

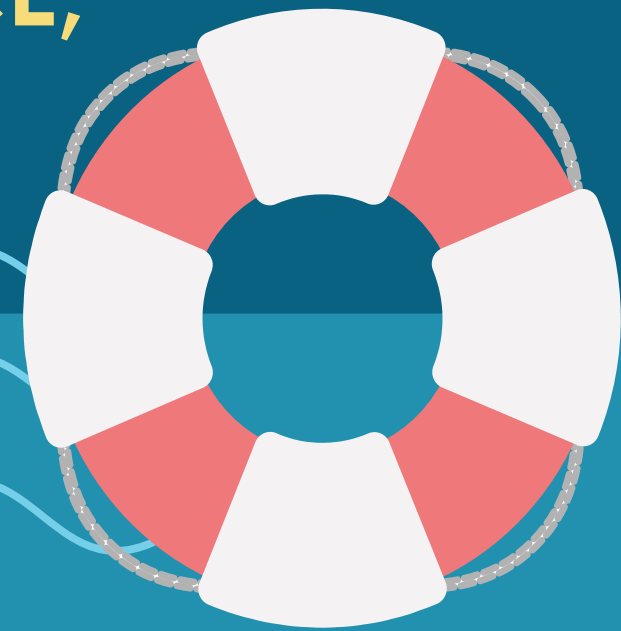
THOUGHT PIECE

SALVORS' LIABILITY IN THE
MODERN WORLD:
RISK ASSESSMENT, TECHNICAL
GUIDANCE, AND LEGAL CHALLENGES



IGP&I

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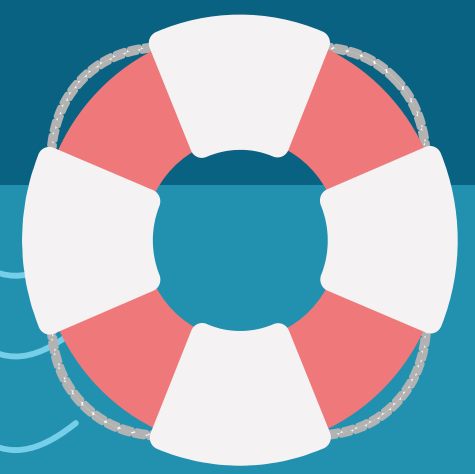
Shipowners and salvors enjoy a symbiotic relationship. As with insurance, a shipowner hopes they never need to avail themselves of a salvor's services but if they do, they will be glad of their existence. So too a shipowner's P&I insurers who would be called upon to respond to potentially costly wreck removal and possibly pollution liabilities if a stricken vessel cannot be saved. As it was pithily put by one insurer at the 2023 London Salvage & Wreck conference, 'insurers need salvors and salvors need insurers.'

However, equally important is the need for the professional salvor to respond with the requisite degree of care and skill to maximise the chances of success, and minimise the chances of failure. In this thought piece, Sam Kendall-Marsden, Chief Claims Officer at NorthStandard explores the legal principles applicable to salvors' negligence, the insurance position and practical considerations, before offering views on the future.

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The Legal Position

The leading English Law case on salvors' negligence is the *Tojo Maru*, decided by the House of Lords in 1971. The case arose out of damage caused to a salvaged vessel by the negligence of one of the salvor's employees, a diver who caused an explosion by firing a bolt through plating into a tank that had not been gas-freed. The court held that there is no rule of maritime law that a successful salvor cannot be liable in damages to the shipowner for the result of any negligence on their part. Damages are likely to be similar if not identical whether the claim is founded in contract or tort, as the object of salvage services is to preserve the ship rather than generate contractual profit.

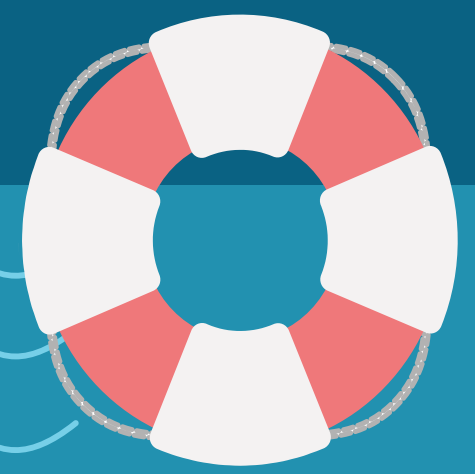


The court dismissed the contentions that 'success' simply means doing more good than harm, and that success may act as a shield against a claim for damages. Rather, the court held that success simply means the vessel being brought to a place of safety. Thus, in cases of success where negligence is also alleged, there are likely to be cross-claims for a salvage award and damages. The former may be set off against the latter, and the salvor may avail themselves of the right to limit their liability in appropriate cases.

