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

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Contents

1 Introduction

In the realm of cargo carriage and shipowners' liability for cargo damage, the relationship between a shipowner's obligation to make the ship seaworthy at the commencement of the cargo voyage, and a shipowner's exemption from liability by nautical fault,[2] is potentially complex. Such complexity particularly involves the role of the master. He may in some respects be considered the servant of the shipowner for purposes of making the ship initially seaworthy, with his faults being imputed to the shipowner, while in other respects he may conduct acts of a nautical nature, with his faults not being imputed to the shipowner.[3]

The topic is at the core of the Hague/Hague-Visby Rules (HVR),[4] being ratified by Norway[5] and incorporated into the Maritime Code (MC). The HVR, aimed at international harmonization of this area of law, are of great prevalence, as they have been ratified by most maritime nations. Hence, case law from such other maritime nations is clearly of relevance when interpreting and applying the HVR, as implemented in the MC, under Norwegian law.

Despite this being so, decisions by the Norwegian Supreme Court are generally void of any reference to international legal sources. This is surprising, and stands in stark contrast to the modus operandi of the Supreme Courts of many other prominent maritime nations which have

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2 'Nautical fault' is here used as a term of convenience for the relevant fault "in the navigation or in the management of the ship", HVR art. IV 2 a) and MC s. 276. The term may be seen as slightly misleading since it was used in a narrower sense, restricted to navigation, in the Brussels Convention of 1957 on global limitation., see Borchsenius, Noen ord om uttrykket 'Feil eller forsømmelse i navigeringen eller behandlingen av skipet' i konnossementsloven § 4 nr. 2 a, AfS 2 1957 pp. 110 et seq.

3 The phenomenon of liability exception for nautical fault is in many ways an oddity, out of touch with today's legal reality – nevertheless it seems to persist. The Rotterdam Rules, which dispose of the nautical fault exception and were expected to replace the Hague/Hague-Visby Rules, seem not to be entering into force.

4 The abbreviation 'HVR' will be used as a collective term, however with the distinction between the two Conventions (the Hague-Rules and the Hague-Visby Rules) made where the context so requires.

5 That is: the Hague-Visby Rules.

ratified the HVR, such as England, Australia and New Zealand. This lack of reference by the Norwegian Supreme Court to international legal sources may have to do with the fact that when incorporated into the MC, the HVR were to a large extent re-edited and rewritten to suit the Norwegian style of legislating. Hence, where matters at the core of the HVR are under judgment, there may be a need to consult the original wording of the HVR, in line with general rules of construction of international conventions. However, the Norwegian Supreme Court's decisions are generally void also of this type of reference – again in stark contrast to the tradition of the Supreme Courts of other important maritime nations.

These methodological aspects provide grounds for reviewing a selection of Norwegian Supreme Court cases within the context of such international legal sources, i.e. by consulting the wording of the HVR and how that wording is construed and applied in relevant case law from other HVR nations. That is what this article aims at doing.[6] The relevant cases are first and foremost the *Sunna* from 2011 but also two older cases will be discusses; the *Faste Jarl* from 1993 and the *Sunny Lady* from 1975.

The essence of the article's findings is that the outcome by the Supreme Court in these cases are generally sound and in many ways compatible with views expressed internationally – however that important nuances of the HVR are overlooked or insufficiently understood.

2 The *Sunna* and the questions raised therein

2.1 The case

In January 2007 the *Sunna* grounded, close to the Orkneys, on its way from Iceland to England with a cargo of 1,900 tons of ferro-silicon. In

[6] A similar analysis is made by Mads Schølberg, Interpreting uniform laws – the Norwegian perspective, MarIus 475, 2017, pp. 147–201. Schølberg's work complements this article in that he also goes into public international law aspects of construction of the HVR and discusses Norwegian law sources in that respect.

violation of the prevailing safety rules requiring double watch keeping during night time sailing, only one person was on watch during the night of the incident. This person, the second mate, fell asleep. About one hour later the vessel grounded after having deviated from its plotted autopilot course, due to a side current. The cargo damage amounted to about NOK 280,000 for which the cargo interest claimed damages. The shipowner on the other hand claimed general average contribution from the cargo interest of about NOK 865,000 to cover the costs arising from salvage operation following the grounding.[7]

Part of the facts of the case was that a few months earlier the vessel had been subjected to sanctions by the Dutch Port State Control, i.a. due to non-compliance with the double watch-keeping rules, as revealed from inspection of the vessel's logbook. Following this sanctioning, the shipowner had taken some corrective measures, including that of arranging a meeting with the master and the second mate addressing the irregularities identified by the Port State Control. The master, however, persisted in his defiance of the rules, as evidenced by the later grounding.

