

Claiming Against a Negligent Salvor: Elements Necessary to Establish a Case of Salvor's Liability

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1. Introduction

The cases involving claims against negligent salvors are seldom in the practice. Whereas one could argue that the professional salvage industry is too professional to make grave mistakes on a steady basis and that the passing-by vessels offering assistance at sea are unlikely to create serious damage to the imperiled object of salvage, a rare opportunity to examine a claim against a salvor before a court or an arbitration tribunal is a result of the practical difficulties experienced by a salvee. A salvee is required to prove the salvor's negligent performance,¹ the costs of such proceedings are high,² and the public policy of leniency towards salvors creates an additional obstacle to the successful claim.³ Unlike the non-professional salvors, the professional salvage industry exists with an aim to make profit from rendering salvage services, and it is up to the tribunals to ensure that the notion of profit does not conflict with the notion of service quality, and to additionally ensure that the consumers' (salvee's) rights are dully protected.

The relationship between the parties of a salvage agreement is/can be regulated by the international law, the domestic maritime (salvage) law, the applicable standards of conduct and customs, the general domestic law regulation and case law, and, what is often the case, especially with regard a professional salvage service, the salvage contract. Whereas the parties to a salvage contract, in accordance with Article 6(1) of the 1989 International Salvage Convention (SALVCON), are free to opt-out of the SALVCON provisions, certain obligations derived from the statutes (including the

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¹ Cf.: T.D. RHIDIAN, *Aspects of the Impact of Negligence upon Maritime Salvage in United Kingdom Admiralty Law*, in *Mar. Law*. 1976-1977, 2, 60.

² Cf.: R. STARBUCK, *The financial procedures of salvage*, in *Port Technology International*, 2007, 20, 31.

³ Cf.: E. GOLD, *Marine Salvage: Towards a New Regime*, in *J. Mar. L. & Com.*, 1989, 20, 488.

implemented international law) are mandatory. With regard the SALVCON, a salvor is under an obligation to perform with due care when conducting the environmental services (Article 8[1b] SALVCON),⁴ regardless of whether a salvage contract has been entered into or not, or whether a salvage contract incorporates such a standard. A salvor is under an obligation to act diligently and avoid harming others – a duty arising either from a contractual stipulation, or, derived from a general non-contractual (tort) obligation of *neminem laedere*. Should a salvor breach one or more of these duties, a sanction – in the form of a diminishment or a forfeiture of the salvage award, or, the imposed liability for damage compensation – is due. Apart from holding a salvor liable (either through the contractual or non-contractual avenue) to compensate a salvee's loss, sanctions should serve as a deterrent seeking to eliminate from the salvage industry such individual professional salvors whose behavior is considered below the standard of the (professional) salvage practice and expertise to the extent that it affects the general appreciation of the salvage profession. By setting up the proper standards of conduct, the salvage industry strives to adopt the appropriate measures to up-hold the required level of care, thus minimizing the possibility of careless consequences, at the same time affecting the affordability of insurance coverage for the limited liability.⁵

In order to assess the availability of remedies in cases of salvor's misconduct, a reference is first made to the recent Israeli salvage case where a salvor, due to careless conduct, created damage to the salvee's object. Further point of analysis is the procedure of assessing the existence and scope of potential salvor's liability, including the examination and explanation of the issue of damage, the remedies available to a salvee, the doctrine of affirmative damages, the elements necessary to establish the basic liability, and the salvor's position when a case of negligent performance is established. The analysis then proceeds to ascertain further elements regularly examined by the relevant courts and arbitration tribunals in order to determine whether it is possible to exclude or diminish the scope of salvor's liability. These elements usually incorporate the issue of distinguishable or non-distinguishable damage, the professional or non-professional service provider, the presence of imminent danger, the case of sudden emergency and the availability of alternative means of salvage. Each of the previously enumerated issues is compared to the examined Israeli case, as a means of demonstrating how the relevant elements are applied in practice.

⁴ For more on this issue, see: M. MUDRIĆ, *Whether the duty to protect the marine environment takes precedence over the general duty to protect the imperiled object of salvage: Article 8 of the 1989 Salvage Convention*, in *The Journal of International Maritime Law*, 2012, 18, 343 ff.

⁵ For a thorough analysis of the issue of salvor's liability in negligence, see: M. MUDRIĆ, *The Professional Salvor's Liability in the Law of Negligence and the Doctrine of Affirmative Damages*, Zürich-Wien-Berlin, 2013.

