5402 – Guideline to markers autumn 2022

Part I, Q 1:

Generally the case is intended to show the relationship with the exam in 5401; similar question of shipowners' vicarious liability for servants' faults (fault by tug's breakage of towing line), with the 5401 circling around Hague-Visby and possible exception from liability through nautical fault, here, in tort law, with no similar exceptions.

Claims for damages are made against both companies.

NorShip's liability: It is clear that m/v Petter acted in m/v Even's service, hence NorShip is responsible for fault on the part of the master of m/v Petter, as per MC s 151. NorShip would therefore be liable regardless of no fault being committed onboard m/v Even.

As a note on the side: As the facts are presented, there is no indication of (contributory) fault by m/v Even, e.g. that the containers containing bottles of gas should not have been stowed in the way they were. It is also no indication of the shipper's potential liability for supplying dangerous cargo and its potential effect on NorShip's contributory negligence. This is outside the maritime law syllabus as it involves Norwegian tort law for such third parties' (shippers') potential liability, which generally would be based on negligence, if not subjected to the jurisprudential doctrine of strict liability for inherently dangerous activity (ulovfestet objektivt ansvar), and such third party's potential liability would not be subject to rights of limitation. The case is designed so as not to involve that type of question.

Since NorShip would be liable, a next point is the right of limitation, governed by MC ch 9. A right of limitation follows from s 171,1; the nature of claims subject to limitation follows from s 172, and the limitation amounts from s 175. There would, based on the facts, be no question of possible bar from invoking limitation by gross negligence as per s 174.

It is clear that the personal injury losses are recoverable in full, ref s 175, 2) with limitation of 2 mill SDR=NOK 20 mill. by those candidates only having the English translation of the MC from 2013, or of 3.020.000 SDR=NOK 30.200.000 by those using updated Norwegian version of the MC).

The property damage becomes subject to limitation. Here the facts split the losses into mere property damage and loss of profit resulting from property damage. MC s 172, 1) merely mentions 'property damage' but loss of income as in the present case would ordinarily be seen as part of property damage (it is not mere financial loss, without property damage, as occasionally may happen), and would in that respect fall within s 172, 1). However, if candidates were to consider such claims for loss of profit as falling within s 172, 3) that must be deemed acceptable, as the course 5402 is a maritime law course not dwelling into details of Norwegian tort law.

The limitation amounts follow from s 175, 3), by those using the English 2013-version of the MC: 1 mill SDR, and with an uplift above 2000 tons (m/v Even being 3.000 tons) of (999 tons x 400 SDR) 399.600 SDR=1.399.600 SDR=NOK 13.996.000 – by those using an updated MC: 1.510.000 SDR, with an uplift of (999 tons x 604 SDR) 603.396 SDR=2.113.396 SDR=NOK 21.133.960.

With respect to the calculation, it should in my view be of limited importance whether candidates operate with uplift of 1.000 tons rather than 999 tons pursuant to 175, 3); this being a mere technical point.

The claims were: NorFuel NOK 70 mill, the Municipality NOK 35 mill, meaning that as per s 176 NorFuel would get twice the amount of the Municipality's, within the stated limitation amounts.

NorTug's liability: NorTug is itself a 'reder' of m/v Petter pursuant to s 151. Negligence on the part of the master of m/v Petter is admitted by NorTug, thus leading to liability (it would not matter by whom on NorTug's behalf the fault be made, by the master or anyone else). The fact that NorTug acted as servant to NorShip would therefore not be a defence by NorTug when faced with claims by third parties, as here. Moreover, the case gives no indication of gross negligence as per s 174, not by the one committing the fault (the master of m/v Petter) and thus also not by anyone within the alter-ego sphere of NorTug (and whether the master would belong to the alter-ego sphere of NorTug need not be addressed, which generally would be answered 'no').

As to NorTug's entitlement to limitation, this follows from s 171. Either NorTug is deemed 'reder' as per s 171, 1, which seems the most natural, given that claims are simply raised against it with no further explanation in the facts – or it is deemed 'anyone for whom the reder … is responsible' as per 171, 2, if one takes the starting point that NorShip is the primary party responsible as 'reder' of the ship directly causing the damage; m/v Even.