Before the courts it was not in dispute that the second mate's falling asleep constituted nautical fault which, as such, would exempt the shipowner from liability. The more difficult issue was how to categorise the master's practice of non-compliance with the watch-keeping rules, considered to be the proximate cause of the grounding: had these rules been complied with, the incident would in all likelihood not have occurred, since two persons on the bridge would not both have fallen asleep.

The City Court[8] held in the favour of the cargo interest on the basis of privity on the shipowner's part: The shipowner had not demonstrated that – following the irregularities revealed by the earlier Port State Control – sufficient steps had been taken to ensure that the double watch-keeping requirement would be complied with. In other words, since there was privity on the shipowner's part, whatever the nautical

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7 Norwegian law was made applicable by reason of the claims being raised under tramp bills of lading, ref. MC s. 347.

8 Judgment of 06.06.2009 by Oslo City Court: 08-183359TVI-OTIR/04.

fault by the master which otherwise might exempt the shipowner from liability, it was overridden by such privity.

The further detail of the City Court's reasoning was that the ISM Code was formally found to have been complied with by the shipowner but that insufficient steps had been taken by the technical manager to inquire into prior incidents and to convey to the ship's officers the seriousness of the topic of non-compliance with the double watch requirements. In that respect the technical manager was considered to be part of the shipowning company's alter ego for the purpose of privity under MC s. 275 in combination with s. 276 i.f. In short: insufficient steps had been demonstrated by the shipowner to avoid an inference of privity under MC s. 275, hence there was no need by the Court to go into the question of possible exemption from liability through nautical fault. As part of this, the Court did not go into arguments by the shipowner as to what belonged to the shipowner's, as opposed to the master's, "sphere of control". The arguments by the shipowner in this respect was that the ship's technical navigational system was in order; the system contained alarms, both for the vessel being off-course and a "dead-man" device, but these were not in use, and were also not required to be in use (since there was a requirement for double lookout), and that all of this (whether or not to deploy the alarm devices) belonged to the master's "sphere of control", hence should be considered part of his nautical decision making.

The Court of Appeal[9] held in favour of the shipowner, on a combination of the following:

First, there was insufficient basis for establishing privity on the shipowner's part as the corrective measures following the shortcomings revealed by the Port State Control were considered to have been appropriate. In this respect the Court pointed to various steps having been taken by the shipowner, such as the issuing of a non-conformity notice to its officers highlighting the duty of safety rule compliance. Moreover, the entirety of the situation had to be seen within the context of it being obvious that such rules must be complied with; the master and officers onboard the ship clearly knew this, not least from being sanctioned by the Dutch Port Authorities.

[9] Judgment of 15.11.2010 by Borgarting Court of Appeal: 09-140485ASD-BORG/01.

Second, the master's failure to insist on double watch keeping during the night of the incident constituted nautical fault which as such exempted the shipowner from liability.

Third, there was no initial seaworthiness capable of overriding such exemption from liability, since when the vessel departed from load port, there was sufficient manning on the bridge (also during night time; the insufficient manning happened two nights later), with the vessel in itself being fully seaworthy and with officers and crew being sufficient in number and generally competent. In other words, the fact that the master later – on the night of the incident – decided not to comply with the double watch requirement, was considered to have an insufficient nexus back to the master's state of mind at the time of departure from load port. In other words, it did not constitute initial unseaworthiness. And even if it were to be so considered, it could easily have been remedied after departure, as evidenced by the fact that the lookout requirement was complied with the first two nights following departure from the load port.

