Selected topics of causation between nautical fault and initial unseaworthiness under the Hague-Visby Rules – a comparative analysis

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Contents

1 Introduction

In my article in SIMPLY 2020,[2] we looked at various aspects of the Norwegian Supreme Court case the *Sunna,* asking how the Norwegian court instances decided the case, including their ways of reasoning, while also considering the same topic within an international context, by looking at the origin of the Hague and Hague-Rules (HVR) and a selection of foreign case law.

We now move away from having the *Sunna* case as the main subject of our analyses, and instead use that case as a stepping stone into adjacent areas of law at the core of the Hague-Visby Rules (HVR) system of risk allocation. The common denominator in the sections that follow is the phenomenon of causation relating to our overriding topic: the relationship between nautical fault and initial unseaworthiness. Such questions of causation are potentially complex, and the approach to their resolution may differ between various legal systems. Still, they are at the heart of endeavours to harmonize the law under the HVR, hence it is worth attempting an analysis from a comparative law perspective.

[2] Solvang, The relationship between nautical fault and initial unseaworthiness under the Hague-Visby Rules – with critical remarks on the Norwegian Supreme Court's methodology in adjudication, SIMPLY/MarIus No.551, 2021, pp 32 et seq.. That article discussed i.a. the English Court of Appeal decision the *Libra* (ch. 4.5.). Subsequently the U.K. Supreme Court rendered its decision in that case, upholding the result but differing on central aspects of reasoning, [2021] UKSC 51.

2 The question of "transforming" initial seaworthiness obligations into nautical fault

2.1 Policy considerations

The problem to be discussed can be formulated thus: If matters relating to initial seaworthiness can be remedied after the ship's departure from the load port (e.g. while the vessel still sails in sheltered waters) but such subsequent remedial acts fail and lead to cargo damage, should such failure then be categorized as nautical fault (failure in management of the ship) exempting the shipowner from liability – or should it be deemed part of the initial seaworthiness obligation attaching (as it were) retroactively, thus leading to liability for the shipowner?

The following main considerations are here at play:

On the one hand, being too lenient in allowing such subsequent failure to be deemed nautical fault, would have the undesired effect of removing important incentives for the shipowner to ensure that the ship is made seaworthy before departure. To put it to the extreme, a shipowner's thinking could go: "Acts of seaworthiness can wait, since if the crew fails in rectifying them after departure, I as shipowner am exempt from liability".

On the other hand, it would in many instances be impractical to have all matters relating to seaworthiness attended to before or at the very moment of departure. Some leeway is obviously needed, and in many instances it would be considered entirely safe to perform certain tasks subsequently. But the legal question then becomes: if such subsequent tasks nevertheless fail, who should bear the risk? It would not be commercially unjust or in any way illogical to say that the shipowner should bear the risk of such subsequent failure, since such tasks belong to the sphere of making the ship seaworthy before departure, rather than to the sphere of nautical faults occurring during the voyage.

In the following we look at some examples of this type of questioning under Nordic law. Before doing so, it is however worth recalling some points from the wording and scheme of the HVR, which in the writer's view have been ignored and/or misconceived in the Nordic discussion, due to the way the Maritime Code (MC) has been drafted.[3]

In the HVR, art. III 1 is considered as "the merchant's" provision: matters of initial seaworthiness are not to be eclipsed by the liability exceptions in art. IV.[4] Moreover, matters of initial seaworthiness are deemed to be within the shipowner's "direct control",[5] hence it should clearly not be open to the shipowner to render the performance of it "outside of his control", by delegating the task to be performed by the crew at a later stage. The system of the HVR therefore points in the direction that if such seaworthiness tasks are performed subsequently, and fail, such failure remains part of the shipowner's initial seaworthiness obligation pursuant to HVR art. III 1.

Based on mere policy considerations, one could probably go one step further and say that if such subsequent failure were to be considered nautical fault, the shipowner should at least be required to demonstrate that there was a prudent system already in place at the time of departure to ensure that performance of the subsequent tasks did not entail any risk of something going wrong. Such a requirement would follow from the very concept of seaworthiness itself: that there are no foreseeable circumstances leading to an increased risk of something going wrong during the voyage – as e.g. adopted by the Supreme Court in the *Sunna*.[6]

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3 See Solvang (2021) ch. 3.4.

4 That does not mean that a matter falling outside of art. III cannot exist as a latent deficiency before departure, see .Solvang (2021) p. 75.

5 See the *Tasman Pioneer*, discussed in Solvang (2021) ch. 3.2.

6 Solvang (2021) ch. 2.

2.2 A preliminary look at Nordic case law

From these introductory considerations, we take a look at three different Nordic Supreme Court cases which all involve this topic of subsequent rectification of aspects of seaworthiness.

The first is the Swedish Supreme Court decision, the *Pagensand*[7] from 1956.