Whilst it is trite law a salvor owes a duty of care to the shipowner, the standard of care will depend on the circumstances, including any contractual arrangements in place. It will depend on whether the salvor is acting in an emergency situation or whether they have had time to plan, and whether or not they are deemed a professional salvor. Public policy considerations will also have a bearing, including potentially social action, responsibility and heroism. As a general principle, the bar to establishing salvors' negligence is set at a relatively high level.

The Lloyd's Open Form (LOF) salvage contract obliges a salvor to exercise 'best endeavours', arguably a higher standard of performance than in a negligence action, or under the Salvage Convention 1989 (which obliges a salvor to take 'due care'). The criteria for determining a salvage award in article 13 of the Salvage Convention include the degree of skill exercised, and the measure of success achieved. Article 18 relevantly provides that fault or neglect may reduce the salvor's award, or negate it altogether. The effects of a salvor's negligence might consequently be threefold: 1) an action in damages, 2) a reduced salvage fund and 3) a reduced (or no) salvage award.

Salvors do not benefit from responder immunity as a matter of English law. Furthermore, the international liability conventions that are most likely to be applicable (the Civil Liability, Bunkers and Nairobi Conventions) preserve a shipowner's rights of recourse against a



negligent salvor. In the US, however, immunity is in principle available under the Clean Water Act to those responding to an oil spill, provided they were not grossly negligent or engaged in wilful misconduct. However, such protection is of limited benefit to salvors as it does not guard against all losses (including personal injury or wrongful death), and it is confined to oil spill response.

P&I Cover for Salvors' Negligence

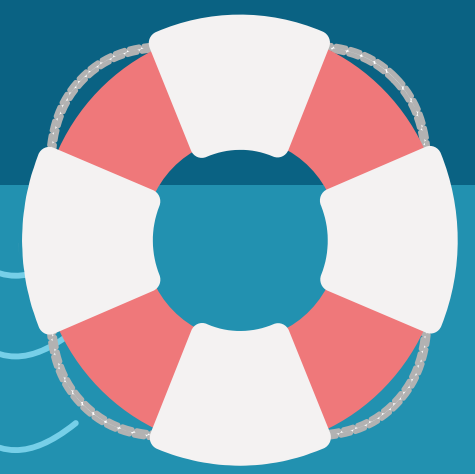
P&I clubs insure shipowners and charterers against third-party liabilities in accordance with the overarching International Group Pooling Agreement. Under the Pooling Agreement, liabilities arising out of salvage operations (other than in respect of life salvage) are excluded absent those covered by special agreement with the relevant club.

Three situations arise: the first is where a club agrees to provide salvor's liability cover in respect of a tug or other salvage vessel operated by the shipowner as a professional salvor. The cover responds to the usual third-party risks up to full poolable limits, including \$1bn for oil pollution.

There are also two non-poolable covers available: the first responds to oil pollution liabilities where the professional salvor is not operating from an entered ship. The second responds to other forms of third-party liability under the same circumstances. However, these latter two forms of salvor's liability insurance are subject to lower limits of cover than the former.

Conclusion

Salvors play a vital role in saving life, protecting the environment and preserving property. Without their activities, the functioning of the globalised system of international trade would be compromised. Whilst legal frameworks provide varying degrees of protection, salvors remain to greater or lesser degrees threatened by the spectre of



allegations of negligence (or worse).

Whilst that can focus minds and elevate standards of performance, there is a risk of this tipping over into risk aversion and perhaps salvors declining to act altogether with potentially catastrophic consequences. This is particularly the case when set against the backdrop of a salvage industry under financial strain, and where there is an increasing tendency for perceived fault on the part of seafarers to be criminalised.

Has the time come to revisit the concept of responder immunity, to ensure salvors remain willing and able to assist in casualty situations? To this end, is there more the salvage industry can do to put out the message it is a force for good in mitigating and preventing harms, worthy of greater legal protection?