Determination of amounts of limitation would be the same as for NorShip, but without the tonnage uplift for the property loss (m/v Petter being 500 tons), hence the limitation amount for the property losses would as per s 175, 3) be: 1 mill SDR=NOK 10 mill (those using the English version) or 1.51 mill SDR=NOK 15.1 mill (those using the updated version).

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Some general remarks pertaining to Q1:

It is clear that by claiming against both companies, the claimants cannot recover more than their full losses after limitation rights are applied. This also means that the generally applicable joint and several liability among joint tortfeasors (solidaransvar) becomes restricted in the sense that NorTug cannot be held liability for the excess of what the claimants can claim against NorShip, due to the uplift caused by m/v Even's tonnage.

Moreover, some candidates may perhaps raise questions of causation, foreseeability and remoteness of damages (påregnelighet og adekvans) in the tort of negligence. Those topics form no specific part of the maritime law syllabus (forming part of general Norwegian tort law). However, to bring them up should probably be deemed acceptable. If so, it may perhaps be asked: was the nature of damage (explosion and fire) so specific to the unfortunate hitting of protruding metal bars that it should be deemed extraordinary and in that sense too remote in relation to 'normal' damage in terms of a towed ship ending up drifting and/or perhaps grounding, as a result of towing line breakage? This type of questioning would amount to mere speculation and, as stated, the case does not invite it. Moreover, it could, on a general basis, be said that the maritime law system entitling shipowners to limitation of liability, constitutes some form of 'abatement' to otherwise considerations leading to invocation of principles of remoteness.

Part II, Q2:

As mentioned, it is clear that the claimants cannot recover more than their full losses after limitation rights are applied. Assuming – as candidates are asked to do – that NorShip is held liable, there would as a starting point be a claim for recourse based on NorTug's admission of negligence on the part of

m/v Petter, combined with the fact that, according to the case, there is no negligence on NorShip's part, hence the basis for such liability would, again, be s 151 (NorTug being 'reder'), and NorTug's right of limitation would follow from s 171 and with the same calculation as above – with NorTug not being liable for the uplift-amount due to m/v Even's higher tonnage than that of m/v Petter.

On a side note: It is worth mentioning (candidates not being expected to observe it) that the LLMC Convention in its art. 2, 2 (corresponding to MC s 172) expressly mentions recourse claims as claims subject to limitation: 'Claims set out in paragraph 1 shall be subject to limitation of liability even if brought by way of recourse or for indemnity under a contract or otherwise'. The Norwegian legislator at the time (Maritime Law Commission headed by prof. Brækhus) deemed it unnecessary to insert this limb as such result in any event would follow from the opening words of art. 2 (as in s 172): '… regardless of the basis of the liability, to claims *in respect of*: ….'. It may, on the other hand, be questioned why the legislator could not simply have inserted those words concerning recourse claims, as a matter of clarification, albeit being deemed superfluous.

Moreover, since there would be a contract for towage between NorShip and NorTug, questions of liability of NorTug (and/or NorShip) would typically be regulated by such contract terms – and typically with far reaching exceptions from liability. The candidates are not given the terms of whatever contract, also since this is an exam in tort law. However, if they point out such a fact of generally applicable contract provisions, that must be viewed favourably.

Part III, Q3:

The topic of salvage is potentially complex. The English language students have no access to Norwegian law sources (case law), so that they depend on the description in the syllabus-book, which gives an outline but with no detailed legal discussions. This should be kept in mind when marking. Moreover, salvage reward topics are by and large of fairly discretionary nature.

The test is therefore whether candidates are able to show sound reasoning on the various points, without (in my view) there being any clear outcome. I give below in more detailed discussions than what the candidates are expected to provide, because of inaccessibility of English language sources, and because the constellation of the case is unusual, to some extent revealing unexplored legal terrain.