In this case a gauging pipe had not been sufficiently locked (a cover not being put on at the end of the pipe) at the time of departure. During the voyage, sea spray entered the pipe and caused damage to the cargo, consisting of paper. The shipowner was held liable for the cargo damage by reason of initial unseaworthiness. The Court discussed questions of causation concerning whether a prudent plan for remedial acts was in existence at the time of departure. In that respect the Court stated that initial unseaworthiness would be found to exist (with ensuing liability for the shipowner) "unless it appears likely that the defect would be remedied before the peril was encountered. Since the evidence in the present case […] justifies the conclusion that there was no established practice of performing gauging by the use of the gauging pipe [at load port], there is no basis for concluding that the defect would be remedied before the peril was encountered."[8]

In other words, since there was no such remedial plan in place, there was an inherent risk that the prima facie state of unseaworthiness would materialize into cargo damage, and the subsequent failure to remedy the prima facie defect was not considered a nautical fault. In principle the approach is similar to that of the Norwegian Supreme Court's assessment of the situation in the *Sunna*: there was no indication that the failing state of affairs (lack of a prudent bridge management plan) would be remedied subsequent to departure.[9]

7 ND 1956.175.

8 My translation.

9 Solvang (2021) ch. 2.

A second case to be mentioned is the Norwegian Supreme Court case the *URD II*[10] from 1919.

That case is mentioned in legal literature on a par with e.g. the *Pagensand* in terms of the said topic of considering allowance for subsequent rectification of seaworthiness defects,[11] but cannot in my view be considered as authority in that respect. The case concerned a claim by a shipowner for recovery under its H&M policy after the ship had sunk. Admittedly, the policy contained a condition for cover that the ship was seaworthy upon departure from port, but such a condition in an H&M policy still does not resemble the risk allocation system of the HVR, nor are the wordings the same. There is e.g. no parallel provision in an H&M policy to that of the relationship between initial unseaworthiness and subsequent nautical fault liability exceptions as in the HVR. Moreover, policy considerations by the courts are clearly different depending on whether there is a question of depriving the shipowner of insurance cover for a lost ship, or instead of imposing liability for (in principle, minor) cargo damage.

The facts of the case were that coal used for fuel was loaded on deck, which prevented the cargo hatch covers from being closed at the time of departure from load port. There would have been plenty of time to have this remedied (coal removed and hatch covers closed) before the ship, after some hours of sailing time, reached open waters. Those acts were however neglected and when the ship encountered open waters, being deeply loaded with minimum freeboard, swell washed over the decks, entered the cargo holds, and the ship eventually sank.

As mentioned, the case concerned recovery under an H&M policy. The Supreme Court found that the ship was (sufficiently) seaworthy upon departure from load port, since as a matter of course the hatches could have been closed in time. There is however no inquiry as to whether the shipowner had in place a prudent plan for this to be performed, as one would expect in the context of the HVR. Moreover, a concurring view by the Court, dissented on the reasoning, held that it would be

[10] ND 1919.364.

[11] Falkanger/Bull, Sjørett, 2016, p. 295.

sufficient in the context of seaworthiness for the shipowner to establish that the ship *in itself* was seaworthy, including being competently manned – thus without adopting any consideration of the risk assessment of the upcoming voyage, which clearly forms part of the seaworthiness test under the HVR.

The third case to be mentioned is the Norwegian Supreme Court case the *Sunny Lady*[12] from 1975.

During an intermediate call into port a crew member intended to replenish domestic water to the ship but mistook the gauging pipes intended to be used, and instead filled water into the pipe for the cargo hold, damaging part of the cargo. The flanges of the respective pipes were overpainted as part of maintenance of the ship so that the correct pipes were hard to identify. However, there were drawings on board showing the pipes' identity, and there were other crewmembers than the one making the mistake (he was new on the ship) who could have instructed him, if asked. The Supreme Court found the ship not to have been initially unseaworthy, and the shipowner was entitled to invoke the nautical fault exemption.

As part of its reasoning relating to the seaworthiness test, the Court put the question: "whether at the beginning of the voyage it could be seen as highly likely that the defect which here existed would be remedied or neutralised during the voyage by the means available on board the vessel."[13] On the facts of the case, the Court answered this in the affirmative: there was reason to believe that during the course of the voyage the new crewmember would acquaint himself with the piping system, or at least ask someone before filling water.

The case is therefore not direct authority on the question of whether prima facie seaworthiness deficiencies may be remedied after departure, since the ship was not found to be unseaworthy, even without the (minor) deficiency in terms of overpainted flanges not being rectified. The case is however of interest since the Court of Appeal in the *Sunna* used the reasoning in the *Sunny Lady* in support of the view that whatever

12 ND 1975.85.

13 Page 92-93 of the decision (my translation).

unseaworthiness existed in the *Sunna* (the master not having in place a bridge management plan),it could have been rectified subsequently. That kind of use of the findings from the *Sunny Lady* in the *Sunna*, seems to be flawed.[14]

2.3 A look to English law – the possible influence of the doctrine of seaworthiness by stages

English law is of relevance since the present topic lies within the ambit of the HVR with its overriding aim of achieving uniformity of the law.

