Hunter v Canary Wharf Ltd [n 63] at 706. (Lord Lloyd).
76 This definition was quoted with approval in eg R v Rimmington [2005] UKHL 63 at paras 9–12; Colour Quest Ltd & Ors v Total Downstream UK plc & Ors (n 48) para 422.
77 The ellipse in the above quotation replaces the word ‘moralis’ present in Archbold but which has been discarded by the courts in recent times as potentially incompatible with the European Convention on Human Rights.
78 Thus in R v Rimmington (n 76) the sending of a large quantity of hate mail to a number of individual recipients did not constitute a public nuisance.
79 Colour Quest Ltd & Ors v Total Downstream UK plc & Ors (n 48) para 428.
80 [1957] 2 QB 169.
81 Ibid at 182.
82 Ibid.
83 Ibid at 184.
84 For example, the crown and its disponees as owners of an affected area of the seabed or foreshore; the owners of harbours, marinas or privately-owned stretches of coastline.
85 R v Stanrock [1994] QB 279 at 289 (Rattie J). This formulation was quoted with approval by Lord Bingham in R v Rimmington (n 76) at para 21.
87 R v Rimmington (n 76) at paras 28–31 (Lord Bingham).

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task, all the more so when the prosecution is directed towards a corporation.88 Finally, and most significantly, the House of Lords’ decision that the offence should not be prosecuted where an alternative basis for prosecution exists would also seem to stand in the way of prosecution under this head: as we shall see below, the Offshore Petroleum Activities (Oil Pollution Prevention and Control) Regulations 2005 (as amended) provide a statutory basis for prosecution.89

Turning now to public nuisance as a tort, it has long been established that individual members of the public may raise proceedings under this wrong where they can demonstrate that they have suffered special or particular damage as a result of public nuisance.90 However, despite its antiquity, the tort is still in a somewhat under-developed form. While it is clear that conduct which would satisfy the actus reus of the crime of public nuisance must be proved, it is far from certain what is required by way of fault before civil liability can flow.91 There is also some doubt over what types of damage may be compensated. A leading commentator has gone so far as to say that “few points in civil law are more obscure than the meaning of ‘special damage’ in the context of public nuisance.”92 Damage to property will qualify as ‘special damage’,93 and in the context of the obstruction of the highway it would seem that at least some trading losses may also be recoverable.94 If this rule is of more general application, this would seem to open up the possibility that some heads of economic loss which are not recoverable in other tortious claims may be recoverable under public nuisance. Personal injury is possibly also recoverable under this tort.95

The law of nuisance in Scotland

The Scots law of nuisance differs from the law of nuisance in the rest of the UK in a number of respects.96 For present purposes, the most significant of these is that Scots law does not recognise either the rule in Rylands v Fletcher or public nuisance as that term is understood elsewhere in the UK. There is no crime of public nuisance in Scots law97 and, as a result, no prospect whatever of public nuisance being used to fill in any lacunae in the criminal law within the Scottish sector of the UKCS.

Whitty notes that an actio popularis has come to be recognised as competent in the Scots law of nuisance, so that a private person who can qualify a sufficient interest may bring proceedings to restrain an invasion of his rights as a member of the public in the use and enjoyment of public places.98 In the case of the foreshore,99 Whitty notes that the crown has a duty to vindicate and protect these public rights. The focus of these rights, however, is protective rather than compensatory, and it must be doubted if they will permit an action for compensation for damage caused by pollution.

These distinctions apart, the ‘basic rationale’ of nuisance in Scotland is essentially the same as in the rest of the UK: ‘the protection of comfortable enjoyment of heritable property’.100 Although the overwhelming majority of reported cases concern circumstances where the nuisance was emitted from another’s use of his own land,101 and it sometimes seems to be assumed that this is an essential element of the wrong,102 there does not appear to be any firm rule stating that this is so.103 In Scots law, as in English law, the question of whether there has been undue interference (or, in the language of the leading Scots authority, ‘material loss or inconvenience’104) is one of fact and degree. The ‘critical question’ is ‘whether what he [the claimant] was exposed to was plus quam tolerabile when due weight has been given to all the surrounding circumstances’.105 Nuisance need not emanate from an adjoining property in order to be actionable.106

Nuisance is not a wrong of strict liability, but requires culpa, the precise nature of which will vary from situation to situation, but which may include negligence.107 Negligently-caused nuisance is not, however, a subspecies of the delict of negligence, but part of the law of nuisance. As Lord Hope has noted:

A claim of damages for nuisance is a delictual claim, as it does not depend for its existence on any contract. It arises where there is an invasion of the pursuer’s interest in land to an extent which exceeds what is reasonably tolerable. The plus quam tolerabile test is peculiar to the liability in damages for nuisance. Where that test is satisfied and culpa is established, the requirements for the delictual liability are fulfilled. Liability in damages for

88 There, it will be necessary to identify a natural person who constitutes the controlling mind of the company and prove that this person possessed the requisite state of knowledge: Tesco Supermarkets v Nattrass [1972] AC 153.
89 These regulations will be discussed in Part 2 of this article.
90 G Kodilinye ‘Public nuisance and particular damage in the modern law’ (1986) 6 Legal Studies 182.
91 Spencer (n 86) 75.
92 ibid 74.
93 ibid.
94 See the discussion in Buckley (n 44) paras 20–101 to 20–185 and the authorities cited therein.
95 Spencer thought that personal injury was ‘clearly included’; see Spencer (n 86) 74. In Corby Group Litigation v Corby Borough Council [2008] EWCA Civ 463, the Court of Appeal, in determining an application to strike the claim out, was somewhat less confident about the matter, but was willing to hold that it was ‘not open to the court to decide that damages for personal injury are not recoverable in public nuisance’. See [2008] EWCA Civ 463 at para 32 (Lord Dyson).
96 For a discussion see N Whitty ‘Nuisance (Resumes)’ in N Whitty (ed) Stair Memorial Encyclopaedia paras 18–25; Cameron (n 46) paras 1409–1413.
97 Whitty (n 96) para 20.
98 ibid para 160.
99 It would seem to be appropriate to extend this right, by analogy, to the seabed within the territorial sea.
100 Cameron (n 46) para 14.09.
101 See eg the list of examples given in Whitty (n 96) para 45.
102 See eg Watt v Jamieson 1934 SC 56 at 57 (Lord Cooper). In discussing the elements of the wrong, Lord Cooper stated that “if any person so uses his property as to occasion serious disturbance of his neighbour’s property . . .”
103 Whitty notes, for instance, that it is sufficient if the conduct of the defendant attracts harmful species of wild animals onto his land or public places which cause damage to neighbouring land. See Whitty (n 96) para 45 (emphasis added).
104 Watt v Jamieson (n 102) at 57 (Lord Cooper).
105 ibid.
107 RHM Bakeries (Scotland) Ltd v Strathclyde RC (1985) SC (HL) 17; Cameron (n 46) para 14.43.
negligence, on the other hand, depends on a failure to take reasonable care where there is a foreseeable risk of injury. That is another species of delictual liability, the basis for which also depends upon culpa.108

Conclusion on liability under tort/delict
The law of tort/delict undoubtedly has a role to play in the context of the recovery of compensation for environmental liability. However, the various different remedies available tend to cluster around the protection of the same interests: principally property rights, and to a lesser extent, personal injury and derivative economic loss. Thus, while the law of tort or delict would seem to permit the owner of a fish-farm some miles distant from the location of an oil leak to claim in respect of the loss of his owned, caged fish, no claim will arise in relation to the wild marine creatures killed by contact with the oil as it drifted towards that location, or for the damage to the waters and marine environment that supported them. This result means that we need closely to examine which other legal sources of liability exist, as the liability provided for by the law of tort/delict is inadequate on its own.

Relevant licence obligations
Introduction
No exploration for oil and gas, or production thereof, can legally take place on the UKCS otherwise than in accordance with a petroleum licence granted by the secretary of state.109 All such licences incorporate the model clauses, a set of standard terms and conditions setting out key aspects of the licensees’ obligations. The licence incorporates the model clauses extant at the time of grant; these can be changed only by agreement or by the passing of retroactive legislation.110 While certain other provisions in the model clauses have evolved over time,111 the provisions bearing on environmental liability have remained unchanged.112 For ease, reference will be made only to the most recent set of model clauses;113 however, the same clause is contained in all offshore production licences (albeit the clause number will vary between different sets of model clauses).

