

Salvor's Liability for Professional Negligence

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1. Introduction

The salvage case law is abundant with examples where salvors intentionally caused damage to the salvee's property in order to gain certain financial benefit.¹ Plunder, theft, fraud, exaggeration of peril, forcing aid and other examples have often led to such outcomes where courts and arbitral tribunals found the salvors responsible and liable to the full amount of damage, without earning a right to a salvage award, often followed by criminal charges. Similarly, salvors were, at occasion, found to have been exploiting the salvee's peril in order to enhance the salvage award payment by unreasonably extending the duration of a salvage service,² waiting for the maritime peril to increase ("*waiting for a bump*"),³ and choosing a distant port of delivery.⁴

¹ For case examples, see: *Norris, Martin J.*, Vol. 3A: The Law of Salvage, in: *Benedict, Erastus C./Knauth, Arnold Whitman*, Knauth's Benedict On Admiralty (New York: Mathew Bender, 7th ed., 2012), at 102, *Camarda, Guido*, Il soccorso in mare (Milano: Giuffrè, 2006), at 323, *Hernandez, Eduardo F./Peñasales, Antero A.*, Philippine Admiralty and maritime law (Manila: Rex Book Store, 1987), at 929, *Lucas, Jo Desha*, Cases and materials on admiralty (Mineola: Foundation Press, 2nd ed., 1978), at 721 *et seq.*, and, *Prüssmann, Heinz/Rabe, Dieter*, Seehandelsrecht: fünftes Buch des Handelsgesetzbuches; mit Nebenvorschriften und internationalen Übereinkommen (München: Beck, 4th ed., 2000).

² See: *The Byron*, F. Cas. 2275 (D. Fla. 1854), *The Arakan*, 283 F. 861 (N.D. Cal. 1922), and, *The Minnie Miller*, F. Cas. 9638 (E.D.N.Y. 1872).

³ See: *Key Tow, Inc. v. M/V Just J's*, 2005 U.S. Dist., 27, 2005 A.M.C. 2840 (S.D. Fla. 2005), *The Pergo*, [1987] 1 Lloyd's Rep. 582, and, *The Aurora*, F. Cas. 659 (Fla. 1840), *Nicastro v. The Peggy B.*, 173 F. Supp. 61, 1960 A.M.C. 914 (D. Mass., 1959).

⁴ See: *The Haarlem*, June 25, 1935, N.J. 1937, 203. aff by Hof Amsterdam June 2, 1938 N.J. 1940, 718., and, *The West Harshaw*, 69 F.2d 521 (2d Cir. 1934).

In most cases, as to be expected, (professional) salvors genuinely strive to provide a proper assistance to the imperiled property. When a salvor acts professionally and achieves a certain result in terms of preserving some or all endangered property, a salvor has a right to claim a salvage award. If not acting with proper care, a salvor may be held responsible for damage resulting out of such careless conduct. Depending on the gravity of such carelessness and the damage so sustained, a salvage award may be diminished or even forfeited. The *doctrine of affirmative damages*, primarily developed in the United States (US) jurisprudence, defines a number of criteria that must be fulfilled in order to hold a salvor liable for damage exceeding the figure of the forfeited salvage award. This implies that a salvor not only loses the opportunity to earn a salvage award, but is additionally placed under an obligation to compensate the damage to the salvee.

General professional liability contractual and non-contractual rules, developed in the second half of the 20th century, dictate that a service provider is responsible to exhibit a certain level or standard of care while rendering a particular service, and that a breach of that duty may lead to responsibility and liability to compensate the damage arising out of poor performance or non-performance. However, existing international salvage regulation provides a limited remedy to the salvee, stipulating the forfeiture of the salvage award as an ultimate sanction. In addition, a long line of judicial policy of leniency towards salvors questions the full applicability of general liability rules in salvage matters. On the other hand, the international legislation concerning the issue of limitation of liability stipulates a number of particular provisions applicable in situations when a salvor is potentially exposed to liability, allowing the salvors to utilize a right to limit the scope of financial liability when performing below the expected standard of performance.

2. Public Policy of Leniency

The public policy of leniency towards salvors, developed by the English jurisprudence in the second half of 19th century, and fully endorsed by the US and European courts until the present day, exerts a special kind of an allowance for salvage services. Recognizing salvage as primarily a *bona fide* service protecting and preserving life and property at sea, and taking into consideration the dangers faced by salvors when approaching and boarding endangered vessels and other property, the public policy offers a unique judicial incentive of narrowing the scope of salvor's liability exposure. In the *Alenquer* case, Justice Willmer described the public policy of leniency by stipulating that it is the duty of judges and arbitrators to "*... err, if anything, on the side of leniency towards salvors in so far as their behaviour is criticized*".⁵ Anyone alleging misconduct on the side of a salvor will have to overcome not only the difficulty of proving the negligent performance, but also the discretionally power of a judge

⁵ *The Alenquer (The Rene (Owners) v. The Alenquer (Owners))*, [1955] 1 Lloyd's Rep. 101., at 112.

or an arbitrator⁶ who should endeavour to take into consideration all possible factors⁷ that might reduce or even deny salvor's negligence⁸ in order to prevent salvors from being discouraged to render salvage services out of fear from excessive liability claims.

Although the public policy of leniency is, as stated earlier, abided to the present day, its interpretation merits attention, as the conditions of rendering salvage services have greatly changed within the time-span of the 20th century. In the second half of the 19th century, most salvage operations were performed by non-professional salvors independent of contractual stipulations.⁹ Considering the expected performance of a passing-by salvor, Dr. Lushington stated his contemplations of the salvor's standard of care in the *Cape Packet*,¹⁰ stipulating that a salvor is under a general duty to exercise ordinary skill and prudence inherently present in the group of persons performing salvage operations.¹¹ At that time, salvage operations were relatively seldom and random, performed by ordinary seamen. Therefore, the skill and knowledge concerning salvage performance could only relate to the skill and knowledge of a prudent sailor.