NorTug's claim:

The case does not give any arguments why NorShip rejects the claim but candidates should be able to pick up the following: would or should a party, NorTug, be entitled to salvage reward when the party has, through negligence by its servant/employee, brought about the situation giving occasion to salvage? This is a potentially complex question.

The most relevant provision dealing with it is MC s 450,3, and the topic is discussed in the syllabus book (Falkanger/Bull, Norwegian version pp 493-94) with an example given of ship collision: if, after the collision, the one ship assisting to salve the other is to blame for the collision, its shipowner has under case law been held not entitled to salvage reward. There are similarities to our situation, since NorTug's ship caused the incident through negligence by its master. It must be probably deemed acceptable if candidates answer along these lines without much further discussion.

However, there are potential complexities. The two incidents are separate; there is no direct link between the breaking of the towing line of one of NorTug's ships, and another of its ships being

(more or less by chance, according to the facts) in the vicinity to assist, and with typical high-risk efforts on the latter's part to succeed in salving. One could therefore take the view that the salving efforts are distinct, coming to m/v Even's assistance 'out of the blue' in relation to the initial incident, and that m/v Tomas, if for sake of illustration, were to belong to a third party shipowner, would have been entitled to reward (subject to other requirements, below).

Moreover, MC s 450, 3 makes the question of forfeiture of salvage reward discretionary. It must therefore be room to take into account also other elements contained in the respective rules, such as s 446, providing general considerations for determining awards, and with elements such as skills and efforts of the salvors and the degree of success, being of significance, see s 446, litras b, c, d, e, g, h.

In this respect, it is also of relevance that breach of duties on salvors' part during salvage (not in creating the salvage situation, as in the present case) has been treated leniently when asking whether such breach of duties should have the effect of reducing the amount of an award, see e.g. Solvang, Norsk Lovkommentar (NLK) note 994 to MC s 444 – with the general notion, taken from the preparatory work to the MC, that there must be 'a significant departure from fully prudent conduct' to disallow an award.

On the other hand, the entire need for salvage was caused by NorTug's (m/v Petter's) fault. Thus, there is a relationship with Part I and NorTug's liability for the losses as such. It could be viewed as illogical that a company being liable for vast losses, is at the same time entitled to salvage reward. But one should recall: the salvage is restricted to salved values in terms of prevention of *further* losses being suffered, by m/v Even, hence by NorShip (and its insurers). It might therefore be viewed as a windfall in favour of NorShip (its insurers) if the undisputable salvage effort as such were not to be rewarded. This has a side also to Q5, below.

If candidates find in favour of NorTug, there may be a need for them also to go through the general requirement that salvage efforts must successful. This requirement is clearly fulfilled: m/v Even was brought out of danger, and the fact that it was partly damaged, does not disallow an award; it is the ship in salved condition (which often will mean reduced value due to damage suffered) that is decisive, MC s 556, a).

Another topic of relevance might be whether the efforts of the master and crew of m/v Tomas would exceed their general duties as employees on a tug, which often will be deployed on salvage-like assignments, ref MC s 450, 1. The facts do not invite any in depth discussion on this point, other than indicating that efforts did exceed such expectations, by description of the efforts and risks involved.

<u>The Municipality's claim:</u>

Also this is potentially complex. It involves the question whether the Municipality as general service provider has exceeded what is expected from it as service provider (s. 450, 1), and it involves questions of the nature in assistance in contribution towards the successful outcome, in tandem with that of m/v Tomas.

In both respects students are, as mentioned, generally restricted to reading the MC and the syllabus book. These sources provide no details in aid of answering, which means that also here the answer may be open. On the one hand, it could be said that the efforts by the fire brigade (fireboat) was no more than what a fire brigade is expected to do – along with what it did on the shore side, and there (on the shore side) naturally with no prospects of salvage reward being earned. On the other hand, the service was, on the facts of the case, crucial to complete the initial significant efforts made by m/v Tomas, and m/v Tomas's efforts would be valueless without those of the fireboat – and this

constellation would be true regardless of whether NorTug's claim for salvage reward were to be disallowed because of NorTug's responsibility for creating the incident. Conversely, it is clear that that if one takes the view that if the Municipality were not to be entitled to reward, that does not detract from the fact that the entire efforts were successful, thus not affecting NorTug's entitlement if that were to be granted in the first place.