2. A Case for Consideration

2.1 Facts

In the recent Israeli case *AG Ofir Marketing Ltd v Menora Insurance Co Ltd*,⁶ due to salvor's negligent performance, the insurer (defendant), responsible for contracting the salvage company, was held liable (in tort, non-contractual damage) to pay damage to the extent of the full value of the (salvee's) vessel, the loss of (salvee's) profits and the adjourned expenses.

Immediately upon the sinking of the vessel, the insured contacted the insurer (claimant), who, in turn, hired a salvage company to aid the vessel. The salvor, being directly instructed by the defendant, attempted to raise the sunken vessel by a method of internal flooding and the use of air bags, a procedure that caused additional damage to the vessel. The salvor then proceeded with a second attempt to raise the vessel by utilizing an external flooding method, and ultimately succeeded. As the vessel, at that point, suffered considerable (initial and additional) damage, the relevant port authority withdrew the vessel's operating license and order the vessel to be towed to a nearby dockyard for a thorough inspection. The insurer objected the order, claiming that a procedure of lifting the vessel to a dockyard could cause further damage. The insured filed an abandonment notice (probably) in an attempt to argue for a constructive total loss. The vessel was ultimately never towed to the dockyard, and the insured, despite the abandonment notice, finally decided to disassemble the vessel.

2.2 Decision

The defendant argued, due to the fact that the vessel was, at the time of the incident, unseaworthy, that he should be allowed to exclude the insurance coverage. Following the official investigation into the facts preceding the sinking of the vessel, the Court held that the vessel sank as a result of considerable lack of due care and diligence on the side of the insured (the unseaworthiness of the vessel caused by claimant's (gross) negligence – the crew failed to take appropriate measures to prevent the entry of water into the vessel and the consequent sinking, and, additionally, failed to follow the relevant rules on the safety of navigation). As the vessel was insured in accordance with a marine insurance policy subject to English law, the Court, following the relevant provision of the UK Marine Insurance Act (breach of warranty on the side of the insured), confirmed the insurer's right to exclude the insurance coverage.

In accordance with the relevant English law provisions, both the insured and the insurer are under an obligation to utilize all reasonable measures to protect the insured object and prevent the occurrence of an insured peril. Following further findings of the official investigation, the salvee's object was deemed unfit for the first utilized

⁶ *AG Ofir Marketing Ltd v Menora Insurance Co Ltd*, CC 2429/01, February 18 2014.

method of salvage (internal flooding) – which, in addition, was underperformed – and the Court held that the choice of method primarily relied on the cost of that method as compared to other, at that time, available method of salvage (external flooding). Having this in mind, the Court held the insurer liable in tort (in accordance with general Israeli provisions on the non-contractual liability) for the total loss of the vessel, as the defendant failed to adhere to the standard of due care when protecting other persons' property (this included the (negligent) work of a person (salvor) instructed by and acting on behalf of the insurer). The Court further held that it was up to the insurer to complete the salvage operation, and, having failed to do so, the Court allowed the claimant to seek compensation for the costs of cutting the vessel into pieces. With regard to the loss of profit, the Court allowed a 25% compensation of the proven loss (the commercial use of vessel), and with regard to the other expenses (the cost of salvage services) the Court deducted the amount of those expenses from the overall compensation.

3. Assessing Salvor's Liability

3.1 Damage

The damage suffered by a salvee can arise out of the original peril threatening the vessel. In the examined Israeli case, this is true for the first part of the overall damage resulting from the poor crew's performance, failing to take appropriate measures to prevent the entry of water into the vessel (the incident occurring as a result of salvee's fault). Had the salvor acted with care throughout the salvage operation, he would not have been held responsible for any (this particular type of) damage occurring during the salvage operation (in reference to the initial incident).

Furthermore, the damage suffered by a salvee can be sustained by an improper conduct of third parties, which, in the examined Israeli case, is not the fact. Such damage could have resulted from the port authority's order to tow the vessel into the port and lift it with a crane to a dockyard for further inspection, but both the insurer and the insured decided against following the order. One could argue that either the insurer or the insured, depending on the final outcome of the case at hand, would have been in a position to claim against the public authority for such damage, had it occurred.

Finally, the damage suffered by a salvee can result as a consequence of a poorly performed salvage service. This is true for the additional damage, where the salvor, following the insurer's instructions, failed to utilize an appropriate method of salvage at the commencement of salvage services. This particular instance of damage gives rise to a possible claim against the salvor. In the examined Israeli case, this particular instance gave rise to the claim against the defendant, due to the fact that the insurer

was in charge of the salvage operation, both with regard the choice and the work of salvor.