With the emergence of steamers, the rendering of salvage services became easier and more effective, and by the end of the 19th century, a number of professional salvage companies started offering their services on a contractual basis. The first issue of the Lloyd's Open Form contract (LOF 1908) incorporated a duty to take best endeavours to save the vessel and cargo on board (Clause 1),¹² emphasizing the nature of a salvage service directed primarily towards a specific standard of performance, rather than a specific result as

⁶ See the comments of Brett MR, in: *The City of Chester*, (1884) 9 P.D. 182, at 187. Also see: the *Glengyle*, [1898] AC 519; 67 L.J.P. 87, P. 97, at 102, and, *The Saint Blane*, [1974] 1 Lloyd's Rep. 557.

⁷ Lord Browne-Wilkinson warns of the necessity of "*potent considerations*" that need to be shown before a public policy of leniency can be applied in an individual case, see: *X (Minors) v Bedfordshire County Council*, [1995] 2 AC 633, at 749. In the salvage context, the "potent considerations" are usually understood as the public function performed by the salvage industry and its irreplaceable role in the maritime sector.

⁸ *Rose, Francis D.*, Kennedy and Rose – Law of Salvage (London: Sweet & Maxwell, 6th ed., 2002), at 162.

⁹ Rudolph gives an account of the assessment of salvor's negligence in the *Antiquity*, referring to the *Rhodian code*, see: *Rudolph, James L.*, Negligent Salvage: Reduction of Award, Forfeiture of Award or Damages?: J. Mar. L. & Com. 7 (1975-1976) 419, at 420. For various judicial interpretations of the "*good faith*" required from a salvor, see, *ie*: *The Blaireau*, (1802) 2 Cranch 240, *The Duke of Manchester*, (1847) 6 Moore P.C. 90, *The Marie*, 7 P.D. 203, and, *The Capella*, (1892) P. 70.

¹⁰ *The Cape Packet*, (1848) 3 W. Rob. 122, at 125.

¹¹ *The Cape Packet*, *ibid.*, at 125. *Cf.*: *The Perla*, (1857) Swab. 230, 166 ER 1111, and, *The Neptune*, (1842), 1 W. Rob. 297, at 300.

¹² Courtesy of Mr. Mike Lacey, Secretary General, International Salvage Union, e-mail correspondence, 17 August 2012.

expected.¹³ This, in turn, enabled a possibility of an objective evaluation of a salvage performance with that of a professional salvor, keeping in mind the notion of profit arising out of successful salvage operations.

Prior to the above described development, the salvage case law indentified the sanction of forfeiture as an ultimate sanction, based on the public policy restriction. The same rationale prevailed during the 1910 Salvage Convention and 1989 Salvage Convention drafting discussions¹⁴. However, through the course of the 20th century, a number of separate factors arose, offering incentive to the judges and arbitrators to re-interpret the public policy. The development of the tort of negligence, the modern understanding of a professional service and the protection of consumers of such services placed more emphasis on a salvee, stressing the fact that a salvee is paying for a professional service, and thus deserves comprehensive legal protection in cases when poor performance or non-performance leads to undesired results. The establishment of the salvage industry as a separate and strong industry, with its own code of conduct and an international association, requires the application of professional liability rules, not only to protect the consumers, but to provide protection to the industry itself, through identifying and sanctioning below-standard performance of those subjects who profess to possess certain skill and knowledge, but lack the same. In addition, the modern appreciation of rescue services, recognizing instances of holding police and fire departments, coast guards and similar subjects liable for damage¹⁵, contributed to the fact that the century old public policy was facing a strong dilemma in the eyes of contemporary judges and arbitrators.

What became the central issue of debate was the question whether the limited scope of salvor's liability exposure should be extended. The maritime tribunals of several important maritime jurisdictions slowly started to recognize and appreciate changing conditions, and began to question the concept of (full) leniency applicable to the (professional) salvor's performance. The landmark cases appearing before the common law tribunals in the 1960's, and before the civil law tribunals in the 1980's, offered a new and complex interpretation of the salvor's exposure to liability for negligent performance. The new codification of salvage law, the 1989 Salvage Convention, to some extent modified and modernized the concept of salvor's misconduct, but, despite the established practice, decided against directly resolving

¹³ *Brice, Geoffrey/Reeder, John (ed.)*, *Brice on Maritime Law of Salvage* (London: Sweet & Maxwell, ed., 2003), at 547.

¹⁴ Article 8 of the 1910 Salvage Convention and Article 18 of the 1989 Salvage Convention on the salvor's misconduct.

¹⁵ *Capital and Counties v Hants CC*, [1997] Q.B. 1004, [1997] W.L.R. 331, [1997] 2 All E.R. 865. See also: *Watson v British Boxing Board*, [2001] 2 W.L.R. 1256, *Miller v. United States*, 614 F. Supp. 948 (D. Me. 1985), and, *Hoff v. Pacific Northern Environmental Corp., et al.*, WL 3043111 (D. Or., 2006), and, *Northern Voyager Limited Partnership, et al. v. Thames Shipyard and Repair Company, et al.*, 2006 A.M.C. 2431.

this issue¹⁶, thus retaining the old position of the forfeiture as a final sanction available through international law. Whereas such drafting led some authors to believe that the international law draws a clear line¹⁷, a predominant number of authors are of an opinion that there is no hindrance to apply the domestic law provisions and case practice¹⁸.

3. Doctrine of Affirmative Damages

Provided that the salvee can prove the salvor's negligent performance, the salvor's claim for a salvage award can be confronted with the salvee's counterclaim for damage. A professional salvor, when negligently performing salvage services, may be faced with the following prospects: a salvage award may be reduced, a salvage reward may be forfeited, and, a salvor may be held liable to the amount of damage exceeding the forfeiture of a salvage award. The first two options are stipulated through the 1989 Salvage Convention (Article 18). Major cases in support of the third option include the English case *Tojo Maru*¹⁹, the American cases *Noah's Ark*²⁰ and *Kentwood*²¹, the French Case *Germain*²², and the German case occurring on the river Elbe²³. The mentioned case law defines the so-called

¹⁶ See: *Selvig, Erling C.*, Revision of the International Convention for the Unification of Certain Rules of Law Respecting Assistance and Salvage at Sea, 1981, in: *Berlingieri, Francesco (ed.)*, The Travaux Préparatoires of the Convention on Salvage 1989 (Antwerpen: Comité Maritime International, 1981), 27, Annex 5, at 32.