The UKCS production licence has both a contractual and regulatory aspect.114 Evidence of the regulatory character of the licence can be found in the fact that, in the event of a breach, the minister is entitled to revoke the licence115 and, when granting new licences for offshore acreage, the minister is entitled to take account of ‘any lack of efficiency and responsibility displayed by the applicant’ pursuant to another petroleum licence.116 However, the licence takes the form of a commercial contract. It is described as being ‘made between’ the secretary of state on the one part and the licensee on the other. It is executed by both parties and is careful to narrate that it has been made in exchange for the payment of money, thus satisfying the doctrine of consideration.117 In these circumstances, there is broad agreement that, in the event of a dispute between the state and the licensee, the licensee will, in addition to being able to pursue a judicial review, be entitled to pursue private law remedies.118 By parity of reasoning, the contractual aspect of the licence would also strongly suggest that the minister would be entitled to pursue a contractual claim for damages in the event that he suffers a loss arising from a breach of the licence. This aspect of the matter does seem to have been much discussed previously, perhaps because the OPOL scheme appears, on the face of it, to provide the state (and other public authorities) with a straightforward route by which to obtain reimbursement for remediation measures and compensation for loss caused by pollution damage. However, given what will be said about OPOL in part 2 of this article, this contractual claim may, in certain circumstances, turn out to be an important remedy.

The relevant obligations in outline
Model clause 23, entitled ‘Avoidance of harmful methods of working’, provides that the licensee119 shall maintain all apparatus, appliances and wells in good repair and condition and shall execute all operations in a proper and workmanlike manner in accordance with methods and practice customarily used in good oilfield practice. Specifically, this model clause obliges the licensee to take ‘all steps practicable’ in order:

(a) to control the flow and to prevent the escape or waste of Petroleum discovered in or obtained from the Licensed Area; and

...
Some aspects of these obligations require further consideration. While in practical terms the party responsible for undertaking or organising the execution of works and activities on the installation will be the operator, the obligations imposed by the model clause are directed not solely towards that party but to all of the licensees, jointly and severally. In the event of a breach by one of the licensees—presumably the operator—of one or more of the operational control obligations contained in model clause 23(1) causing an escape of oil, this provides the minister with the additional security afforded by having a multiplicity of parties from whom he may recover damages. However, the licensees’ obligation under the licence is not strict. There mere fact that oil has escaped and the secretary of state has suffered a loss will not be enough to found a contractual claim for damages. If, for some reason, oil escapes despite the fact that all of the model clause 23(1) provisions have been complied with, the licence has not been breached; and if it has not been breached, then there is of course no prospect of the secretary of state maintaining a contractual claim for damages.

Additionally, the clause contains important provisions relative to the funding of liability for damage caused by any release of oil from an offshore installation. Model clause 23(9) provides that:

...the Licensee shall comply with any reasonable instructions from time to time given by the Minister with a view to ensuring that funds are available to discharge any liability for damage attributable to the release or escape of Petroleum in the course of activities connected with the exercise of rights granted by this licence.

The minister is under an obligation to give the licensee particulars of the proposal he has in contemplation and an opportunity to make representations. This might give the impression that bespoke arrangements for financial security are entered into for each licence. In the past, this did not really happen: the obligation was generally implemented by the minister’s practice of insisting that the licensees’ nominated operator is a member of OPOL. However, oil spill modelling work carried out under the auspices of OSPRAG in the immediate aftermath of the Deepwater Horizon disaster revealed that in a small number of scenarios the upper limit of liability available under the OPOL scheme (£250 million) might not be sufficient to satisfy all claims made. Additionally, for reasons we shall discuss in Part 2 of this article, the (potentially very significant) cost of drilling a relief well is not covered by OPOL. This potential gap did not much exercise ministerial minds prior to Deepwater Horizon but has, in the aftermath of that disaster, become much more pressing.

As a result, DECC has now produced new guidelines setting out its expectations in this regard. These in turn refer to a further set of OGUK Guidelines, which set out a methodology for demonstrating financial responsibility, and to which the secretary of state has said he will attach ‘considerable weight’ in assessing if financial responsibility has been properly established. Thus, Deepwater Horizon has led to an increase in the industry’s regulatory burden in this regard, and a concomitant increase in the degree of security enjoyed by the secretary of state, who may be legitimately criticised for not previously giving this important matter sufficient attention.

The second part of this article will appear in the next issue. It will describe and analyse the relevant UK regulatory law, consider the Environmental Liability Directive and discuss the benefits and limitations of OPOL (the scheme of voluntary strict liability instituted by the industry itself) before drawing the disparate threads of the current law together.