Looking at English law, two main observations can be made. The first is that the English law solution is aimed at being rooted in the wording of the HVR, that is, in HVR art. III – an approach which is entirely absent from Norwegian/Nordic law, and which may, at least partly, be due to the HVR art. III having been "hidden" as part of the redrafting of the HVR into the MC.[15] The second observation is that the English law allowance for subsequent rectification of seaworthiness aspects, seems to be more restrictive (in favour of the cargo side) than is the main position under Nordic law.

In order to understand the English law position, it seems convenient to start with the English common law doctrine of seaworthiness by stages. Although that doctrine is set aside by the system of the HVR, it still plays a role in the English approach to construing the HVR.

The common law doctrine of seaworthiness by stages entailed a strict obligation of seaworthiness, not merely a due diligence obligation as in the HVR. Moreover, the "voyage", in the common law sense, meant the planned (first) stage of the cargo voyage, not the cargo voyage as whole, as is the English law understanding of the system of the HVR. Such evaluation of seaworthiness by stages at common law could for example be assessed against the (first) stage when the ship reached an intended intermediate port for bunkering as part of the cargo voyage.

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14 Solvang (2021) pp. 95-97.

15 Solvang (2021) ch. 3.4.

The English common law approach is illustrated by the leading case, the *Newbrough*[16] from 1939. The planned first stage was to sail from load port at Vancouver to an intermediate port at the Virgin Islands to bunker, and from there proceed on the cargo voyage to the UK. Upon sailing from Vancouver, the ship had insufficient bunkers on board to make it to the Virgin Islands. After passing the Panama Canal, she therefore had to deviate to Jamaica for bunkers. While sailing towards Jamaica the vessel grounded due to negligent navigation, and was lost.

The House of Lords held that the shipowner was not entitled to rely on any exception for negligent navigation, since the vessel was initially unseaworthy: the deficiency of bunkers constituted an increased risk of danger to the vessel and cargo, as assessed against how the voyage was planned at the time of departure from load port, i.e. to sail to the intended intermediate port at the Virgin Islands to bunker.

The "cause" of the damage in the *Newbrough* is considered attributable to the initial unseaworthiness, since without such unseaworthiness, no deviation for bunkering would have occurred, hence also no grounding during the course of such deviation. In that sense, the risk of any misfortune occurring during the course of deviation is imposed on the shipowner, in the sense that he forfeits what would otherwise be covered by liability exception for nautical fault.

That perspective is not foreign to Norwegian and Nordic law. If one asks the question: would a prudent shipowner have allowed the ship to sail with knowledge that she had insufficient bunkers to the intended port, and the answer is "no" (assessed at such earlier times when deviation would entail a significant additional risk), the same outcome probably would ensue. In that sense initial unseaworthiness would override a situation where the incident itself would fall squarely within the wording of a nautical fault exception. However, the situation of the *Newbrough* does not really belong to our category of cases reviewed above from Nordic law. In the *Newbrough* there was no question of rectifying a prima facie situation of unseaworthiness en route. The unseaworthiness was

[16] *Northumbrian Shipping v. E. Timm & Sun* [1939] A.C. 297.

"irreparable", in that the ship was incapable of reaching the intended port of loading.

It is worth noticing that the English doctrine of seaworthiness by stages has an aspect to the English contract law doctrine of deviation, which in turn forms part of the English law discussion of the phenomenon of "fundamental breach of contract", which has no direct counterpart under Norwegian contract law.[17] The doctrine of deviation is rooted in the notion that if the ship, through deliberate decision by the master or shipowner, deviates from the route contractually agreed with the merchant, then such deviation leads to an increased risk *per se,* which in turn means that whatever mishaps that may occur during the course of such deviation, are deemed to fall outside the ambit of contractual liability exclusions. In that sense the deviation (or other types of "fundamental breach") are deemed to be the "cause" of the relevant mishap, by "transposing" the situation outside of the scheme of contractual protective remedies.[18]

We then turn to how the HVR are considered under English law in relation to our question of "transforming" initial unseaworthiness into situations of nautical fault. As mentioned, the HVR are viewed as having the effect of setting aside the doctrine of seaworthiness by stages, in favour of a system whereby the upcoming voyage (the cargo voyage) is considered as a whole. However, the common law doctrine seems nevertheless to exert significant influence through the rigidity of perspective from which the HVR system is viewed.

Illustration can be found in various examples given by the authors of Cooke et al, Voyage Charters. It should be noted that the authors start

[17] See some comparative law aspects in Solvang, Sensur av ansvarsfraskrivelser: Har prinsippet i Wingull (ND 1979 side 231) satt spor etter seg? ('censoring of liability exclusion clauses – has the principle laid down in the Wingull-case set its marks?'), Lov og Rett, 2009, pp. 27-42. Aspects of causation on a comparative law level are also discussed in Solvang, The English law doctrine of indemnity for compliance with a time charterer's orders – does it exist under Norwegian law? SIMPLY/MarIus no. 419, 2013, pp. 11-28. Moreover, complex questions of causation on a comparative law level in the context of laytime and demurrage, are discussed in the monography, Solvang, Forsinkelse i havn – risikofordeling ved reisebefraktning ('delay in port – risk allocation in voyage chartering'), Gyldendal, 2009.