¹⁷ Montas examines this option, although clearly disagreeing with the same, see: *Montas, Arnaud*, Le quasi-contrat d'assistance: essai sur le droit maritime comme source de droit (Paris: Librairie Générale de Droit et de Jurisprudence, 2007), at 87-88.

¹⁸ *Rose, supra note 8*, at 502. *Brice, Geoffrey*, The Law of Salvage: A Time for Change? "No Cure-No Pay" No Good?: Tul. L. Rev. 73 (1999) 1831, at 1841. The Australian delegation was concerned about the possibility of salvors being held liable for actions taken under the directions of a Coastal State, see: *Government of Australia*, Document LEG/CONF.7/9, Proposals on duties of salvors in relation to protection of the environment, in: *Berlingieri, Francesco (ed.)*, The Travaux Préparatoires of the Convention on Salvage 1989 (Antwerpen: Comité Maritime International 2003), at 18.

¹⁸ Cf.: *Trappe, Johannes*, L'Arbitrage en Matière d'Assistance Maritime: ETL 18 (1983) 719, at 734.

¹⁹ *The Tojo Maru (Owners of the Motor Vessel Tojo Maru v. N.V. Bureau Wijsmuller)*, [1972] AC 242.

²⁰ *The Noah's Ark v Bentley & Felton Corp.*, 292 F.2d 437 (5th Cir. 1963), 322 F.2d 3, 1964 A.M.C. 59.

²¹ *Kentwood v. United States*, 930 F. Supp. 227, 1997 A.M.C. 231 (E.D.Va., 1996).

²² *Navire "Germaine"*, Cour d'appel d'Aix-en-Provence, 8 juin 1983, DMF 1985, 435 - One of the rare cases where the issue of salvor's fault was reviewed before the French courts. After concluding that a salvor is under the *obligation of means*, the court determined that a salvor's responsibility arises when his actions are either intentional or negligent. Upon reviewing the facts of the case – according to which the salvor towed a yacht to deep waters where the (new) damage to the yacht occurred – the court held that the salvor was not to be blamed (no fault was determined) due to the fact that he was not in a position to assess the impact of the already sustained damage to the occurrence of possible new damage. The salvee's claim for damage was, thus, dismissed.

²³ Urteil des OLG Hamburg vom 5.1.1984 (6 U 207/83) - Following the capsizing of a yacht on the river Elbe, a subsequent (non-contractual) rescue operation, and the damage occurring on the yacht during the rescue operation – the owners of a yacht demanded a reduction of a salvage award based on Article § 746 of the

doctrine of affirmative damages, according to which a professional salvor can be held liable for the damage caused due to negligent performance of salvage services, even if such liability goes beyond the threshold regulated by the Salvage Convention.²⁴

The first notion of assigning salvor's responsibility beyond the forfeiture of a salvage award appeared in the US case *Henry Steers*,²⁵ where Judge Thomas recognized different circumstances surrounding negligent performance, leading to different possible results. According to the deliberations of the American judge, in circumstances where salvor's elevated ("*culpable*") negligence results in a distinguishable damage to the salvaged object, the salvage award may be diminished or completely forfeited, and the owners of damaged salvaged property may demand compensation.²⁶ Based on such deliberation, it can be argued that the early development of the US salvor's liability case law differs from the English practice by employing a more liberal imposition of stricter sanctions that allowed a consideration of claims for damage beyond the forfeiture of a salvage award. Additionally, US courts were obviously responding to the emergence of professional salvage companies through differentiating between the professional and non-professional salvors in respect of the expected measure of skill and care. A professional salvor should adhere to the behavior reflecting such skill and care as visible in the behavior of a person in the same industry who is employing "*ordinary prudence and capacity*", whereas a non-professional salvor should use good faith to the best of his individual capabilities.²⁷

The notion of a distinguishable damage, already present in the *Henry Steers* and previous case law, found its full application within the doctrine of affirmative damages, fully constituted in the US case *Noah's Ark*,²⁸ where the court held a non-professional salvor

German Commercial Code, due to the alleged contributory fault of the salvor, and additionally claimed damage (stipulated as an independent claim, and not a counterclaim) arising from the salvage operation based on benevolent intervention into another's affairs. The court found no evidence that the salvor's conduct was either intentional or grossly negligent, and concluded that the salvor successfully averted the danger threatening the yacht, and the general danger that the capsized yacht constituted for the safe inland waterways navigation. Accordingly, the court dismissed the claim regarding the benevolent intervention and the arising damage, at the same time stipulating that the same logic is to be applied regarding the first claim (counterclaim – reduction), based on a general tort rule as stipulated in Article § 823 of the German Civil Code.

²⁴ Vincenzini, *Enrico*, International Salvage Law (London: Lloyd's of London Press, 1992), at 185.

²⁵ *The Henry Steers, Jr.*, (1901) 110 F. 578 (D.C.N.Y., 1901).

²⁶ *The Henry Steers, ibid.*, at 14. Cf.: *The S.C. Schenk*, (1907) 158 F. 54.

²⁷ *The Henry Steers, ibid.*, at 28.