3.2 Salvee's Options

The 19th century case law principle has established that a salvor who acts with willful misconduct or intention to cause harm will lose the right to claim a salvage award, and may additionally be held liable for the damage so caused.⁷ Neither the 1910 Salvage Convention nor the SALVCON adopted that principle, as the relevant Article 8(3) of the 1910 Brussels Salvage Convention and Article 18 SALVCON make no distinction between the loss of right to request a reward in cases of intentional behavior, and a decrease in or a total forfeiture of a salvage award in cases of (gross) negligent behavior. Thus, the intentional conduct, just like the gross negligent conduct, will lead to a reduction or forfeiture of an award, irrespective whether such conduct is criminal in nature or not. For the examined Israeli case, this is a non-issue, as the observed conduct amounts to a negligent performance of salvage service.

When a salvor acts carelessly, a salvee has three options at the disposal. First, a salvee can attempt to terminate the contract or terminate the non-contractual salvage operation in case a breach occurs or is visible at an early stage of a salvage operation. Second, a salvee can await the completion of a salvage service and then seek to decrease the value of a salvage award, equal to the damage sustained and subject to the measure of negligent performance.

Whereas the American approach to assessing the scope of liability traditionally corresponds to the notion of damage,⁸ the European counterparts usually argue that, irrespective of the fact that the scope of actual damage should correspond to the volume of imposed sanctions, a breach of duty in the salvage context is not always necessarily strictly comparable with the actual damage arising out of negligent performance.⁹ Thus, when a salvage award is being diminished, the level and severity of negligent performance will play a key role in assessing to what extent the salvor's award will be decreased.

Finally, a salvee can (counter) claim for damage, leading to a procedural method of set-off where a figure of damage is set-off with a figure of salvage award calculated as if a salvage service has been performed flawlessly.¹⁰ This, in some cases, leads to a

⁷ See: R. WILLIAMS, B. GAINSFORD, *The Jurisdiction and Practice of the High Court of Admiralty*, London, 1869, 123 ff., and, H.R. BAER, *Admiralty law of the Supreme Court*, Charlottesville, 1979, 608 ff.

⁸ See: *The Henry Steers, Jr.*, (1901) 110 F. 578 (D.C.N.Y., 1901).

⁹ A.L. DESCHAMPS, *La Convention internationale de Londres sur l'assistance maritime et le droit français des contrats*, in *DMF*, 1993, 533, 699. Cf.: E. VOLLI, *Assistenza e salvataggio*, Padova, 1957, 269.

¹⁰ Cf.: G. BRICE, J. REEDER, *Brice on Maritime Law of Salvage*, London, 2003, 518-519.

result where a salvor not only fails to earn a salvage award, but is also held liable to pay for the additional damage.¹¹

3.3 Affirmative Damage Doctrine

The two previously noted options are codified in Article 18 SALVCON, whereas the third option has been made available through the landmark cases in several jurisdictions: the English case *Tojo Maru*,¹² the American cases *Noah's Ark*¹³ and *Kentwood*,¹⁴ the French Case *Germain*,¹⁵ and the German case occurring on the river Elbe.¹⁶ The mentioned case law defines the so-called doctrine of affirmative damages (established primarily through the United States (US) case practice), according to which a professional salvor can be held liable for the damage caused due to negligent performance of salvage service, even if the extent of damage and the scope of liability go beyond the threshold regulated by the SALVCON.¹⁷ Despite the available case law predating the SALVCON, that demonstrated the utilization of set-off in salvage cases,¹⁸ the SALVCON drafters decided against incorporating the third option in the SALVCON text. The item was placed on the agenda, but it never received a thorough discussion.¹⁹ Opinions differ to why the item was never resolved before the international *fora*. Some authors argue that the predominant opinion of the present delegates favored the interest of voluntary salvors,²⁰ whereas others argue that the issue was left intentionally open not to hinder further development of salvage law in this respect, at the same time avoiding a possibility of the new international instrument failing to be adopted.²¹ Irrespective of the lack of appropriate norm in the SALVCON, there are no provisions in the SALVCON stipulating an exclusion of such method either.²²

In the English case *Tojo Maru*, following a collision of two tankers, the tanker *Tojo Maru* sustained serious damage and required a salvage service. The salvor

¹¹ Cf.: E. VINCENZINI, *International Salvage Law*, London, 1992, 185.