The Supreme Court took a different approach from the lower courts. The Supreme Court found it unnecessary to go into the question of privity on the part of the shipowner. Instead, the Court found against the shipowner on the basis of initial unseaworthiness. The reasoning was that the master's non-compliant attitude towards the safety rules was a state of affairs already existing at the beginning of the voyage, as combined with the fact that at such time the vessel did not have in place a rule compliant bridge management plan for the upcoming voyage. In other words, this non-compliant bridge management plan brought about by the master, combined with the fact that there was no indication that the master intended to change his attitude and comply with the rules during the upcoming voyage, made the ship unseaworthy at the beginning of the voyage.

Moreover, although the shipowner was subject to a mere due diligence obligation to ensure that the vessel was seaworthy at the beginning of the voyage, the shipowner was in this respect vicariously liable for the acts of its employees, including the master. The master's non-compliant attitude was in this case clearly negligent (in fact wilful), hence the shipowner was

held vicariously liable for the vessel's initial unseaworthiness through the master's fault. Furthermore, based on such finding of liability for initial unseaworthiness, there was no need to go into the question of whether the conduct of the master constituted nautical fault, since the requirement for initial seaworthiness and its ensuing liability, would override any otherwise applicable nautical fault exception.

2.2 Comments to the case – methodological aspects and the international context

The Supreme Court decision makes good sense when viewed in the light of the MC and traditional Norwegian contract law principles of vicarious liability for faults committed by the servants of a contracting party. On the other hand: the questions at stake are complex, as illustrated by the different approaches taken by the different Courts, and the topic is within the core of the risk allocation system of HVR upon which the relevant provisions of the MC are based. The decision by the Supreme Court (and the lower Courts) is conspicuously void of any reference to the HVR and to the jurisprudence of other HVR states.

Moreover, reading the Supreme Court's decision, the very reference to the HVR is made in a way as to cast doubt on the Court's understanding of the background to the provisions of the Code. Other statements cast doubt on whether the Court understands essential features of the provisions, e.g. the relationship between liability exception for fire and nautical fault. This is important, since in the context of the HVR, some of the premises of the decision seem to be mistaken. That does not mean that the finding of the Supreme Court is "wrong" when seen in the wider context of the HVR. Probably it is also tenable within such a wider context. The point is rather that the Court makes it too easy for itself by merely looking at the MC and established principles of contract law (vicarious liability for servants' fault) in a Norwegian context. Moreover, the Court's finding that an event of initial unseaworthiness renders moot any question of navigational fault and its liability exception, is too simplistic.

Apart from the above methodological points, there is reason to highlight some factual points of the *Sunna* which are capable of explaining some of the differences of opinion between the three Norwegian court instances, and which at the same time may be of general interest in analysing the topic at hand within the wider context of the HVR.

First, what may appear as somewhat unclear is the nature of the master's fault in the *Sunna*. To simplify: if emphasis is placed on the master's mindset in relation to the upcoming voyage, that may point in the direction of a traditional situation of nautical fault; it could for example be the case that the master had planned to assess the forecasted weather conditions in order to decide whether to deploy single or double watch during night time. On the other hand, if emphasis is placed on a deficient bridge management system as a permanent state of affairs, the topic takes the appearance of a traditional unseaworthiness defect, on a par with other systemic failure involving ship safety, required to be in place before embarkation on the relevant voyage.

The facts of the case seem to consist of a combination of both. There was an established practice of non-compliance with the rules which at the same time meant that the master made ad-hoc decisions as to the need for deploying double night time watch keeping – as reflected in the case, in that the first night after the ship sailed from the Icelandic load port, there was in fact double watch deployed. [10]

This twofold fact seems essentially to account for the view of the Court of Appeal that the conduct of the master constituted nautical fault and that the ship was not initially unseaworthy. The Supreme Court, on the other hand, saw the dominant factor as being that of a failing bridge management system as part of the ship's characteristics, at the time of commencement of the voyage. In that sense the master's decision making on the night of the incident became of secondary importance to the Supreme Court's way of looking at it; this was a mere reflection of the failing practice already in place when the voyage commenced. The Supreme Court stated in this respect:

[10] P. 2 and 7 of the Court of Appeal's decision.