²⁸ *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.: the older US case law where the principle of compensation of damage was fully endorsed, although lacking a clear definition and classification as visible in the *Noah's Ark* case: *Serviss v Ferguson*, (1897) 84 F. 202 – a US case, where the court reasoned that the salvor's duty to compensate the salvee for damage equals the same duty of a bailee regarding the hire (at 203), holding the salvor liable to pay for the damage suffered by the salvee due

responsible for causing a distinguishable damage (the danger of salvee's vessel running aground did not exist prior to the salvor's negligent performance) due to the salvor's negligent performance. Justice Brown employed a very concise method of assessing salvor's liability, according to which the existence of *negligence* plays a limited, *secondary role*. The key element of salvor's liability is the existence of a *distinguishable* damage caused by the salvor, which is different from the damage that was threatening the salvaged object from the original peril. In cases where a damage sustained by the salvee due to salvor's negligent performance is equal to the damage that was threatening the salvee under the original peril, such damage is to be considered as a *non-distinguishable* damage, according to which a salvor can be held liable only in cases of willful or gross negligence.

Interestingly enough, although the concept of a distinguishable damage was formulated in the US jurisprudence, English salvage cases from the second half of the 19th century contain deliberations strongly resembling the concept developed by their American counterparts several decades later. In the *Thetis*,²⁹ Sir Phillimore held a salvor liable for the damage caused by negligent performance, especially having in mind the fact that the collision and sinking, not previously directly threatening the salvee, were neither necessary nor unavoidable. The same judge, deciding in the *C.S. Butler*,³⁰ required a proof of an elevated negligent performance ("*crassa negligentia*"³¹) in order to hold a salvor liable. Thus, the English jurisprudence, preceding the relevant US case *Noah's Ark* by almost a hundred years, contained both key provisions – distinguishable damage and an enhanced degree of negligence – that formulate the original US doctrine of affirmative damages.

Whereas the *Noah's Ark* case clearly differentiates between distinguishable and non-distinguishable damages, the US case *Kentwood v. United States*³² marks one step further in the assessment of salvor's liability and the formulation of affirmative damages doctrine. Contrary to the previous case law, Judge Clark stated that in cases of non-distinguishable damages a professional salvor that renders a service without proper equipment and experience in a non-emergency environment could be held liable for affirmative damage regardless of the degree of negligence observed.³³ According to such determination, a professional salvor needs to adhere to a high standard of responsibility and care, and is responsible for damage even in the absence of gross negligence, willful misconduct or

to salvor's exhibited lack of due diligence, *The Ashbourne*, 99 F.111 (D.C.N.Y., 1899), *The Cape Race*, 1927 A.M.C. 628, 18 F.2d 79, and, *The Albany*, 44 F. 431 (D.C.Mich., 1890).

²⁹ *The Thetis*, (1867-69) L.R. 2 A. & E. 365.

³⁰ *The C.S. Butler (The Baltic)*, (1872-75) L. R. 4 A. & E. 178.

³¹ *The C.S. Butler*, *ibid.*, at 183. The older general English case law refers to *crassa negligentia* as a method of assessing the degree of duty owed in particular circumstances, see, *ie: Pentecost v London District Auditor*, [1951] 2 K.B. 759.

³² *Kentwood v. United States*, 930 F. Supp. 227, 1997 A.M.C. 231 (E.D.Va., 1996).

³³ *Kentwood v. United States*, *ibid.*, at 240. *Cf.: Sea Tow Servs. of Carteret County, Inc. v. S/V Nautilus*, 2000 A.M.C. 799.

distinguishable injury. Thus, a simple negligence resulting in a breach of a contract is a sufficient cause to grant a salvee an opportunity to claim damage against a professional salvor.³⁴

Similar to the comparison of American and English practice concerning the concept of distinguishable damages and the required degree of negligence, more than one hundred years earlier, an English adjudicator, Judge Hannen, delivered a comparable deliberation to that of the *Kentwood* case. In the *Yan-Yean*,³⁵ a salvor was held responsible for the damage that would have occurred irrespective of salvor's (non-distinguishable damage) negligent performance, due to the fact that the salvor was deemed inexperienced for the task at hand, at the same time finding salvor responsible for refusing the assistance of another tug³⁶. Although Judge Hannen did not feel restricted by the notion that a maximum penalty for a misconduct is a forfeiture of a reward (a restriction perceived by the admiralty judges before and after him³⁷), he forfeited the award, due to the lack of evidence to support the notion of holding the salvor liable for damage beyond the forfeiture of the award.³⁸ Had there been more evidence to support salvee's claim, such a decision would have coincided with the early development of the affirmative damages doctrine in US case practice.

Also preceding the relevant US salvage cases is the English case *Dwina*,³⁹ where Sir Butt diminished the salvage award, but asserted that salvor's performance was not an act of gross negligence,⁴⁰ and that an ordinary negligence can make a salvor liable,⁴¹ suggesting that the salvor's behavior ought to be reviewed under the auspices of the standard rules of common law. The proposed notion was explored in the *Unique*,⁴² where Justice Bucknill questioned the concept of maximum sanctions limited to the forfeiture of the salvage award,⁴³ recognizing the claim for damage as entitled to a separate legal consideration.

³⁴ In: *D. Evanow and Others, v. The Tug Neptune, and Others*, 163 F.3d 1108 (9th Cir., 1998), the Court of Appeals affirmed the *Kentwood* principle of applying simple negligence for professional salvors. The towage operator (tug *Paul C*) was the sole person accountable for creating (due to his negligence) the situation of "sudden emergency".

³⁵ *The Yan-Yean*, (1883) L.R. 8 P.D. 147.

³⁶ *The Yan-Yean, ibid.*, at 149-150.

³⁷ For more on the issue, see: *Williams, Robert G./Bruce, Gainsford*, *The Jurisdiction and Practice of the High Court of Admiralty* (London: Maxwell, 1869), at 168. Cf.: *The John and Thomas*, 1 Hagg. 157, *The Charles Adolphe*, (1856) Swab. 153, *The Lady Worsley*, (1855) 2 Sp. 256, *The Magdalen*, (1861) 31 L. J. Adm. 24, *The Florence*, (1852) 16 Jur. 576, *The Houthandel*, (1853) 1 Spk. 29, *The Louisa*, (1848) 2 W. Rob. 24, and, *The Wear Packet*, (1855) 2 Spk. 256.

³⁸ *The Yan-Yean, supra note 35*, at 150.