[18] The matter involves a number of complicating aspects which are not addressed here, see e.g. Cooke et al, Voyage Charters, 3rd Ed., 2007, pp. 251-267. The 3rd edition is here used, the relevant parts are identical in the 4th edition from 2014.

out by giving weight to HVR art. III (which is an absent factor in the Norwegian discourse – as pointed out earlier). The authors take as an example intended bunkering during the course of a cargo voyage, while at the same time looking at the voyage as a whole. The authors state:

> "Where matters of seaworthiness need to be attended to after the voyage has begun, such as taking on bunkers at a port of call in the ordinary way in order to complete the voyage, it is submitted that the shipowners are not in breach of their Article III rule 1 duty merely because the vessel does not have sufficient bunkers on board to complete the whole voyage at the beginning of that voyage, at least where a prudent owner would have done the same and, probably, where suitable arrangements for taking bunkers have been made."[19]

From a Norwegian perspective, this does appear a very cautious and in many ways unrealistic approach. It seems obvious that, in modern times where bunkering is planned as a matter of course and at the convenience of the shipowner, planned bunkering to be effected en route, would be entirely in order, not even being seen in the context of initial unseaworthiness. The example seems under English law to be a remnant of the common law doctrine of seaworthiness by stages, where older cases typically involved bunkering, but where bunkering practices have later changed.[20]

From there, the authors go on to state:

> "In such a case, if, through subsequent fault of servants or agents, the vessel does not in fact take on sufficient bunkers at the port of call and loss or damage results, the shipowners are not in breach of their Article III rule 1 obligations so long at least as it is not attributable to a prior failure to make proper arrangements."[21]

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19 Cooke et al (2007) p. 973.

20 The remarks in Cooke et al are at odds also with the views expressed by the authors elsewhere to the effect that in modern times deviation for bunkering at intermediate ports is seen as more or less a matter of course, see Cooke et al (2007) pp. 252-253.

21 Cooke et al (2007) p. 973.

From a Norwegian perspective, one would be tempted to ask: what other solution could there be? If the fact of planning to bunker en route is not a matter of unseaworthiness, and if faults made in connection with such bunkering occur due to taking on insufficient bunkers, and if later deviation ensues for the purpose of replenishing bunker, and if an accident then happens during the course of such later deviation, it is hard to see how this accident could in any way be traced back to initial unseaworthiness.

Again, the English thinking seems to be rooted in the earlier doctrine of seaworthiness by stages. This also applies to the reservation by the authors that the taking on of insufficient bunkers en route is a result of lack of planning. With the ordinary seaworthiness test being applied: if at the commencement of the voyage there is some lack of planning of how much bunkers the ship shall take on board at an intermediate port of bunkering – would a prudent shipowner then have disallowed the ship to sail with knowledge of such facts? The answer seems to be no. From a Norwegian perspective, this example would probably therefore not fall within the category of rectifying initial seaworthiness deficiencies subsequent to departure.

The authors then state, in direct continuation of the above:

> "They [shipowners] may also be protected by the exception In Article IV rule 2(a), should it be necessary for them to rely on an exception, as, for example, when there is loss or damage to the goods, as opposed to liability in salvage for example. There may, however, be other subsequent faults by those servants which will cause the carriers to be liable under Article III rule 2 [which imposes a duty of care for the *cargo*] or because they evidence a failure 'properly to man the ship'."[22]

These remarks make good sense, since they go to the very point of such subsequent fault (i.e. fault in management of the ship for bunkering, which in turn may end up in "deviation" leading to navigational fault being committed) – all of this being considered within the ambit of HVR

[22] Ibid.

art. IV 2(a). These remarks also make good sense in terms of the general notion that, in given cases, the subsequent fault may relate to caring for the cargo and for that reason would not qualify as nautical fault[23] – or it may be a reflection of incompetence by the crew, in which case we are back to the topic of initial unseaworthiness, as e.g. argued by the cargo side in the Norwegian *Sunny Lady*, namely that the crew was incompetent in not having learned the correct way of replenishing domestic water into the right pipe.

Then, finally, we reach examples that are familiar to the Norwegian discussion. The authors state in direct continuation of the above quote:

> "On the other hand, the abandonment of the doctrine of stages may well mean that in other respects, e.g., in the case of loading at a river port, a vessel needs to be seaworthy for an ocean passage, and due diligence exercised accordingly, at an earlier time than under the common law. This does not cause any particular injustice because of the abandonment of the absolute undertaking of seaworthiness and also, *so long as the shipowners remedy the unseaworthiness at a stage which would have been proper in the context of the doctrine of stages, it should not be causative of any loss or damage*."[24]

The latter part of the quote, concerning lack of causation, is from a Nordic perspective trite: if it is prudent to remedy a seaworthiness defect subsequently and it is so remedied, then there can be no question of liability for a subsequent event leading to cargo damage, since ex hypothesis there is no breach of any obligation which caused the cargo damage.