> "When it is in advance clear – due to the master's dispositioning of the crew – that the ship will generally not be seaworthy at night time, there is in my view also initial unseaworthiness. The voyage must in this respect be considered as a whole, and it becomes insignificant whether or not there was a failure in the bridge manning at the very moment the ship departed from berth. […] No evidence is adduced to the effect that it is likely that the master during the voyage would change his practice. The mere theoretical possibility that this might happen, is to me of no significance."[11]

The Supreme Court's fact-finding, and its emphasis on the inherent character of the defective bridge management system, is clearly not up for criticism. What is of interest is nevertheless to try to reconcile these different perspectives (below).

Second, what is left open in the Supreme Court's decision is the question of what constitutes nautical fault within the context of the case. The Supreme Court held it unnecessary to go into this question, as already explained. However, if one changes the emphasis on the nature of the master's conduct from that of failing to have a rule-compliant bridge management system in place, to that of intending not to deploy double watch keeping during the course of the voyage, there would be a greater need to have this point clarified. Unsurprisingly, the shipowner argued along these lines by stating:

> "One and the same mistake[12] cannot both constitute nautical fault under section 276 first paragraph and lead to initial unseaworthiness. In that case there would have to be another contributing cause to the accident. It would lead to erosion of the exception for nautical fault if one and the same mistake, committed by one and the same person, should also lead to liability under the rules of initial seaworthiness."[13]

This submission that one and the same fact cannot lead to two irreconcilable legal consequences, is as such trite. However, the Supreme Court

11 Paras 48 and 49 – my translation.

12 Norwegian: 'forhold', signifying the more neutral: 'condition', 'event' or 'cicumstance'.

13 Para. 23 – my translation.

did not conduct any analysis of it, on the footing that initial unseaworthiness in any event overrode nautical fault – a topic which is worth looking further into (below).

A still further point of uncertainty concerns the aspect of the shipowner's vicarious liability for the master's mistake. This in turn has a connection to the above two points: If one were to view the master's fault as that of failing to implement a rule compliant bridge management system (as held by the Supreme Court), this would be considered a task delegated to the master on a par with other aspects of ensuring the ship's seaworthiness.[14] If, on the other hand, one takes the view that the master's mistake consisted in not intending to deploy double watch keeping during the voyage, hence the mistake (arguably) being nautical in nature, the point about vicarious liability becomes less clear.

The point in this respect would be that the ship might well be considered to be initially unseaworthy by reason of the master's non-compliant intentions, but as long as the master was – by appearance – competent, it seems questionable whether such a seaworthiness defect would be something for which the shipowner is liable. The situation could be characterised as that of "human latent defect" along the following lines: a) a decision by the master, being made at the time of the commencement of the voyage, is nautical in nature, while at the same time such decision would make the ship unseaworthy; b) the shipowner is not liable for the master's faulty nautical decisions, while at the same time being vicariously liable for its servant's mistakes in making the ship initially seaworthy; c) is the shipowner then liable for the master's mistake?

In this respect it should be noted that the overall competence of the master and crew was not in question in the *Sunna*. Moreover, and as we have seen, the shipowner argued that the shipowner would not be vicariously liable for the master's conduct even though such conduct con-

[14] See as an example the English case, the *Eurasian Dream*, Lloyd's Rep. 2002, 2, 692, involving the liability exception of fire and where the master had failed to implement prudent firefighting routines before commencement of the voyage. In that case the master was however (also) found to be incompetent due to his lack of experience with the relevant type of ship, and the shipowner was found negligent in not having procured the relevant training of and instructions to the master.

stituted a defect in the ship's seaworthiness, since the master's mistake was nautical in nature. The Supreme Court dismissed this point by holding that a shipowner's obligation of initial seaworthiness would override whatever nautical fault defences, as already explained.

The various points of facts and law here outlined give occasion for a deeper analysis of the topic.

3 Some structural points relating to the Hague-Visby Rules and their transformation into the Maritime Code

3.1 The wording and structure of the two sets of rules

A premise in common to the above stated questions concerns the relevant provisions of the MC and their relationship to those of the HVR. This area of the law – the relationship between nautical fault and initial unseaworthiness – may appear obscure, as also reflected in parts of the Supreme Court's decision in the *Sunna*. This obscurity is in turn an aspect of the MC having been detached from the original wording of the HVR.[15]

It may therefore be of value to review the above questions in a broader legislative context, by giving an account of the relationship between the HVR and the legislative product of the MC, while also giving an example of how foreign courts may approach some core elements of the topic being discussed.

