5402 Guideline to markers – autumn 2021

Generally, the case is fairly s straight forward in the area of liability for bunker oil pollution (Q1). It opens for topics of vicarious liability and the class of servants for whom shipowners are responsible (Q2), while it comprises potential complex questions as to the relationship between s 172/175 and 172a/175a (Q1, Q2 and Q4).

NB – after these guidelines were written the Bergen City Court's decision of 16/11/21 in the KNM Helge Ingstad case was released, and I have not taken the time to incorporate its views (and it may not be final, pending questions of appeal), but it essentially holds that in recourse rounds in a ship collision situation the higher limitation of MC s 172a is not applicable, contrary to my view in an earlier article on the topic in SIMPLY/MarIus, but my view has been taken in two recent Dutch Supreme Court decision. This is a complex topic and for the purpose of assessing students' answers, it should not matter whether the City Court has held in the one or other direction.

Part I

Q1

a) Oil spill

A natural first question is whether MC ch 10 I or ch 10 II applies to the item of oil spill. The case states that this concerns a tanker and that it was sailing in ballast, not being cleaned from previous cargo, hence that (implicitly) there were some residues from the previous cargo of oil. It follows then from s 191, 3, combined with the definition of 'ship' in that provision, and combined with s 183 i.f., that ch 10 II applies – as also made clear in the syllabus book (Falkanger, Bull, Brautaset) pp 238 and 246. It is however a somewhat concealed piece of facts being presented in the case, and the solution is not clear-cut from a mere (superficial) reading of the respective provisions in the MC (one could be inclined to think that bunker spill is bunker spill, thus must follow from ch 10 I), so that candidates should not be penalized strongly for making a mistake, particularly if the reasoning for the choice is as such sound, and they approach the further parts of the question correctly, albeit with an incorrect albeit with a mistaken starting point. In the following I set out alternative solutions to cover both alternatives as here described.

i) Alternative 1 based on MC ch 10 II (being the correct approach):

The answer is fairly straight forward.

Although the facts reflect that Frey was innocent in the collision, it is clear that this does not affect her owner's liability (on a strict basis) pursuant to s 191, and limitation follows from s 194, giving the limitation amount of 4,15 mill SDR (41,5 mill NOK), hence part of the claim of clean up costs of 46 mill NOK is uncovered. Moreover, it follows from the channeling rules in s 193 that it is the registered owner, Navigare, that is responsible.

ii) Alternative 2 based on ch 10 I (which some candidates may have adopted)

The point about strict liability becomes the same, ref s 183, but on the question of who of the parties are liable, the answer differs, as definition of 'shipowner' differs in s 183 from that of s 191. The definition in s 183 clearly comprises both companies.

On the question of limitation of liability under ch 10 I complications arise. It is crucial that candidates see that ch 9 applies, via s 185, 2. A question may then arise whether s 172/175 or 172a/175a are applicable. For the clean up costs the answer is not clear. It could be seen as removal of "everything that has been on board the ship" (172a 1). This is the most plausible construction, also seemingly relied on in the syllabus book, yet the wording in 172a denotes a situation of "removal" as part of wreck removal, and not clean up costs of the surroundings in a typical oil spill situation. On the other hand, if one takes the view that such costs are not sufficiently clearly covered by the wording 172a, it seems also not easily covered by the stipulated alternatives of the wording of 172.

The questions is discussed in guidelines to earlier exams. I quote below what is stated in the guideline to the 2019-exam, also since this question reappears in different forms under Part II and III below.

Quote:

"Admittedly, s 185 2nd para refers to ch 9 in respect of limitation rights but there is here some uncertainty as to the application of s 172/175 vs 172a/175a. The answer is not obvious but probably s 172a/175a apply. The question is set in some detail in the guidance to the 5402 spring 2019 exam which I here quote:

Quote:
This seems not to be entirely sorted out. The wording of section 172a suggests that bunkers oil spills are not covered; It is not an expense incurred on removal of any items mentioned in section 172a, 1) and 2), which can also be seen in the context that ordinary oil spills are excluded in the limitation rules, cf. section 173 2). In other words, one did not have in mind when the rules were designed – the London convention of 1976 as supplemented with the 1996 Protocol, as implemented in the Sea Act – that the mere bunkers oil spill should be covered in the regulations. But the considerations behind the rules of section 172a can give cause for an expansive interpretation, which seems to be reflected in Falkanger and Bull's discussion of the theme.

Falkanger and Bull state on page 173, quoting the preparatory works, that there is "a need for an increase in the liability limits, especially concerning liability for expenses towards preventing and limiting pollution from ships, and in relation to liability for wreck removal". Further, on page 201: "in the case of bunkers oil spills, the larger limitations amounts in section 175 a cf 172 a will be applicable"
In Ot.prp.nr.79 (2004-2005) pp. 41-42:

"Bunkers oil is not cargo. Hence bunkers oil spills are only covered by section 172 a first subsection when the ship has been in an incident as stated in section 172 a first subsection number 1). Claims after bunkers oil spills where the ship is not 'sunk, stranded, abandoned or wrecked', are regulated by section 175 subsection one number 3) and 4) (…) and the limitation rules in section 175 apply, not section 172 a or the limits in section 175 a.
(…)
The ministry agrees with the drafting committee here. The ministry presupposes that section 172 a applies to all measures to remove, destroy or neutralise the danger from the ship or something that has been on board the ship. This also applies to measures directly in conjunction with material damage, such as removal of bunkers oil spills from a dock. Section 172 a is generally applicable, without regard to the manner of damage that is avoided or mitigated, and does not, for instance, discern between pure environmental damage or material damage."
Hence the picture is far from clear.