¹² *The Tojo Maru* (Owners of the Motor Vessel *Tojo Maru* v. *N.V. Bureau Wijsmuller*), [1972] AC 242.

¹³ *The Noah's Ark v Bentley & Felton Corp.*, 292 F.2d 437 (5th Cir. 1963), 322 F.2d 3, 1964 A.M.C. 59.

¹⁴ *Kentwood v. United States*, 930 F. Supp. 227, 1997 A.M.C. 231 (E.D.Va., 1996).

¹⁵ *Navire "Germaine"*, Cour d'appel d'Aix-en-Provence, 8 juin 1983, DMF 1985, 435.

¹⁶ Urteil des OLG Hamburg vom 5.1.1984 (6 U 207/83).

¹⁷ E. VINCENZINI, *op.cit.*, 185.

¹⁸ F.D. ROSE, *Kennedy and Rose – Law of Salvage*, London, 2002, 502.

¹⁹ E.C. SELVIG, *Revision of the International Convention for the Unification of Certain Rules of Law Respecting Assistance and Salvage at Sea, 1981*, in F. BERLINGIERI (edited by), *The Travaux Préparatoires of the Convention on Salvage 1989*, Antwerpen, 1981, 27, Annex 5, 32.

²⁰ G. BRICE, *The Law of Salvage: A Time for Change? "No Cure-No Pay" No Good?*, in *Tul. L. Rev.*, 1999, 73, 1841.

²¹ F. Berlingieri's opinion was received in a direct e-mail correspondence in February 2010.

²² S. GAULT, *Marsden on collisions at sea*, London, 2003, 499. Cf.: K.U. BAHNSEN, *Internationales Übereinkommen von 1989 über Bergung*, Hamburg, 1997, 214-215.

successfully completed the first phase of the operation, and proceeded to make additional required repairs to the anchored tanker before towing it to a port for further repairs. During that phase of the operation, the salvor caused an explosion, resulting in additional damage to the tanker. The salvee claimed that the damage so caused was higher than the salvage award apportioned after the ultimately successful salvage operation (the salvor managed to repair the additional damage and tow the tanker to the port). Thus, the salvee refused to pay the award, and additionally claimed for further damage (caused by the said explosion). Following an arbitration proceeding, the case was finally resolved before the House of Lords, where it was held that the salvor is liable for a breach of duty of care (causing a foreseeable damage to the tanker), arguing that a salvor should not be treated any differently than any other person offering services to the public.²³ As the damage caused by the explosion exceeded the value of salvage award, the salvor received no compensation, and instead had to pay the amount calculated after the set-off between the figure of damage and the figure of salvage award has been made.

In the US case *Noah's Ark*, the salvor dropped the tow during the towage operation, causing the grounding of salvee's vessel. The Court held the salvor liable due to a (ordinary) negligent performance of salvage service that caused a distinguishable damage to the salvee's vessel (the risk of grounding did not exist prior to the actions of salvor).

In the French case *Germaine*, the French court held the salvor not responsible for the damage on the yacht occurring during the towage phase of salvage operation, as the damage was not foreseeable. However, the same court confirmed that there are no obstacles to holding a salvor liable for intentional or negligent conduct.

In the previously referred German case, the owner of the yacht claimed against the salvor both in contract and tort, arguing that the salvor negligently caused damage to the yacht during the performance of salvage service. Although ultimately finding the salvor's performance adequate and professional, the court nevertheless stated that, in general, a salvor could be held liable for intentional or gross negligent conduct during the performance of salvage services.

In the examined Israeli case, the faulty choice of the method of salvage is attributable to the insurer, thus not affecting the appropriated salvage award, but affecting the insurer's exposure to damage compensation.

3.4 Establishing Liability

A salvor will be held liable for damage when it can be proven that a salvor is in breach of a salvage contract (breach of a specific term in contract – i.e., the use of best endeavours to save), or a salvage agreement (breach of a term implied through

²³ Cf.: R. DAVISON, A. SNELSON, *The Law of Towage*, London, 1990, 71-72. In the *Teh Hu* the Court of Appeal applied common law rules without a distinction between the maritime law and common law, see: *The Teh Hu*, [1970] P. 106.

the statutory/international norm – i.e., the duty to take due care during the performance of salvage service). An implied term can be understood as a term that is applicable to a salvage operation given the nature and circumstances of a specific salvage case, considering the will of parties at the time of commencement of salvage operation, and taking into consideration the customs related to salvage law and statutory provisions concerning a specific type of salvage service.