There seems however to be one difference between the Nordic and English approaches. Under Nordic law, if there is a prudently planned remedial act to an initial deficiency, the thinking is that the obligation to exercise due diligence at the time of departure is fulfilled through such prudently planned remedial act. Hence, a subsequent failure to do the remedial act would be considered a nautical fault occurring during the

[23] See Solvang (2021) ch. 3.1.

[24] Ibid (my emphasis).

voyage, thus exempting the shipowner from liability – see the account given above.

This type of thinking seems however to be foreign to English law. There the test of seaworthiness seems to be assessed against the voyage as a whole (which in itself is also the case under Norwegian law), and if matters are attended to after departure but the remedial acts fail, then this seems to be viewed as matters of initial unseaworthiness having been committed retroactively (as it were) – and with no legal basis for categorizing them as nautical fault.

That point is important since it has to do with the construction and application of the HVR. Matters of initial seaworthiness are governed by HVR art. III 1, and there is no basis in the HVR for having art. IV and nautical fault "taking over" in such situations of breach of art. III 1.[25] This is the problematic part in the thinking of the Nordic cases allowing for subsequent unseaworthiness failure to be "transformed" into nautical fault – and it may be another example of how the HVR art. III 1 seems to have been neglected under Nordic law, probably because of the way the MC has been drafted.[26]

Therefore, as a matter of construction of the HVR, and as a matter of international uniform application, it seems that the Nordic law position should at least go no further than those principles allowing for subsequent rectification as suggested in the previous section. In other words, those principles as reflected in the Swedish Supreme Court decision *Pagensand* seem to be sound, while those derived from the Norwegian Supreme Court case *URD II* seem not to be, in the context of the HVR.

[25] This is a different topic than that dealt with in Solvang (2021) ch. 4.3. There the point was that certain nautical faults already occurring before departure might *not* entail breach of HVR art. III 1.

[26] Solvang (2021) ch. 3.1.

3 Causation and evidentiary aspects – nautical fault pointing retroactively towards initial unseaworthiness

In the *Sunna,* the conduct of the master was evidentially substantiated by the fact that he had on a prior occasion been sanctioned by the Dutch Port State control for having defied the safety rules.[27] This, combined with the later grounding when there was no double watch on the bridge, bore out the fact that the master at the time of departure from load port, had the mindset of defying the rules and that there was no prudent bridge management system in place – hence the vessel was initially unseaworthy.

If one were to disregard the fact of the prior Port State control, the result in the *Sunna* should be no different, apart from the evidentiary aspect: It might have been more difficult to establish that the rule-defying mindset of the master was already in existence at the time of departure. It might for example have been easier for him (if wishing to do so) to fabricate a version that this was a one-off instance of deciding that there was no need for double watch keeping. It should in this respect be recalled that the master's explanation for only deploying a single watch on the night of the incidence, was that the weather was calm, and that the crew needed rest to do maintenance work on the ship during daytime. It might in this respect not have been straightforward to establish initial unseaworthiness if, ex hypothesis, the only available evidence had been the version given by the master and crew.

By altering the facts in this way, it may perhaps be asked whether, so to speak, any incident of nautical fault of some gravity, may not shed retrospective light on what may be considered intrinsic causes already in existence at the time of departure, hence constituting initial unseaworthiness. If a master makes a grave navigational mistake, would that not mean that this was part of his character, which materialised during

[27] See the detailed account given in Solvang (2021) ch. 2.

the voyage but existed latently back in time?[28] Clearly, such questioning involves complicated issues at the intersection between evidentiary aspects and evaluation of legal principles of causation. Some reflections may be made in that respect.

There is clearly a difference between the *Sunna* where the rule defying mindset of the master was the cause of a later incident, and a case where an incident happens which leads the master or crew to make a bad nautical decision. To again use the *Sunna* as an example: in theory it might perhaps be the case that since the second mate fell asleep on watch, he might already have had this character of being prone to falling asleep at the earlier time of departure. It seems however to be an unrealistic approach to say that the vessel must therefore have been initially unseaworthy; there would be a multitude of potential causes which might occur after departure which could, in the legal sense, be viewed as the proximate cause of the nautical fault of falling asleep.[29] This, at the same time, illustrates the important distinction between incompetence of crewmembers (constituting initial unseaworthiness) and singular instances of negligence (constituting nautical fault), which forms part of several English law decisions.[30]

On the other hand, there might well be grave incidents of nautical fault which could constitute at least prima facie evidence of initial seaworthiness, and perhaps also prima facie evidence of the shipowner being at fault in not detecting incompetence by the master or the crew.

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[28] See also the discussion about 'latent human defects' in Solvang (2021) ch. 4.6.