[15] It does not help that the HVR themselves are partly piecemeal, not being made out in a traditional Norwegian/civil law way of drafting legislation, see also Solvang, Shipowners' vicarious liability under English and Norwegian law, MarIus 541, 2021, pp. 57–58, and Solvang, Choice of law vs. scope of application – the Rome I Regulation and the Hague-Visby Rules contrasted, MarIus/SIMPLY 535, 2020, chapter 2.3.

The structure of the HVR is straightforward. Art. III 1 sets out the shipowner's[16] obligations before and at the beginning of the voyage. This entails a due diligence obligation divided into three separate points: i) to make the ship itself seaworthy, ii) to properly man the ship, and iii) to make the ship cargoworthy.

Apart from these obligations attaching at the time of commencement of the voyage, there is a separate obligation in art. III 2 to care properly for the cargo during the various operations while in the shipowner's custody.

Art. III states:

"1. The carrier shall be bound before and at the beginning of the voyage to exercise due diligence to:

a) Make the ship seaworthy;

b) Properly man, equip and supply the ship;

c) Make the holds, refrigerating and cool chambers, and all other parts of the ship in which goods are carried, fit for their reception, carriage and preservation.

2. Subject to the provisions of Article IV, the carrier shall properly and carefully load [...] carry [...] and discharge the goods carried."

Art. IV then sets out the relevant exceptions from liability, the so-called Catalogue, where we shall restrict ourselves to the nautical fault exception. Article IV opens by rephrasing the shipowner's due diligence obligations under art. III, and then goes on to state the events for which the shipowner is not liable, among them the nautical fault exception.

Art. IV states in its main parts:

"1. Neither the carrier nor the ship shall be liable for loss or damage arising or resulting from unseaworthiness unless caused by want of due diligence on the part of the carrier to make the ship seaworthy and to secure that the ship is properly manned, equipped and supplied, and to make the holds […] and all other parts of the ship in which goods are carried fit and safe for […] carriage […] in accordance with the provisions of paragraph 1 of Article 3 […].

2. Neither the carrier nor the ship shall be responsible for loss or damage arising or resulting from:

[16] I use the term 'shipowner' while the HVR use the term 'carrier', primarily intended for liner service and carriage of general cargo, as well as under tramp bills of lading where the term 'shipowner' would normally be used.

(a) Act, neglect or default of the master, mariner, pilot, or the servants of the carrier in the navigation or in the management of the ship.

(b) Fire, unless caused by the actual fault or privity of the carrier

[…]

(p) Latent defects not discoverable by due diligence

(q) Any other cause arising without actual fault or privity of the carrier, or without default or neglect of the agents or servants of the carrier, […]."

The structure of the MC differs from that of the HVR.

Article III is reflected in MC s. 262 with the slight difference that art. III 1 and 2 when reproduced in MC s. 262 have changed places. Moreover, the point in art. III about the obligation of seaworthiness being restricted to the time of commencement of the voyage, is left out in MC s. 262 (which merely includes it as part of the shipowner's general duty of care) and instead appears in the exemption from liability in MC s. 275, by way of MC s. 276.

MC s. 262 reads:

"The carrier shall perform the carriage with due care and dispatch, take care of the goods and in other respects protect the interests of the owner from the reception and to the delivery of the goods. The carrier shall ensure that the ship used for the carriage is seaworthy, including it being properly manned and equipped and that the holds […] are in proper condition for receiving, carrying and preserving the goods. […]."

MC s. 275 sets out the basis of liability by providing the general rule that the shipowner is liable for cargo damage if caused by negligence by the shipowner or anyone for whom he is responsible, reflecting the shipowner's obligation as set out in HVR art. III 2, as mirrored by the liability scheme in art. IV 1 and 2 (q).

MC s. 276 then sets out the shipowner's exemption from liability, stating that the shipowner is not liable for nautical fault nor for fire unless caused by privity of the shipowner – as taken from HVR art. IV 2 (a) and (b). MC s. 276 then sets out the reservation of these exemptions with respect to initial unseaworthiness, for which the shipowner will be liable if caused by negligence by him or by anyone for whom he is responsible.