Should a salvee attempt to argue a diminution or a forfeiture of salvage award, or pursue the notion of damage compensation beyond the forfeiture of salvage award, it will become necessary to prove²⁴ the existence of salvor's negligent performance. A salvee will primarily need to establish the existence of a duty to render salvage service with an appropriate level of care (based either on a salvage contract, otherwise agreed salvage service, or a statutory norm). In the examined Israeli case, this duty is derived from the insurance contract (based on the appropriate English law norm) and a non-contractual obligation to take care of other persons' property. Furthermore, a salvee will need to establish the breach of that duty (which is assessed either on the contractual stipulations or on the general rules concerning the duty of care as established through the law of tort – non-contractual damage) and the causal link between the breach of duty and the resulting damage. The additional damage on the insured vessel in the examined Israeli case makes a straightforward argument, especially due to the existence of official investigation that the salvee can rely on. Finally, a salvee must establish the existence of a foreseeable (adequate) damage, depending on the particular domestic law approach to the issue of causal link. Again, the official investigation offers a clear finding with regard the relation between the salvor's poor performance and the consequent damage.

Equal to the examined Israeli case, when a salvor's misconduct results in a total (or a constructive) loss of the salvee's vessel, a claim for damage may include the value of vessel calculated in accordance with the market value at the time of loss, and the loss of profit (earnings), having in mind the contractual obligations involving the use of salvaged vessel (as the claimant argued in the examined Israeli case).²⁵ In case that the damage does not result in a total loss, a claim for damage may include the costs of repairs and the loss of profit.²⁶

3.5 Salvor's Position

A negligent performance can affect the salvor's position in three distinct instances. First, it can reduce the amount of the salvaged property, decreasing, in the process, the

²⁴ See: *Dorset Yacht Co. Ltd v. Home Office*, (1970) AC 1004, *Southern Holdings, Inc., Southern Scrap Export Company, LTD. and Bayou Barge Line, Inc. vs. Sandbar II, Inc., F&L Towing, Inc., and Others*, 1992 A.M.C. 1706.

²⁵ See: *Owners of Dredger Liesbosch v. Owners of Steamship Edison*, [1993] AC 449, and an older case, *The Winkfield*, [1902] P. 42.

²⁶ See: *The London Corporation*, [1935] P. 70.

overall salvaged fund and the figure of salvage award. Second, it can lead to a diminution or a forfeiture of salvage award. Finally, it can create an additional obligation on the salvor to pay for the damage caused. Due to the fact that all three instances are derived from the same negligent underperformance, a simultaneous incorporation of all three negative aspects of a poorly performed salvage service would lead to an unfair result.²⁷ Employing all three instances to a single case would create a double penalty for a salvor, as a salvor would be required to pay for the overall damage despite the fact that a portion of this damage has already been deducted from the salvage award he would have otherwise earned. In the examined Israeli case, this is not the issue, as the salvage award is indisputable.

4. Additional Factors

Regardless of whether a salvee has successfully proven the key elements necessary to assess the salvor's liability, as discussed above, the courts and arbitration tribunals will assess a number of additional factors in order to determine whether a salvor will be held liable beyond a forfeiture of salvage award. This reflects an old public policy of leniency towards salvors, which – in conjunction with another public policy in accordance to which the courts and arbitration tribunals will seek means to increase the salvage award in order to encourage salvage services – serves as a deterrent to a flow of (negligence) cases against the salvage industry. The tribunals are traditionally inclined to favor the salvors in disputes, taking into consideration the importance of having the industry present and active, and having in mind the complex and often dangerous nature of a salvage service.

The English courts have developed the public policy of leniency in the 19th century, stipulating that a court (or an arbitration tribunal) has a duty to protect the interests of salvors whenever possible.²⁸ This implies that a tribunal must seek out all possible factors leading to a lenient approach of assessing existence and scope of salvor's liability. However, whereas such policy was fully understandable prior to the emergence of professional salvage industry²⁹ – during which time the relevant case law determined the skill and knowledge of a salvor to be equal to that of an ordinary

²⁷ Compare: G. BRICE, *Salvorial Negligence in English and American Law*, in *Tul. Mar. L.J.*, 1998, 22, 575. Cf.: G. DARLING, C. SMIT, *LOF 90 and the New Salvage Convention*, London, 1991, 16-17.