[29] Similar considerations may arise in respect of one-man shipowning companies where the master is at the same time the owner/manager of the ship and where intricate situations of nautical fault (by the 'master-ego') and commercial faults (by the 'manager-ego') of one and the same person – see Solvang, Rederiorganisering og ansvar – rettslige utviklingsrett ('organisation of shipowing companies – legal developments'), MarIus no. 484, 2017, pp. 31 et seq, with comments on the case *Vågland*, ND 1954.56. See also Solvang (2021) ch. 4.7.

[30] See e.g.the *Eurasian Dream,* Lloyd's Rep. 2002, 1, 719, discussing aspects of incompetence vs. negligence in relation to the fire exception of the HVR. The master was found to be incompetent and the shipowner was held liable in negligence for not having detected it and for not having provided him with proper fire fighting training.

An instance of grave misconduct by the master follows from the New Zealand case, the *Tasman Pioneer*[31] from 2010. During the voyage of a liner service ship, the master decided to alter the normal route by deviating east of an island (the Japanese island Okino Shima) to shorten the sailing distance and thus bring the ship back on time schedule. While deviating, the vessel touched bottom, which led to seawater ingress.[32] The master decided to conceal this navigational error by proceeding for about two hours until reaching a geographical point compatible with the original sailing route. From here he called the Coast Guard and the offices of the shipowner, and gave a forged story of having struck an unidentified submerged object. He also instructed the crew to lie to the Coast Guard when later interviewed about the incident.

The water ingress stemming from the extra time taken before the master called for assistance, caused (additional) damage to the cargo, and when learning the true facts, the cargo owners rejected the shipowner's purported invocation of the HVR exception for nautical fault relating to the (additional) cargo damage – that the initial grounding constituted nautical fault was not in dispute.

According to the cargo owners, the scope of the exception for nautical fault (negligent navigation) of the HVR could not reasonably encompass this type of wilful misconduct by the master. However, with differing results among the various court instances, the New Zealand Supreme Court held that the nautical fault exception did apply. It is important to note that the Supreme Court emphasised the need to go to the roots of the HVR as drafted, and not let that intended risk allocation system be influenced by national law principles, e.g. concerning censoring of contractual (here: legislated) terms on the basis of principles of loyalty, etc. – as the lower courts had held.

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31 Lloyd's Rep. 2010, 2, 13.

32 It transpired that the deviation was in itself unproblematic; the master had sailed that route before, however on the present occasion he discovered that the radar did not work properly, hence he decided to abort the deviation, and as part of this abortion (turning in a narrow straight) the ship touched bottom. See also the account given in Solvang (2021) ch. 3.2.

Moreover, the master of the *Tasman Pioneer* was found to be competent as a seaman, hence there was no issue raised concerning negligence on the shipowner's part in not providing a competent crew – as obliged by HVR art. III 1). There was also no assertion made by the cargo side to the effect that the master had (perhaps) a mindset already in existence at the time of departure, which posed a general risk of something like this happening during the voyage, thus making the ship initially unseaworthy. Hence, the thinking must have been that as a matter of causation it was the prior grounding (being of a "plain" nautical fault nature) which brought about the master's wholly unacceptable conduct.

We leave the topic here – with the *Sunna* as an example of the evidentiary importance of being able to establish the true facts in this interface between initial unseaworthiness and nautical fault, in that case with the prior Port State control as important evidentiary means of shedding light on the true circumstances of what later happened.

It is, moreover, worth pointing to a slight paradox that may ensue in some of these cases, namely that it is in the general interest of the shipowner to argue, and adduce evidence to the effect, that it was the master's decision making that failed, not what lay within the shipowner's "direct control"[33] and thus within the sphere of responsibility of the shipowner.

This possible inclination of highlighting the fault of the master is particularly clear from the City Court's decision in the *Sunna*. The shipowner introduced evidence to the effect that the shipowner's superintendent acted prudently in instructing the master to comply with the safety rules; it was the master who failed by not being amenable to taking them seriously. One could then speculate: if the master had been called as witness, hence been given the opportunity of speaking his case, his inclination would probably have been to counter the version given by the superintendent, thus potentially weakening the shipowner's case.

These reflections concerning evidentiary aspects of important questions of causation, which in turn are decisive to the question of liability of the defendants to a legal dispute, may be said to be general in nature.

[33] As that term was used in the *Tasman Pioneer*, see Solvang (2021) ch. 3.2..

However, the importance of such reflections is enhanced in this type of cases which involve liability exceptions for something as central as the conduct of a contracting party's main servant: the shipowner's master.

4 Causation "the other way around" – initial unseaworthiness not causative of nautical fault

The previous chapter concerned situations of nautical fault which could throw retrospective light on what might constitute initial unseaworthiness – or to put it the other way around; possible instances of initial unseaworthiness which materialize into, and thus cause, what would otherwise be seen as nautical fault. There are also, however, other possible constellations in play: that instances of initial unseaworthiness are considered not to be the proximate cause of subsequent nautical fault. One example is the English case, the *Isla Fernandina*.[34]

The ship sailed on a cargo voyage from Puerto Bolivar to Libya. Upon passing the Panama Canal, the bosun was seriously injured from an accident onboard, and the ship had to deviate to the nearest port for medical assistance (the bosun died in the meantime). During such deviation to port, the master and the third officer misread the navigational lights, leading to the ship grounding (near the Salmedina Bank). The cargo, consisting of fresh bananas, was damaged by the ensuing delay. In the subsequent proceedings it transpired that the ship did not have on board charts of the area with a suitable scale for navigating in close waters; it only carried a small scale chart as the plan was merely to transit the area.