MC s. 276 states:

"The carrier is not liable if the carrier can show that the loss resulted from:

1) Fault or neglect in the navigation or management of the ship, on the part of the master, crew, pilot or tug or others performing work in the service of the ship, or

2) Fire, unless caused by the fault or neglect of the carrier personally.

The carrier is nevertheless liable for losses in consequence of unseaworthiness which is caused by the carrier personally[17] or a person for whom the carrier is responsible failing to take proper care to make the ship seaworthy at the commencement of the voyage.[…]"

This latter part concerning initial seaworthiness is adopted from HVR art. III 1 (as rephrased in art. IV 1) although slightly rewritten and structurally rearranged. It is rewritten in the sense that the MC reference to the liability of the shipowners' servants, is *not* similarly expressed in art. III 1 (for the significance of which, see below). It is rearranged, in that the shipowner's obligation in respect of initial seaworthiness (art. III 1), is instead put as an exemption to the shipowner's exemption from liability by reason of nautical fault or fire – while the art. III 1 obligation concerning initial seaworthiness is in a "diluted" sense reproduced in MC s. 262.

In summary: There are differences, both in the structure and in the wording of the two sets of rules. Although the MC is intended to reflect the content of the HVR, it is doubtful whether this is in fact achieved on important points of construction.

3.2 Approach to construction illustrated by the New Zealand Supreme Court case, the *Tasman Pioneer*

This type of rewriting of the HVR when implemented into the MC may have good policy reasons, which we shall not discuss here.[18] It is nevertheless worth pointing to the obvious: when e.g. the so called Catologue (of liability exceptions in art. IV) is removed from the system of the MC,

[17] I.e. privity, a term which due to its brevity in that context has led to considerable confusion, which does not arise under the HVR wording.

[18] As to the background for removal of the Catalogue, see e.g. Solvang (2021), pp. 57 and 93–94.

one loses important connecting factors to how those parts of the Rules are construed in countries where the Catalogue is retained.[19] Moreover, essential perspectives on the understanding of the HVR risk being lost in the process of such rewriting.

The New Zealand Supreme Court case, the *Tasman Pioneer*[20] from 2010, may serve as illustration of the approach taken when the HVR are left intact in domestic legislation.[21]

The case concerned the scope of the navigational fault exception in grave cases of misconduct by the master; whether the exception should be somehow censored or curtailed by general principles of disloyal conduct, something the Supreme Court answered in the negative.

The circumstances of the case were: 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.[22] 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,

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19 In this respect: It is not the case that judges in those countries do not realise that part of the Catalogue may be considered moot in view of the shipowner's general liability for negligence. Obviously they see this – as did Brækhus when objecting to legislating the Catalogue, see Solvang (2021) pp. 57 and 93–94. However, even if part of the Catalogue may appear "illogical", it does not detract from the value of having the same text as a basis for uniform construction. See comments by the Court of Appeal in the *Tasman Pioneer*, below.

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

21 In the form of the New Zealand Maritime Transport Act 1994, implementing the HVR.

22 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.

and when learning about the true facts, the cargo owners rejected the shipowner's 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 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.

The Supreme Court starts its analysis by giving an account of the essence of the HVR, by looking at the relationship between HVR art. III and art. IV (and in that regard not with the wording of art. III being "hidden" as in the MC s. 262). Moreover, the Court emphasizes the relationship between the two articles by looking at what is considered to be within the "direct control" of the shipowner for purposes of initial seaworthiness, as opposed to what falls within the prerogative of master and crew as nautical fault exceptions:

> "The scheme of the Rules is clear. Carriers are responsible for loss or damage caused by matters within their direct control (sometimes called "commercial fault"), such as the seaworthiness and management of the ship at the commencement of the voyage. This allocation of risk is confirmed by article 3.2 being made subject to article 4 and by the inapplicability of article 4.2(b) and (q) exemptions in the event of "actual fault or privity" of the carrier. The allocation of responsibilities between the carrier and the ship on the one hand and the cargo interests on the other promotes certainty and provides a clear basis on which the parties can make their insurance arrangements and their insurers can set premiums."[23]

[23] Para. 8 of the decision and with reference to and approval of the approach taken by the Australian High (Supreme) Court in the *Bunga Seroja*, below.