²⁸ *The Alenquer (The Rene (Owners) v. The Alenquer (Owners))*, [1955] 1 Lloyd's Rep. 101, 112. Cf.: F.D. ROSE, *op.cit.*, 162., *The City of Chester*, (1884) 9 P.D. 182, 187, *Glengyle*, [1898] AC 519; 67 L.J.P. 87, P. 97, 102, and, *The Saint Blane*, [1974] 1 Lloyd's Rep. 557.

²⁹ See: J.L. RUDOLPH, *Negligent Salvage: Reduction of Award, Forfeiture of Award or Damages?*, in *J. Mar. L. & Com.*, 1975-1976, 7, 420.

prudent seafarer³⁰ – with the appearance of salvage industry came into the existence the standard salvage contract forms, and as early as 1908 (Lloyd’s Open Form 1908), such contract forms have introduced a clause concerning the standard of conduct indicating the term best endeavours as a best appropriate measure of performance for a professional salvor.³¹ Thus, an objective evaluation of the promised performance in line with the expected professional salvor’s standard of conduct³² indicated a change in perception, with the public policy of leniency being placed to a test, requiring ever more effort on the side of tribunal to exonerate a salvor from the alleged misbehavior. Whereas the older case practice accepted a forfeiture of salvage award as an ultimate sanction for such misbehavior – point promulgated through the both relevant international salvage conventions³³ – the modern appreciation of professional service and professional liability, the protection of the consumers and the tort of negligence initiated the gradual reinterpretation of the policy, as the 20th century case law placed more focus on the actual behavior of salvors, indicating that the policy nowadays stands more as an exception than as a rule.³⁴ According to some authors, whereas the old case practice placed forward the interests of salvor (“shield”), the 20th case law places forward the interests of salvee (“sword”).³⁵

4.1 Distinguishable Damage

The established case law has determined that a salvor, irrespective of whether being a professional or not, is to be held liable to the full extent of damage, should the damage caused through the negligent performance of service be of a distinguishable nature.³⁶ This implies that such particular damage would not have occurred but for the salvor’s performance. If the damage caused though the salvor’s negligent conduct can not be distinguished from the damage that would have occurred out of the initial peril, a non-professional salvor may not be held liable beyond a forfeiture of salvage award unless it can be proven that the salvor’s conduct was grossly negligent. As established

³⁰ *The Cape Packet*, (1848) 3 W. Rob. 122, 125, *The Perla*, (1857) Swab. 230, 166 ER 1111, and, *The Neptune*, (1842), 1 W. Rob. 297, 300.

³¹ For more on this issue, see: M. MUDRIĆ, *Standard Salvage Contract Forms: The Scope of Best Endeavours – Reasonableness and Foreseeability*, in *The Journal of International Maritime Law*, 2013, 19, 220 ff.

³² G. BRICE, J. REEDER, *op.cit.*, 547.

³³ Article 8 SALVCON and Article 18 SALVCON.

³⁴ J.L. RUDOLPH, *op.cit.*, 431.

³⁵ See: S. HODGES, C.J.S. HILL, *Principles of maritime law*, London, 2001, 376.

³⁶ Cf. generally: T.D. RHIDIAN, *opt.cit.*, 64 ff., G. BRICE, *op.cit.*, 572 ff., S. GIRVIN, T. STEPHENS, *Liabilities of Salvors*, in T.D. RHIDIAN (edited by), *Liability Regimes in Contemporary Maritime Law*, London, 2007, 83, R. SHAW, *The 1989 Salvage Convention and English Law*, in *LMCLQ*, 1996, 212, and, J.E. EDWARDS, *When damages will be assessed against negligent salvor*, in *A.L.R. Fed.*, 2009, 28, 223 ff.

by the US *Kentwood* case,³⁷ a professional salvor may be held liable for damage regardless of the exhibited level of negligence, irrespective of whether the damage is distinguishable or non-distinguishable. Once a distinguishable damage has been determined, the assessment of salvor's liability pends further evaluation in order to determine a possible existence of exclusion factors preventing the application of affirmative damages doctrine.

In the examined Israeli case, the findings of official investigation indicate the presence of distinguishable damage – the damage sustained by the sunken vessel during the first salvage attempt, utilizing the internal flooding method. The use of the second method (external flooding) proved to be successful, absent of any damage, stressing the fact that the additional damage would not have occurred but for the salvor's careless performance, and a poor choice of salvage method.