³⁹ *The Dwina*, [1892] P. 58.

⁴⁰ *The Dwina, ibid.*, at 64. Cf.: *The Lowmoor*, (1921) 6 Ll.L.Rep. 63, and, *The Royal Firth*, (1923) 17 Ll.L.Rep 204.

⁴¹ *The Dwina, ibid.*, at 61.

⁴² *The Unique*, (1939) 63 Ll.L.Rep. 75.

⁴³ *The Unique, ibid.*, at 77.

Referring to a "*reasonably good owner*", Justice Bucknill found the salvor negligent for a breach of the duty of care,⁴⁴ thus, legally liable for the damage arising from the breach.⁴⁵

The concept explored by Justice Bucknill was fully endorsed in the *Delphinula*,⁴⁶ where Justice Atkinson held salvor responsible for failing to take reasonable precautions in order to prevent or minimize the damage, and allowed the salvee to claim damage, thus marking the initial point where the notion of negligence in maritime law was understood to be consistent with its conventional understanding under a general common law assessment of liability.⁴⁷ In addition, this was the first major English case where affirmative damages were introduced into case practice. This practice was soon reconfirmed in the *Alenquer*,⁴⁸ where Justice Willmer held the salvor liable for negligent maneuvering,⁴⁹ deprived him of the salvage award, and allowed the salvee to recover damage.⁵⁰

Perhaps the most important case concerning the issue of salvor's liability for negligent performance, the *Tojo Maru*,⁵¹ marked a final reconciliation of the US and the English principles of salvor's liability assessment. In 1965, the tanker *Tojo Maru* collided with another tanker, sustaining serious damage on the hull, with the engine room and fuel tank flooded. A professional salvor signed a salvage contract (LOF), stopped the leak, pumped out the water, and removed most of the cargo (crude oil). Upon the successful completion of the first phase of the salvage operation, the vessel required additional repairs before being fit for towage. Well over a month after the commencement of salvage operation, in calm seas and with an abundance of time to plan and consider further salvage tasks, the salvor's chief diver, contrary to the salvage tug master's instructions, dived under the tanker in an attempt to seal a crack in the outer hull with a metal plate using a Cox Bolt Gun. Failing to ensure that the cargo hold was free of any gas residue, the diver proceeded with the underwater operation, and caused an explosion when the Bolt gun came in touch with the gas. The

⁴⁴ Failing to observe due diligence while mooring the barge.

⁴⁵ *The Unique*, *supra note 43*, at 80.

⁴⁶ *The Delphinula (Anglo-Saxon Petroleum Co. Ltd. and another v. Admiralty), Same v. Damant*, [1947] 82 Lloyd's Rep. 459.

⁴⁷ *The Delphinula*, *ibid.*, at 632.

⁴⁸ *The Alenquer (The Rene (Owners) v. The Alenquer (Owners)*, [1955] 1 Lloyd's Rep. 101.

⁴⁹ *The Alenquer*, *ibid.*, at 102.

⁵⁰ *The Alenquer*, *id.* Cf.: *Cadwallader, F.J.J.*, *The Salvor's Duty of Care: Marit. Stud. Mgmt.* 1 (1973) 3, at 9, and, *Thomas, D. Rhidian*, *Aspects of the Impact of Negligence upon Maritime Salvage in United Kingdom Admiralty Law: Mar. Law.* 2 (1976-1977) 57, at 89.

⁵¹ *The Tojo Maru (Owners of the Motor Vessel Tojo Maru v. N.V. Bureau Wijsmuller)*, [1972] AC 242. There are a number of other prominent cases in existence, which, unfortunately, cannot be researched due to the confidentiality of the arbitration proceedings. See, *ie: The Eschersheim Erkowit (Owners) and Others v. Salus (Owners) and Others*, [1976] 2 Lloyd's Rep. 1.

explosion caused a substantial damage to the vessel. The salvor nevertheless managed to complete the salvage operation and tow the tanker to the designated port, claiming the right to the salvage award. The salvee refused to pay the salvage award and counterclaimed damage caused by the explosion.

According to the decision of the arbitrator J. V. Naisby Q.C., the salvor was held liable for a breach of duty of care, based on a negligent act of the diver who caused a foreseeable damage to the tanker. After assessing the figure of salvage award⁵², sum of damages suffered by the salvee⁵³, and the figure of salvor's limitation of liability⁵⁴, the arbitrator set-off the claim for salvage award with the counterclaim for damage, and applied the limitation to the balance, leaving the salvor empty-handed, with an additional burden of compensating the salvee in the amount of salvor's limitation fund. Both parties were unsatisfied with the findings of the arbitrator, and the case was referred to Judge Willmer L.J. at the Probate, Divorce and Admiralty Division, who affirmed arbitrator's conclusions, with an exception concerning the salvor's right to limitation of liability. Judge Willmer held that the salvor had no right to limit the liability, based on the relevant provision of the 1957 Limitation Convention⁵⁵. This determination was affirmed by the House of Lords.

The case was further referred to the Court of Appeal. The Court of Appeal was of an opinion that the salvors should not be held liable for any counterclaims due to the fact that they did *more good than harm*, and that the public policy protects the salvors and encourages salvage services. The Court of Appeal argued that where the actual salvaged value (taking into account a damage caused by a negligent act of a salvor) exceeds the value of the vessel at the time of the commencement of a salvage operation (taking into consideration the perilous situation and the damage suffered by the vessel at that time), a salvor has done *more good than harm*, and therefore should not be made responsible to compensate the

⁵² The arbitrator assessed the salvaged value in the following amounts: (a) £ 1.280.627 in respect to vessel; (b) £ 49.248 in respect of the freight; and, (c) £ 142.348 in respect of the cargo.

⁵³ The damage was assessed by calculating the difference between the value that the vessel would have possessed upon completion of the salvage service if there had been no negligence, and the actual value of the ship in light of the negligence (nominal salvage award). The resulting figure was then capped having in mind the salvor's right to limit liability. During the court procedure to follow, this point was thoroughly debated, resulting in the loss of the right to limit the liability).