One could therefore, in theory, end up with various constellations: a) that NorTug's claim is disallowed but the Municipality's is allowed, b) that the Municipality's claim is disallowed but NorTug's allowed, c) that both are allowed, or d) that both are disallowed.

Candidates are not asked to give any size of an award allowed (naturally, also since no value of m/v Even is given) but if they nonetheless express some views on the distribution of an award in case of alternatives a)-c), that must be in order, e.g. that based on the criteria in MC s 446, probably NorTug would have earned the bigger portion, and/or that if only one of the claimants is allowed, the contribution by the other (being disallowed) would be deducted from the respective party's allowance of an award.

Part IV, Q4:

This question asks about the master and crew's entitlement on the assumption that NorTug's claim would be disallowed, and then on the natural premise: the entire event was created through NorTug's (m/v Petter's) fault.

Also this is potentially complex. In general, the master and crew are disallowed to claim salvage, apart from the claim made by their shipowner, Falkanger/Bull p 496 (and Solvang NLK note 1032). Such solution would apply also here, and it must be considered fully acceptable by candidates to give such a simplistic answer. However, if candidates were to make observations along the following lines, that should be rewarded.

What is envisaged in the statement by Falkanger/Bull is an ordinary situation where the shipowner as a starting point would be entitled to salvage reward but for some reason fails to bring a claim for it. That is premised on the statement by Falkanger/Bull to the effect that the master and crew might bring a claim for damages against the shipowner for the shipowner's failure to bring the claim, leading to losses for the master and crew. That scenario is not what happened in our case. If NorTug's claim is disallowed vis-à-vis NorShip, that was because their tug m/v Petter caused the incident, which has nothing to do with the factual position of the m/v Tomas, which could in theory have been owned by any tug company.

This means that (at least in my view) it is an open question whether the said starting point, not expressly stated in the MC, must necessarily prevail – also since in other situations private persons may be entitled to salvage reward.

See as example in Solvang NLK note 999 to MC s 445 and ND 1970.323: the chief of the fire brigade (brannsjefen) and port-master (havnekapteinen) brought personal claims for salvage reward apart from their employers' claim; these persons lost the case because their employers' claims succeeded (the municipal fire brigade and the port authority) and that the private persons did not exert efforts beyond what was expected from them as part of their employment – but the case illustrates that private persons may, depending on the circumstances, bring private claims irrespective of their employers' – which means that employees onboard ships may be disadvantaged by the mere fact that they operate from ships.

On a side note: Of potential relevance to this discussion comes an unfortunate error in translation from the Norwegian to the English syllabus book, being the book students depend on (many of them not being able to read Norwegian). The Norwegian book states, p 496: 'Er de berettigede misfornøyd med hvordan rederen har håndtert bergelønnskravet, må de eventuelt reise erstatningskrav mot ham.' That is a succinct way of describing the situation. In the English version, the important point about the *claim* for salvage reward is erroneously omitted, giving the wrong associations, p 590: 'If those entitled are unsatisfied with how the shipowner has handled the salvage award then they must direct potential claims for damages against him' – as if the distribution from an *award granted*, is the problem, which is not the situation envisaged.

Still another factor may be mentioned: The claim for salvage reward is not simply resolved by being set-off against NorShip's claim for damages. If the claim for reward were to succeed, then the employees onboard m/v Tomas would receive their share – independent from NorTug not being entitled to its share (because NorTug being responsible for the entire incident). NorTug would in that respect represent the interests of the crew of m/v Tomas in receiving their share, thus the interest of the crew of Tomas could play a part in the discretionary evaluation of whether NorTug should be entitled to reward under MC s 450,3. Moreover, this provision mentions fault on the *salvor's* part – and in our case m/v Petter was not salvor.