4.2 (Non-) Professional Salvage Service

The case law demonstrates a clear distinction between professional and non-professional salvors. A professional salvor, professing to have special skills and knowledge of salvage services, and expecting to receive a fair compensation for a rendered service, is exposed to a more severe liability regime.³⁸ This implies that a professional salvor bears full responsibility for negligent conduct, irrespective of the fact what level of negligence salvor's conduct amounts to. A non-professional salvor, unlike his professional counterpart, offers assistance at sea out of solidarity, with no guarantee of skill and experience other than that of a common seafarer. Thus, it is unlikely that a court or an arbitration tribunal would hold a non-professional salvor liable, unless it can be proven that his conduct has amounted to gross negligence, or that in the process of rendering a voluntary layman service, a non-professional salvor has created a distinguishable damage to the salvee's property.³⁹ With regard the case law determination of holding a non-professional salvor responsible for damage due to gross negligent performance, the practice favors the injured party, stating that a salvor, irrespective of the status, should know when the required service is beyond his knowledge and skill, and should, therefore, abstain from rendering such service. Should a non-professional salvor, however, offer a contractual service under one of the commonly used standard salvage contract forms, the performance must adhere to the standard as expected in accordance with that particular contract form (this, today,

³⁷ *Kentwood v. United States*, *op.cit.*

³⁸ Cf.: E. GOLD, A.E. CHIRCOP, H.M. KINDRED, *Maritime Law*, Toronto, 2003, 609, and, M.J. NORRIS, *Vol. 3A: The Law of Salvage*, in E.C. BENEDICT, A.W. KNAUTH, A. WHITMAN (edited by), *Knauth's Benedict On Admiralty*, New York, 2012, 528.

³⁹ See: *The Noah's Ark v Bentley & Felton Corp.*, 292 F.2d 437 (5th Cir. 1963), 322 F.2d 3, 1964 A.M.C. 59. Cf.: *Serviss v Ferguson*, (1897) 84 F. 202, *The Ashbourne*, 99 F 111 (D.C.N.Y., 1899), *The Cape Race*, 1927 A.M.C. 628, 18 F.2d 79, *The Albany*, 44 F. 431 (D.C.Mich., 1890), *The Dygden*, 158 F. 54, 116., *Conolly v. S.S. Karina II*, 302 F. Supp. 675 (E.D.N.Y. 1969), and, *The Henry Steers, Jr.*, *op.cit.*, 28.

predominantly being the standard of best endeavours), as the salvor is being paid in accordance with the usual fee as expected from a contractual service. This, in turn, implies that a non-professional salvor offering a contractual service could potentially be held liable to the full extent of damage for exhibiting ordinary negligence, with the lack of professional experience not being a sufficient excuse.⁴⁰ In the examined Israeli case, the insurer engaged a service of a professional salvage company, and the court readily applied the ultimate sanction for the improper behavior.

4.3 Imminent Danger

The level and intensity of danger present in a salvage scenario can make an impact over the assessment of salvor's exposure to the liability. Should the circumstances of a particular salvage operation be extreme, with an imminent danger threatening both a salvee and a salvor, things could go for the worse despite the salvor's best efforts.⁴¹ This is particularly true for the occasions where an imminent threat to life supersedes all other attempts to protect the endangered property (or the environment).⁴² In such circumstances, the case law has opted not to hold a salvor liable for any damage resulting on the endangered object of salvage. It is, however, possible that the immediate danger may very well subside during the performance of a salvage service. In such a case, no allowance is to be made for the second phase of the salvage operation, absent from immediate danger.⁴³ In the examined Israeli case, no presence of imminent danger has been detected, rendering this factor not applicable.

4.4 Emergency Situation

An emergency situation is commonly understood as a set of circumstances arising independently from and uncontrollable by the involved actors, requiring an immediate response (i.e., a sinking vessel in a storm, a tanker ablaze, etc.).⁴⁴ Such eventuality requires an urgent action (no time for special planning) with the means (equipment and personnel) available on the spot. The relevant case law treats such occurrences with leniency in respect to any possible negligent performance, with an ultimate sanction being the salvage award forfeiture. The latter is, however, only true if the relevant body of knowledge (salvage and maritime industry professionals' accumulated experience) determines that a reasonable salvor, performing under the same circumstances, would have done the same (the damage occurring out of such performance is, thus, deemed unavoidable). Irrespective of the afore said, this factor

⁴⁰ Cf. generally: C.C. van DAM, *European Tort Law*, Oxford, 2006, 190.