The Court found that the lack of proper charts constituted initial unseaworthiness, since a possible need to deviate to shore should form part of prudent voyage planning. However, the Court found on the evidence that the master and third officer would have relied on the navigational

[34] Lloyd's Rep. 2000, 2, 15.

marks as the only means of navigating to the port, even if proper charts had been on board, and that therefore there was no causation between the initial unseaworthiness and the later grounding. Hence, the shipowner was held entitled to invoke the liability exception of nautical fault. Moreover, the master and the third officer were considered to be competent as seamen, hence there was no basis for holding the shipowner liable for unseaworthiness in terms of incompetence by officers and crew.

This case, therefore, on a par with the *Sunna*, has the strange effect of giving incentive for the shipowner to argue that the master or crew onboard acted negligently, thereby escaping the consequences of liability for initial unseaworthiness. In other words, a cargo claimant may succeed in showing initial unseaworthiness stemming from negligence (that of not procuring a complete set of charts), while the shipowner successfully counters by submitting that even if the ship had been seaworthy, this would not have led to a different outcome, as the master would have run the ship aground anyway. But with the constellation as in the *Isla Fernandina*, there may be a further twist, in that the master as part of his evidence would perhaps not have had an incentive to argue otherwise. He would risk being at fault on either alternative: not procuring the necessary charts at commencement of the voyage and/or failing in navigation by relying on insufficient navigational marks.

5 Causation within the scope and purpose of safety rules being violated

A matter of causation which is intrinsic to the concept of negligence as a basis of liability, concerns a delineation to be made as to whether the damage in question falls within the category of interest intended to be protected by the relevant safety rules.

The point can be briefly illustrated as follows: a) there is damage caused by the defendant, b) there is an instance of rule violation by the defendant, c) there is causation in the sense that had the rules not been

violated, the damage would not have occurred. However, there may still be a limiting factor (of causation): did the damage happen in the direction of the interest intended to be protected by the violated rules?

A classic example is the English case *Goris v. Scott*[35] from 1874. In that case, the safety rules for the carriage of live sheep as deck cargo required separation fences to be mounted on deck. The shipowner neglected to mount such fences. During the voyage much of the deck cargo was washed overboard as the ship encountered rough seas. This washing overboard would not had happened if separation fences had been mounted. The shipowner was nevertheless held not liable for the lost cargo since the interest intended to be protected by the rules was that of preventing spread of disease among the animals, not to protect them from being washed overboard.

By parity of reason it could perhaps be submitted that the safety rules in the *Sunna* requiring double watch keeping during night time sailing, had the purpose of ensuring satisfactory lookout ('two pairs of eyes see better than one'), not the (primary) purpose of preventing officers on watch from falling asleep. Should the shipowner, perhaps, have been acquitted along this line of reasoning?

The answer seems clearly to be in the negative. Such an argument was not even raised by the shipowner before the Courts. The interest intended to be protected by the safety rules in the *Sunna* was accident prevention to ship and cargo, i.e. to prevent damage due to improper navigation of the ship – and in that sense to avoid the very type of damage which actually ensued. It would therefore be too artificial an argument to say – within such intended scheme of damage prevention by the rules – that the primary situation envisaged by the rules (to enhance the effect of lookout) was not causative of the way the damage occurred.

It is, moreover, an open question whether the type of principle of causation which was in play in the *Goris v. Scott,* would be applied as rigidly under Norwegian law as it was at the time under English law.[36]

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35 (1874) 9 LR Exch 125.

36 See e.g. Hagstrøm/Stenvik, Erstatningsrett, 2019, pp. 91-94. They point to the Supreme Court case in Rt. 1970.1452 (damage caused by high voltage electricity in private

6 Causation and its relation to a wide or narrow concept of seaworthiness

The question of causation between initial unseaworthiness and subsequnt faults (possibly) being of nautical nature, may furthermore be seen as a question of adopting a "narrow" or a "wide" concept of seaworthiness. The very notion of unseaworthiness entails aspects of foreseeable risks during the upcoming voyage, hence within such a context, intrinsic questions of causation.

We may again take the *Sunna* as an example. The Supreme Court found as a matter of fact and evidence that the absence of a prudent bridge management plan at the time of departure, meant that there was an increased risk of something going wrong during the voyage, and that this increased risk as a matter of causation materialized during the voyage. This type of risk-assessment approach could be called a "wide" concept of seaworthiness.