It is clearly a strength for the candidates if they see this question. Which result they land on will be of less importance, provided that their reasoning is sound. On the other hand, it should be acceptable

also if the candidates do not consider this question, as long as they orient themselves correctly in chapter 10 1 with a referral to chapter 9 and choose either sections 172/175 or 172a/175a."

Unquote

The essence is therefore that there may be some doubt on this point, and that one must be lenient in assessing candidates ending up with the oil spill costs being recoverable under 175 rather than 175a.

With respect to limitation, the LLM students use the (non-updated) English version of the MC which provides for limitation under s 175, 3 to be 1 mill SDR. The (updated) MC expected to be used by Norwegian students provides for 1.510 mill SDR. The limitation under s 175 is the same under the old and new version, i.e. 2 mill SDR. The ships' sizes have been set so that the uplifted tonnage limitation becomes inapplicable. Thus, under both alternatives the claim of oil spill of NOK 46 mill would be subject to limitation (see further below).

However, it is to be reminded that these complications do not arise if candidates take the right approach under Alternative 1 above.

b) Wreck removal

The claim for wreck removal and who is the liable party, is not entirely clear. The students (LLMs are primarily non-Norwegian) are not supposed to know any details of the Harbour Act and Pollution Act other than what is found in the syllabus book. It here transpires (Falkanger/Bull/Brautaset p 264-65) that the registered owner (Navigare) is subject to orders of wreck removal, while s. 37, ref s 28 of the Pollution Act may open for also the operator being liable. In the case the facts are made 'dodgy' in that the municipality chose to be in charge of the operation, thus incurring the costs itself, which are claimed against both companies. This does not affect the starting point that it is the registered owner (Navigare) who is responsible, but it would not, in my view, be wrong if candidates were to hold that (based on the formulated facts) also the operator (reder: Kysttank) is liable. Some candidates may note that this was a topic discussed by the Supreme Court in the Server case, but that cannot be expected as the case was published after the syllabus book.

With respect to limitation of the wreck removal claim, it is trite from s 172a, 1 that this is covered, thus falling within 175a – meaning that the claim of NOK 4.6 mill would as such be unaffected (see further below).

c) Limitation in total

Since I have split up the discussion in alternative answers above, there is a need also here to split up.

i) Alternative 1 based on MC ch 10 II (being the correct approach):

The oil spill would here be recoverable against Navigare under MC s 194 with limitation as above described, the wreck removal against Navigare would be recoverable in full (ch 9 and s 175 via obligations under the Pollution Act or the Harbour Act), thus the two claims would not compete under the same liability regime/fund.

Kysttank not being responsible for the oil spill but possibly for the wreck removal (above) would, likewise, be responsible for the wreck removal in full.

ii) Alternative 2 based on ch 10 I (which some candidates may have adopted)

Assuming both claims can be made against each company, the totality of claims are NOK 50,6 mill and with the limitation under s 175a being NOK 20 mill, this means that NOK 30,6 mill are unrecoverable. This further means that the distribution of the recoverable damages would be as set out in s 176, with the proportion being 1:10, but since the same claimant (the municipality) is behind both claims, such distribution becomes irrelevant.

Assuming, on the other hand, that s 175 were to apply to the clean up claim, this would mean that the wreck removal claim (NOK 4.6 mill) becomes recoverable in full while the clean up cost (NOK 46 mill) is subject to limitation of NOK 10 mill (s 175 In MC old version) or NOK 1,510 mill (s 175 in MC updated version).

Part II

General remarks:

The facts relating to Norship's vicarious liability are made deceptive in the way the arguments are presented. Clearly, the question is not whether Frank is employed or not with Norship, but whether anyone employed with Norship, i.e. Peder As, acted negligently. This must be answered in the affirmative. Candidates may go further into this discussion by picking up the arguments made in the case, which must be in order, e.g. along the following lines: Although Peder had reason to believe that Frank would call upon him if other ships appeared, rather than for Frank to take matters into his own hands (as it were), this can clearly not disculpate Peder, and in turn not Norship. The potential if something were to go wrong (a 15 year old not acting as told) is immense, which is why there are licensing requirements etc. imposed on those being in charge, and being present, on the bridge.

In the case, arguments concerning limitation of liability are mixed with those of liability as such. Candidates are expected to sort this out. In short: Liability of Norship is governed by s 151. Limitation is governed by ch 9: We are outside the scope of recourse under the channeling provision of ch 10 II (candidates take this course, above), since s 193 i.f. refers to general tort law principles, hence with MC s 151 as the governing provision.