⁴¹ See: *The Elena G.*, 61 F. 519 (E.D.Pa., 1894), *Stevens v. The S. W. Downs*, F. Cas. 13,411 (E.D. La. 1854), *The Thornley*, 98 F. 735 (5th Cir. 1899), *The Launberga*, 154 F. 959 (E.D.N.C. 1907), *The Herman*, F. Cas. 6406 (Fla. 1840), and, *Shupe v. United States*, 1979 A.M.C. 2282 (C.D. Cal. 1979).

⁴² See, e.g.: *The St. Blane*, *op.cit.*, 560-561.

⁴³ See, e.g., *The Henry Steers*, *op.cit.*, and, *The Yan-Yean*, (1883) L.R. 8 P.D.

⁴⁴ *Illey v. Hadley*, 693 S.W.2d 507.

plays no role in situations when a salvage operation becomes necessary due to salvor's careless conduct during the performance of service.⁴⁵ In the examined Israeli case, no presence of emergency situation has been detected, rendering this factor not applicable.

4.5 Alternative Means of Salvage

A salvage enterprise is, like most other, a competitive one, and it is often the case that companies strive to complete a salvage operation on their own, even if another company is close by, ready to assist, having, perhaps, better equipped tugs and better trained personnel at their disposal. Sharing a salvage contract, however, implies sharing a salvage award. The case law has demonstrated that there are such occasions when salvors cause damage due to negligent performance, having had, at the same time, an opportunity to request assistance from other salvors who would have performed better, avoiding the said damage altogether. Establishing such eventuality will necessarily provoke an evaluation in order to determine whether a salvor should be held liable for not engaging the services of the alternative salvor.⁴⁶ The drafters of the SALVCON anticipated such occurrences and devised specific salvor's duties regarding the cooperation with other salvors.⁴⁷ In the examined Israeli case, no mention of alternative salvage companies ready to assist has been made, rendering this factor not applicable.

5. Conclusion

The full concept of leniency towards salvors was more applicable in the period preceding the emergence of professional salvage companies. In that time the prospect of being assisted at sea depended on the good will of passing-by vessels – this being random in its own right – and the element of luck concerning whether the passing seafarer is more or less experienced in the seafaring skills. Only when the first salvage companies began offering their services was it possible to contemplate a salvage-specific standard of care. This, in turn, led the tribunals to gradually question the concept of full leniency, especially due to the fact that a salvee is paying the service in accordance with the industry's set fees. The bigger and more frequent these fees became, the more funds were made available for the salvage companies. This, in turn, has brought upon a rise in performance expectancy – salvage companies are expected to invest in the know-how, the training of personnel and the equipment, being ever more prepared to respond to dire and crisis situations. Thus, whereas a particular emergency situation a hundred years ago made a salvage operation impossible, the

⁴⁵ See: *The Thetis*, (1867-69) L.R. 2 A. & E.

⁴⁶ See: *Conolly v. S.S. Karina II*, *op.cit.*.

⁴⁷ Article 8(1c) SALVCON.

same circumstances occurring today perhaps require a routine professional salvor's performance to be resolved successfully. Applying an equal measure of leniency to both examples is obviously erroneous. Refloating, for example, a stranded ferry – such as was the case with a ferry Marko Polo (Adriatic coast, 2009), performed in calm seas with an abundance of time to plan the specific tasks – cannot be compared to the attempts to board the MSC Napoli – stuck in extreme conditions, in a danger of running aground (British coast, 2009).

The Israeli court, having established all the necessary basic requirements to hold a salvor liable, and in the absence of exclusion factors (the imminent danger, the emergency situation, and the alternative means of salvage), having in mind that the damage created by a professional salvor was distinguishable, correctly held the insurer liable to the full extent of damage (the loss of vessel, the loss of profit and the salvage costs). Irrespective of the fact that the insurance coverage was excluded (corresponding scenario would be that of a non-contractual salvage), the court nevertheless examined the general non-contractual liability norms, found the insurer to be in breach of a general duty, and applied the available sanctions in order to protect the insured's interests.

The same logic is to be applied in the pure salvage scenarios, with the same ultimate goal in mind. No matter how important the salvage industry is for the safety of navigation and the uninterrupted flow of goods over oceans, and no matter how strong a sentiment of a more traditionally based legal setting is, the law governing the modern professional liability requires a strict adherence to various duties regulating a performance of specific services. The law of salvage had devised a number of critical points additionally supporting the salvor's position, but in the absence of exclusion factors, there is nothing to prevent the full application of both the contractual and non-contractual liability rules on the provision of salvage services.

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