⁵⁴ Based upon the tonnage of the salvage tug *Jacob van Heemskerck*.

⁵⁵ Article 1(1b), *1957 Limitation Convention*. The relevant norm upon which the court based its decision was Section 503 (1) of the 1894 Merchant Shipping Act, as amended by the 1958 Merchant Shipping Act, *The 1894 Merchant Shipping Act, 57 & 58 Vict. C. 60, and, the 1958 Merchant Shipping (Liability of Shipowners and Others) Act, Amended Article 503*. For more information, see: *McNair, William Lennox/Honour, John Philippe*, *Temperley's Merchant Shipping Acts* (London: Stevens, 5th ed., 1954), at 558-561, and, *Marsden, Reginald G./McGuffie, Kenneth C.*, *The Law of Collisions at Sea* (London: Stevens, 11th ed., 1961-70), at 128 *et seq.* See also: *Porges, Waldo/Thomas, Michael*, *The Merchant Shipping Acts* (London: Stevens, 6th ed., 1963), at 800 *et seq.*

additional damage (beyond the forfeiture of the award).⁵⁶ In contrast, should a salvor have done *more harm than good*, a salvage award was to be forfeited and the liability for a negligently caused damage would need to be ascertained.⁵⁷ The doctrine of "*more good than harm*" was understood as a method of assessing a possible salvor's liability in which a salvage operation was to be considered through a comparison of the beneficial and non-beneficial performance of a salvor. The salvee appealed further.

The House of Lords rejected the findings of the Court of Appeal. Lord Diplock opposed the proposed method of assessing salvor's liability (more good than harm doctrine), arguing that, based on the general English law on recovery of damage due to negligence, the above-described "measure of harm" figure would in itself constitute a claim for damage.⁵⁸ The doctrine of more good than harm inserts into the equation the full benefit of a salvage service, neglecting that a salvor is rewarded on the basis of *quantum meruit*,⁵⁹ and that the full benefit assessment would render salvage assistance unnecessary, as the cost of salvage would equal the total damage sustained, or even more.⁶⁰ Lord Morris objected the assessment of measure of good as the value of the salvee's vessel, stating that in cases where a high priced vessel, in no immediate danger, is in a need of a salvage assistance of a moderate value (with a low-figure expected salvage award), it would be unfair to consider the measure of good as achieved by a salvage operation in the original value of the vessel.⁶¹ Lord Reid rejected the proposed doctrine in cases where there is no *sudden emergency* or other mitigating circumstances present, such as was the case *Tojo Maru*, where there was no danger of a total loss in the absence of salvage services, and where the salvor, after successfully completing the initial phase of the salvage operation, was at liberty to carefully plan and execute the repairs.⁶² Lord Reid further considered the availability of alternative salvors in the area,⁶³ stating that even in the case of sudden emergency, if there were additional salvors on a scene that could have successfully completed the operation, a salvor who negligently caused damage would find it difficult to defend against negligence. With regard to the public policy issue, Lord Reid openly questioned a policy of rewarding salvors

⁵⁶ *The Tojo Maru*, *supra* note 51, at 268.

⁵⁷ *The Tojo Maru*, *id.*

⁵⁸ *The Tojo Maru*, [1971] 1 Lloyd's Rep. 341 the LOF form as a typical contract for work and labor, showing that the principles of "success", "*quantum meruit*" and "discretion of the court" are present in general (non-maritime) contractual relationships and contract forms.

⁵⁹ *The Tojo Maru*, *supra* note 51, at 293-294.

⁶⁰ For an example of an unreasonable figure of a salvage claim see: *Sea Tow Services of Carteret County, Inc. d/b/a Sea Tow Beaufort, Inc. v. S/V Nautilus*, 2000 A.M.C. 799, at 560-561, where the salvor's claim for a salvage award amounted to a sum of 113% of the salvaged value.

⁶¹ *The Tojo Maru*, *supra* note 51, at 274.

⁶² *The Tojo Maru*, *ibid.*, at 268-269.

⁶³ *The Tojo Maru*, *ibid.*, at 265 and 298.

for not taking reasonable care,⁶⁴ having in mind that the acceptance of the duty to take care corresponds to liability for breach of that duty and the damage thus caused,⁶⁵ placing forward the right of an injured person to seek compensation.⁶⁶

In conclusion, the House of Lords held that the salvor's right to a reward and his obligation to pay the damage are two separate entities, subject to a set-off.⁶⁷ Furthermore, the salvor's negligent performance is not just one of the factors to be taken into account when assessing the (diminution or forfeiture of) salvage award, but can also serve as a separate cause of action in damage.⁶⁸ Finally, the salvor should not be treated any differently from any other person who receives a reward for certain performance, at the same time being exposed to liability for negligent performance.⁶⁹

4. Limitation of Liability

The decision in the *Tojo Maru* pointed to the fact that the 1957 Limitation of Liability Convention contained several loop-holes with regard to the salvor's right to utilize the right to limit the liability⁷⁰. In accordance with the 1976 Limitation of Liability Convention, the

⁶⁴ Stipulating a reasonable care as expected from a person of the same profession, see: *The Tojo Maru, ibid.*, at 293.

⁶⁵ *The Tojo Maru, id.*

⁶⁶ *The Tojo Maru, ibid.*, at 252.

⁶⁷ Cf.: *Rose, supra note 8*, at 511.

⁶⁸ *Kerr, Donald A.*, The 1989 Salvage Convention: Expediency or Equity: *J. Mar. L. & Com.* 20 (1989) 505, at 517. the salvor lost the award, and had to, ultimately, pay a sum of approximately US\$ 700,000 to the salvee.

⁶⁹ Cf.: *Davison, Richard/Snelson, Anthony*, The Law of Towage (London, Hamburg: Lloyd's of London Press, 1990), at 71-72. A reference was made to the *Teh Hu* case, where the Court of Appeal applied common law rules without making any distinction with regard to the maritime law or the law of salvage *per se*, see: *The Teh Hu*, [1970] P. 106.