Still a point to discuss would be: did the master and crew of m/v Tomas exceed what was expected from their employment, onboard a tug, which occasionally will be used for salvage assignments? This is a similar point as discussed under Q4 above but there it concerned the expectation of services as such, here it concerns those onboard m/v Tomas as potential personal salvage claimants. The facts of the case does not answer this, other than indicating that their efforts were extraordinary, hence the efforts could be seen as exceeding such professional expectations.

On a side note: Crew onboard tugs may have tariff agreements entitling them to salary uplift in case of salvage operations, see Solvang NLK note 1049 to MC s 451,3 with examples from case law. Therefore, we do not know the financial end result if the master and crew were not to succeed as salvage claimants in our case.

So far, various factors have been discussed which could be of relevance if candidates were to expand on their reasoning. There is however one important further twist to the question:

If the initial fault of NorTug (m/v Petter) were to deprive NorTug of its claim for salvage reward, and the master and crew of m/v Tomas were not held entitled to claim salvage reward as personal claimants, one could then ordinarily envisage that the master and crew could claim damages against its shipowner (NorTug) for the shipowner depriving the master and crew of such a claim, as described above. But in the present case the abnormal constellation appears that it was the fault on the part of NorTug (m/v Petter) which brought about the situation of m/v Tomas being in a position to perform salvage. In other words, had it not been for NorTug's (m/v Petter's) fault, there would have been no basis for m/v Tomas to earn salvage reward, hence the master and crew of m/v Tomas have not suffered any loss *by reason of* NorTug's fault. On the contrary, the fault created the opportunity to perform salvage.

Seen in this light, it would perhaps not be unreasonable if the master and crew of m/v Tomas were not entitled to claim salvage reward as personal claimants; we are confronted with a fairly unusual situation, known from tort law, of 'passive imputation of fault' (passiv identifikasjon). On the other hand, m/v Even (its insurers) would then get the salvage service 'for free' – and we are back to the opening point: whether the initial fault of NorTug should have the effect of depriving NorTug of salvage reward altogether.

The more candidate grasp this overall constellation, the better – but it should be recalled that they are restricted by a word limit of 3.000 words.

Part V, Q5:

[On the eve of the day of the exam (received by me the morning after, one candidate pointed out an error in the text. Reference should have been made to Part II, not Part II. The text should have read:

"Part V - We now assume that one or more of the claimants in Part III were entitled to salvage reward against NorShip"

The error should be apparent from its context, and no other candidates reacted to it, but if candidates were to mention it and express frustration or otherwise disadvantage caused by it, due regard must be given during marking.]

The question is put openly in the sense that one does not ask which (or both) of the claims for salvage reward that were to succeed. The question concerns NorShip's claim for indemnity against NorTug and NorTug's possible right of limitation.

As to the right of indemnity, there should be no difference between this item and the other items of losses for which indemnity is claimed under Q2; it would be loss (liability) on NorShip's part resulting from NorTug's fault.

On a side note: The potentially complex part of setting-off of a salvage reward claim from NorTug versus first paying it (partly for the benefit of the master and crew of m/v Tomas) and then claiming such loss (liability) as indemnity against NorTug, is partly commented on under Q4 above).

As to NorTug's right to limit its liability, the crux is that MC s 173, 1) exempts claims for salvage reward from the otherwise right to limit liability (essentially for the purpose of not having salvors lose the incentive to salve). That means that salvors in their claim for reward against NorShip would not have to compete with the other claimants within the confines of limitation amounts, as under Q1. But here we are faced with a recourse claim which is not what is envisaged in MC s 173. The answer to whether or not a recourse claim for a party's (NorShip's) liability to pay salvage award, is subject to limitation, is therefore an open question, and if candidates were to see this point, that should be rewarded.

What outcome they then prefer would in my view not be material. They could argue that the result should the same as under s 173 (although the underlying considerations differ), or they may take the view that we are now within the ambit of s 172, in line with other 'ordinary' claims, since claims for recourse differ (consideration wise) from claims for salvage reward. (And again the point arises that in the original text of the LLMC Convention, claims for recourse are expressly inserted in art. 2, not in the corresponding MC s 172 – see above.)

Trond Solvang – December 2022