A negligent person may become personally liable, as contemplated by s 151, 2 and by s 171, 2, and as described in the syllabus book (p.190-91).

Moreover, there is no sufficient facts presented to reasonably assert that there is gross negligence and thus privity on Norship's part (Lars Holm being managing director, thus the alter-ego of the company) to say that limitation becomes inapplicable pursuant to s 174.

There may be a question of Peder Aas having acted grossly negligent, but in view of the insight requisite ("… gross negligent with knowledge that such loss would probably result", ref s 193, 3, ref s 185, 1, compare s 174), also this seems doubtful. However, it would be positive if candidates were to discuss the outcome on the alternative / subsidiary basis of such gross negligence, see below.

Q2

The answer is that Norship is liable and probably has a right of limitation of liability: there being no gross negligence on the part of its alter ego (Lars Holm), and Peder Aas' possible gross negligence would not constitute the alter ego of the company.

A question would however be the above discussed relationship between s 172a/175a and 172/175.

If one assumes (alternative 2 as discussed in Part I) that the clean up costs were to be covered by s 172a as against Kysttank/Navigare, the question becomes whether the same applies in a recourse situation (through subrogation-like considerations) or whether such claim is "transformed" into a claim under s 172 in the recourse round, and, if so, that Norship would benefit from the lower limitation under 175 than what Kysttank/Navigare are subjected to under s 175a.

If one assumes (alternative 1 as discussed in Part I) that the direct claim is covered by MC ch 10 II as against Navigare, the same question will potentially arise: is a recourse claim for clean up costs to be covered by s 172a/175a or 172/175?

The same type of question may arise in respect of the wreck removal claim: this, in its direct claim form, is clearly covered by s 172a/175a, but does that apply also in a recourse situation?

The answer is unclear and both solutions must, in my view, be deemed acceptable. This latter point is up for decision by the Bergen City Court in the KNM Helge Ingstad case, with judgment expected in the near future, and with likelihood that the question (irrespective of outcome) will be appealed to the Supreme Court. I have written an article in SIMPLY in favour of the 172a solution, relied on by the State in the case. Erling Selvig has written an opinion taking the opposite view, relied on by the owner of the Sola TS.

Q3

As already indicated, Peder Aas may become personally liable as there should be no doubt that he acted negligently by leaving the command to Frank.

One interesting feature in this respect concerns channeling of liability and the effect of possible gross negligence (loss of limitation right). According to s 185 second sentence (if candidates adopt this alternative, above), the channeling provision in s 193 2 and 3 "applies accordingly" – what does that mean in the present context? The extent of the scope of liable parties under s 183 makes s 193 of limited application, but for Peder Aas as the ship's master s 193 2 a) would apply, prima facie making him immune from suit. However, this immunity does not apply in case of gross negligence, ref s 193, 3.

Similarly, one could in a recourse round like here (where Peder is not an employee of Kysttank/Navigare but rather an employee of the recourse-defendant Norship), start with general rules of liability, involving e.g. s 151, ref s 171 2, and where s 174 would lead to the the result that "a liable person" is not entitled to limitation in case of gross negligence. This result of full liability would, by the way, accord with the solution under general tort law, making such liability subject to possible abatement (lemping), ref s 151 2.

However, even if severe criticism could be launched against the acts of Peder Aas, the requirement of insight into the likelihood of ensuing damage under s 174 (ref s 193, 3), would probably not be met

(as discussed above). Therefore, this topic of the consequences of gross negligence is complex and candidates should be rewarded for at all spotting it.

The essence under Q2 and Q3 would be that Norship would become liable in recourse; that Norship would have a right of limitation intact; that Peder Aas might be subjected to personal liability, and that he (possibly) would be fully responsible if found to have acted with gross negligence, which is doubtful, but if so, he would be left with invocation of general tort law rules of abatement (but this latter point is part of general tort law, falling outside the scope and syllabus of 5402).

Part III

This type of question is not generally dealt with in the syllabus. Answering it requires thinking along the lines of general tort rules. It should in that respect, in principle, be nothing preventing a claimant from "jumping over" a party being liable by virtue of legislation (bunker oil pollution and/or wreck removal) and instead claim directly against the party being liable based on negligence (MC s 151) - e.g. in a collision case as here, where the colliding ship is (solely) to blame – and thus "skip" the party that would in any event be entitled to recourse. Or it could be envisaged that all three (or four) parties were purportedly held jointly liable by the claimant (with the defendants being subject to different liability regimes).

The point with the question is to raise awareness of these phenomena, and to test out: what set of rules would then govern? In principle: would the defendant (Norship) be entitled to apply the same rules as if the liable parties as envisaged under MC ch 10 II, respectively ch I (Part I above) were to be claimed direct - or as if held liable in recourse (Part II above)? In this type of questioning, one again encounters the question of whether s 172a/175a or 172/175 should be applied, and with the answer seemingly being that the claimant could here invoke 172a/175a – which has the effect (possibly) of illustrating that also in a recourse round (see Part II) the higher limitation of 175a should apply.

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Since this Q4 is of a somewhat speculative nature, candidates' answering of it should be given correspondingly reduced weight as compared with Q1-Q3.

Trond Solvang – December 2021