⁷⁰ During the discussions at the CMI meetings, IMO's Legal Committee meetings and the Conference Working Groups sessions, all the delegates were aware of the necessity to grant salvors a (clear) right to limit their liability when not acting from a salvage tug, as well as in the instances where no salvage tugs are involved (i.e., when the salvage services are rendered with the use of aircrafts, helicopters, submarines or cranes). The mentioned deficiency became apparent in the *Tojo Maru* case. According to the 1957 Limitation Convention, salvors are allowed to limit their liability when they operate from a vessel and/or when the act in question has been performed on board the vessel. Since the negligent act of the diver was performed *off board* (the diver was in the water at the time of the explosion), and was deemed not to be in connection with the *navigation or management* of the vessel, the salvor was denied the right to limit his liability. Such a common understanding, however, took some time to be generally accepted, as some early records show, see, *ie: Berlingieri, Francesco*, Salvage News: CMI Newsletter October (1975) 3, at 7. During the discussions, however, an unanimous decision was reached within the CMI to provide salvors a right of limitation when not operating from their ship, or even when no ship is involved, see: *Legal Committee, Hamburg Draft Convention – Introductory Report to IMCO*, in:

salvors are allowed to calculate the limitation fund by one of the two following methods: through a general provision of Article 6(1), according to which a salvage tug is understood as being equivalent to any other vessel,⁷¹ or, through the special provision of Article 6(4),⁷² according to which under certain conditions, the salvor has a right to limit his liability according to a specified tonnage value (1.500 tons). The latter is applicable in two instances: when a salvor is performing outside of a vessel – the typical situation being when a "chief" salvor is conducting a salvage operation from the salvage firm headquarters, helicopter or a shore location, and, when a salvor is performing on the salvee's vessel or in respect to the salvee's vessel – this wording being a direct consequence of the *Tojo Maru*. The 1996 Limitation of Liability Protocol sets the limit to the figure of 2.000 tons,⁷³ creating the overall limitation figure for personal injury claims in the amount of 2 million SDR, and for other claims in the amount of 1 million SDR.

The negligent performance may affect the salvage operation in three distinct instances.⁷⁴ First, the negligent performance may reduce the amount of the salvaged property, thus decreasing the overall salvaged fund – calculated either on the basis of the value of an unrepaired vessel, or on the basis of the value of a repaired vessel decreased by the value of costs of repairs necessitated – and, subsequently, decreasing the figure of salvage award which is calculated in respect to the salvaged fund. Second, the negligent performance has a direct effect on the salvage award by means of reduction (or forfeiture) of the overall figure due to bad performance. Finally, the negligent performance imposes an obligation (liability) on the salvor to pay for the damage so caused.

It is necessary to bear in mind that all three described instances are arising out of the same negligent conduct (same occurrence), and all result in the same damaging consequence(s). As Brice notes,⁷⁵ penalizing a salvor through each mode separately would be highly dubious and unfair. Such a process would involve a decreased or forfeited salvage award due to a reduced salvaged fund and a bad performance; and, a claim for damage based on the same cause affecting the salvage award as stipulated earlier. This would *de facto* make a salvor liable twice, and such a "double penalty", according to Brice, would not correspond to a fair result.⁷⁶ The so-called "set-off" model of assessment, as established

Berlingieri, Francesco (ed.), The Travaux Préparatoires of the LLMC Convention, 1976 and of the Protocol of 1996 (Antwerpen: Comité Maritime International, 2000), at 48.

⁷¹ Article 6(1), 1976 LLMC Convention.

⁷² Article 6(4), 1976 LLMC Convention.

⁷³ Article 3, 1996 LLMC Protocol.

⁷⁴ Cf.: *Rose, supra note 8*, at 518.

⁷⁵ *Brice, supra note 13*, at 575.

⁷⁶ Cf.: *Darling, Gerald/Smit, Christopher*, *LOF 90 and the New Salvage Convention* (London: Lloyd's of London Press, 1991), at 16-17, and, *Rose, supra note 8*, at 518.

through the relevant case law, requires that a salvage award is first estimated as if the salvage operation has been performed successfully, free from salvor's errors (nominal salvage award – calculated by ignoring the reduced salvaged fund and bad performance factors), and, that such a figure is then deducted from the figure of damage caused by salvor's negligent conduct.⁷⁷ This method refers to the third option of remedies available to a salvee in cases of salvor's negligent performance. Whereas the reduced salvaged fund factor is included in the figure of damage factor – in order to avoid the above described double penalty occurrence – the bad performance factor should remain an element necessary to be considered when assessing salvor's liability. A pure figure of damage will not, on its own, suffice to impose the full application of the liability rules in salvage operations, having in mind both the theoretical background of the liability framework in salvage law, and the particularities of salvage services that, apart from assessing a breach of duty in a general context, require an assessment of additional factors necessary to be considered before deciding on whether to hold a salvor (fully) liable. Considering the above stated, Deschamps is of opinion⁷⁸ that the factor of fault (ie negligence) should not directly correspond to the calculation of damage, as it is the scope of actual damage that should correspond to the volume of sanctions imposed, but recognizes that in the salvage context, a breach of the duty to take care is not always necessarily comparable with the actual damage suffered.⁷⁹ In instances where the figure of damage is small and (obviously) lower than the value of the salvage award calculated taking both the reduced salvaged fund and bad performance factors into consideration (actual salvage award), there is no need to proceed with the calculation of nominal salvage award, as the salvor's negligence has not caused such damage to require a simultaneous forfeiture of the salvage award and the application of the affirmative damages doctrine. In such an instance, the reduced salvaged fund factor represents (equals) the figure of damage factor, whereas the bad performance factor may bring about a further decrease in the final assessment of the figure of salvage award, depending on the scope of bad performance exhibited.