The Court of Appeal, on the other hand, essentially confined its assessment of seaworthiness to a finding that a) the ship was furnished with a competent crew, and b) there was a safety manual onboard which was easily accessible to the master (and the Court found that the shipowner's representatives had reason to believe the master would make use of it).[37] Hence, what subsequently happened during the voyage would, according to the Court of Appeal, be assessed within the scope of nautical fault. This tendency of applying a seaworthiness test without emphasis on the risk aspect of something going wrong, could be called a "narrow" concept of seaworthiness.

housing, attributable to insufficient isolation as part of wrongful installation work) which bears some resemblance to the said English case, but comment (p. 94): "Even if one has the more ordinary sequence of damage in mind through the formulation of the relevant rule of conduct, that is not the same as saying that it has been the intention to limit the scope of liability accordingly. On the contrary, the presumption must be that it is irrelevant how the damage occurs, when being caused by rule violating conduct." (my translation)

37 See Solvang (2021) ch. 2.

These differing approaches have their parallels in foreign law. An example can be taken from U.S. law and the case of *Mahnic v. Southern S. S. Co.*[38] from 1944. That case concerned seaworthiness in the context of personal injury suffered by a crewmember.[39] During the voyage a crewmember was doing maintenance work (by being hauled fifteen feet over the deck) by the use of ropes. The rope broke, turning out to be decayed, and the seaman fell onto the deck. The rope was selected by the claimant (the injured seaman) from a box placed onboard the ship, which contained unused ropes, being a few years old. All the ropes looked fine from appearance but some turned out to be decayed.

On the question of whether the ship was unseaworthy due to being equipped with decayed ropes, the District Court held that it was seaworthy since there were other ropes on board of sound quality which could have been selected. The Court of Appeal held likewise. The Supreme Court reversed, on the basis that there was an increased risk of something going wrong with the mixture of sound and decayed ropes, hence the ship was found to be unseaworthy.

The case provides a simple illustration of the point at hand, also appearing in the *Sunna*. Should one look at the mere existence of good working condition of the ship and crew at any given time (in our context: at the commencement of the voyage), or should one look at the combination of potential risk factors and the likelihood of something going wrong during the voyage – in other words, considerations of foreseeable risks and causation?

Somewhat simplified, one could say that the Supreme Court in the *Sunna* and the Supreme Court of the U.S. both took the latter approach, that is, they adopted a "wide" concept of unseaworthiness. The same point is reflected in the *URD II* (above) where the concurring vote of the Supreme Court expressed a "narrow" perception of seaworthiness: that it sufficed to look to the formal-technical status of the ship and crew at the time of departure, without considering the likely further events, namely

[38] 1944 A.M.C. 1.

[39] See also Solvang (2021) ch. 5 with similar discussion of the U.S. case the *Racer*.

whether the combination of risk factors already in place might lead to an increased likelihood of a later casualty.

The same type of question came up in the *Sunny Lady* (above). Here the Supreme Court did consider the question of the likelihood of something going wrong in view of the prima facie deficiency at the time of departure: the flanges of the gauging pipes being overpainted, combined with a crew which at that time was inexperienced in the peculiarities of the ship. In that case, the subsequent mistake (filling of domestic water into the wrong pipe) was found to be an incident of nautical fault, and – notably – the ship was not considered to be initially unseaworthy. This latter position was reached through a combination of factors: the overpainted flanges constituted a kind of de-minimis defect, combined with the fact that the crewmembers were competent as such, and that there were reasons to expect that the crewmembers would be trained during the course of voyage and thereby learn the correct identity of the pipes. In other words, through a combination of such factors there was no sufficient foreseeable risk that something might go wrong (through the wrong use of the pipes) for saying that the ship was initially unseaworthy. In that sense, the Supreme Court, again, adopted a "wide" concept of seaworthiness.

It may be asked whether, at least in theory, a contrary view might have been taken in the *Sunny Lady*, in line with the causative approach taken by the Supreme Court in the *Sunna*. One could say that the facts as they materialized during the voyage in the *Sunny Lady* (the combination of overpainted pipe flanges with an inexperienced crew), would shed retroactive light on an increased risk already in existence at the commencement of the voyage, hence meaning that the ship was initially unseaworthy.[40] In other words, one could "count backwards" from the ensuing damage through the factors leading up to it, with these factors being traceable back to the initial condition of the ship (and crew), and

[40] And thus to require that the shipowner adduce evidence to the effect that there were proper procedures in place to cater for a proper training etc. of the new crewmembers so as to avoid the mishap that later ensued – along the line of prudent rectification of initial seaworthiness defects as discussed in chapter 2 above.

possibly end up with a conclusion of initial unseaworthiness. However, such "counting backwards" based on a mere causative approach, loses sight of the discretionary assessment of foreseeable risk at the time of commencement: would a prudent shipowner with knowledge of the relevant facts (overpainted flanges and inexperienced crew) have allowed the ship to sail? This concept, entailing notions of (reasonably) foreseeable risks, was applied in the *Sunny Lady* and answered by the Supreme Court in favour of the shipowner – and that conclusion hardly invites criticism.