What is perhaps unclear is whether the limitation of liability is to be applied before the set-off, or after the set-off between the salvage award and a counterclaim for damage has been made. The difference in the practical utilization of set-off may be considerable, as the following arbitral decisions demonstrate. In an unreported case appearing before the LOF arbitration,⁸⁰ the salvor was found negligent during the performance of a salvage service, and the figure of damage exceeded the figure of a nominal salvage award (calculated on the

⁷⁷ *Brice, supra note 13*, at 518-519.

⁷⁸ *Deschamps, Aude Lapovade*, *La Convention internationale de Londres sur l'assistance maritime et le droit français des contrats*: DMF 533 (1993) 684 at 699.

⁷⁹ *Cf.: Volli, Enzo*, *Assistenza e salvataggio* (Padova: Cedam, 1957), at 269.

⁸⁰ *Lloyd's*, *LOF Digest* (London: Salvage Arbitration Branch, 2001), at 37.

basis as if the salvage service was performed free of errors). The arbitrator calculated that the salvor's exposure to liability would be twice as much if the right to limit was applied on the balance of the two claims, than if the claim for damage was first submitted to the limitation rule, and the resulting figure (the limitation fund) set-off with the claim for a salvage award. The arbitrator then concluded that the provision of Article 5 of the 1976 Limitation Convention is available only if both claims are a subject to Article 2 of the same Convention, found that this is not the case, and, subsequently, allowed the salvor to limit his liability prior to the set-off.

Contrary to such reasoning, the arbitrator in the *Tojo Maru* allowed the application of the limitation rule only after the set-off between a claim for a salvage award and a claim for damage was made. The arbitrator required an express wording in respect of a "claim" being understood as a claim falling under the provision of Article 2, and found that not to be the case, whereas in the former case, the arbitrator understood such categorization by implication. The matter is, thus, left unresolved⁸¹ (based on the matter of construction [whether Article 2 is expressly or by implication relevant for the assessment of Article 5 claims]), and, therefore, subject to the further determination in the practice.

It is, thus, clearly visible that the salvor's right to limit the liability can potentially produce two different results (considering the monetary value of the remuneration/reparation). Whereas the financial limit of liability is a fixed variable (calculated either on the tonnage of the employed tug, or in accordance with a special tonnage rule), the application of the right to limit the liability may considerably influence the final (monetary) exposure of a salvage company. Based on the first (unreported) arbitral case as examined above, the following figures are given as an example to support the previously stated conclusion. The value of a nominal salvage award is set to 100 units of account, the value of claim for damage is set to 200 units of account, and the limitation fund is set to 150 units of account. A decision to grant a right to limit the liability after the set-off of nominal salvage award with the claim for damage (After Set-Off) will produce the following effect: nominal salvage award 100 – claim for damage 200 = 100 / limitation fund 150 = 100 units of account, as the balance of 100 is lower than the limit of limitation fund. A decision to grant a right to limit the liability before the set-off of the nominal salvage award with the claim for damage (Before Set-Off) will produce the following effect: claim for damage 200 / limitation fund 150 = 150 – nominal salvage award 100 = 50 units of account. If the value of claim for damage increases, for example, to 1000 units of account, the After Set-Off situation will result in the final figure of 150 units of account, subject to the overall limit of the value of limitation fund, whereas the figure in Before Set-Off will remain the same. It is, therefore, obvious that the Before Set-Off option is more favorable for a salvor. The practice utilizes both options, and there is no clear determination as to which option should have an advantage. It is submitted that the correct approach would be to adhere to the After Set-Off option, irrespective of whether the

⁸¹ Cf.: *Darling/Smit*, *supra* note 76, at 68.

negligence arose as a result of professional or non-professional salvor's performance, having in mind the scope of negligence required for a non-professional to be held liable according to the concept of affirmative damages. The rationale behind such a recommendation is based on the premises according to which the choice between appropriate methods of calculating the limitation of liability is made taking into consideration the best interests of an injured party (the salvee).

5. Conclusion

The affirmation of the doctrine of affirmative damages in the second half of the 20th century has brought upon important considerations regarding the role and interpretation of the salvor's obligations as stipulated through either a contractual clause, or implied through an appropriate international and national norm.

The 1989 Salvage Convention does not expressly or by implication prevent the courts and arbitration tribunals from utilizing the full scope of remedies as available through applicable domestic law. The application of sanctions as understood by the affirmative damages doctrine is applicable on the professional salvors in all instances, regardless of the level of exhibited lack of proper performance, and the type of damage caused through such irresponsible performance. The application of sanctions as understood by the affirmative damages doctrine is applicable regarding the non-professional salvors in instances when they cause a distinguishable damage, or, when they cause a non-distinguishable damage due to a gross negligent performance. The application of sanctions as understood by the affirmative damages doctrine may not be enforced if it can be proven that the breach of duty resulted due to an imminent danger factor. The application of sanctions as understood by the affirmative damages doctrine may not be enforced if it can be proven that the breach of duty resulted due to a sudden emergency factor that was not caused by a salvor, provided that, in case a service is performed by a professional salvor, a reasonably prudent professional salvor would not have been able to resolve such emergency adequately. The application of sanctions as understood by the affirmative damages doctrine may exceptionally be enforced in instances where a total loss was certain and imminent, and where a salvor, irrespective of the level of exhibited performance, failed to save the vessel and other property, but it can be proven that alternative salvors would have been able to render the salvage service successfully.

With regard to the salvor's right to utilize the right to limit the liability, the following can be concluded. In cases where the volume of damage suffered by a salvee is severe, the set-off should be made by subtracting the figure of a nominal salvage award with the figure of damage. The right to utilize the instrument of limitation of the liability should be allowed

after the set-off has been made, provided that the figure of damage surpasses the figure of a nominal salvage award, in order to favor the injured party (salvee). When a salvor is in a position to choose between two available methods of applying the limitation, advantage should be given to the method that protects the interests of the injured party (salvee). Finally, in cases where the volume of damage suffered by a salvee is small, no set-off is required, as the salvor's negligent performance is to be taken into consideration when assessing the final figure of the salvage award.