The Court goes on, for the purpose of that case, to inquire into the history of the nautical fault exception in art. IV 2 a), aided by the preparatory works of the Hague Rules, as to why the exact wording of that provision was chosen:

> "This clause, Article IV, is the shipowners' clause. Now, Sir, I would venture to remind the Committee that we have dealt with the cargo interests clause in Article III, and we have agreed and accepted the actual words that the cargo interests have put forward imposing the obligations on the ship with regard to seaworthiness, and, what is more important, we have accepted Article III (2), which says that "The Carrier shall be bound to provide for the proper and careful handling … of the goods carried." We have not sought to weaken those or qualify those in any way. When we come to Article IV (2) our big point is the navigation point, and what we have asked is that we should have the words which from time immemorial have certainly appeared in all British bills of lading. …"[24]

The purpose of that reference to the preparatory works of the Hague Rules (preceding the HVR) was to provide a route into the further history of that wording as guidance to construction of the nautical fault exemption. As part of that inquiry the Court also looks to the understanding of the exemption as expressed in foreign case law, e.g under English, German, French and Dutch law (the latter three belonging to the civil law tradition).[25]

Likewise, it may be of interest to look at the methodological approach taken by the Court of Appeal in the *Tasman Pioneer*.[26] After having discussed the nature of the HVR liability exceptions in art. IV,[27] the Court states:

[24] Para. 23 with quotes from Sturley (editor), The legislative History of the Carriage of Goods by Sea Act and the Travaux Preparatoires of the Hague Rules, Colorado 1990.

[25] Paras. 23 and 26.

[26] Lloyd's Rep. 2009, 2, 308.

[27] Realising, by quoting the Australian High Court in the *Bunga Seroja* (p. 326), that art. IV litras d, e, f, g, h, j, k, l, m, n, and p, would have little effect apart from the shipowner's general liability for negligence. This shows that also in modern times this Catalogue can be dealt with sensibly, and that it would not need to be stricken out of legislation as "illogical", as has been the position of the Norwegian legislature, see Solvang (2021) pp. 57 and 94–95.

> "However the antidote may be that the carrier does have a duty 'to properly man … the ship' pursuant to Art III, r 1 (b) and by doing that should be regarded as having fulfilled its obligation in that regard to the shipper. Subpara (a) fits naturally into the reality, at that time, that the master at sea, being in command […] has to make decisions in the navigation and management of the ship all the time. Mr. Gray [for the shipowner] is right to caution the court against taking into account the modern day constant contact between owner or charterer or their agents on shore and the bridge of the ship. The Conference could have adopted a policy that the ship owner was going to be liable for the consequences of such decisions by the master. It decided to the contrary."[28]

This illustrates both the oddity of the nautical fault exception in modern times, and the need for a conscious attitude towards how to apply it, by looking into the text and history of the HVR. Although this example of the methodological approach is taken from New Zealand law, similar examples can be taken from other HVR nations, such as the Australian High Court (below) or from English courts, as in the Commercial Court decision of the *Eurasian Dream*,[29] which provides a synthesis of principles governing the application of HVR art. III 1 and 2 and their interaction with art. IV.

3.3 Approach to construction illustrated by the Australian High Court case, the *Bunga Seroja*

A further example which illustrates important methodological aspects when construing the HVR can be taken from the Australian High Court[30] in the *Bunga Seroja*[31] from 1999.

In his leading speech, Lord Gaudron stated:

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28 P. 236.

29 Lloyd's Rep. 2002, 1, 719.

30 The Australian High Court in effect means the Supreme (federal) Court. The case concerned an appeal from the Supreme Court of New South Wales.

31 Lloyd's Rep. 1999, 1, 512.

> "In understanding the operation of the Hague Rules,[32] there are three important considerations. The rules must be read as a whole, they must be read in the light of the history behind them, and they must be read as a set of rules devised by international agreement for use in contracts that could be governed by any of several different, sometimes radically different, legal systems. It is convenient to begin by touching upon some matters of history."[33]

Elsewhere, Lord Gaudron stated: "Because the Hague Rules are intended to apply widely in international trade, it is self evidently desirable to strive for uniform construction of them."[34]

That case concerned the concept of perils of the sea, which is of no direct relevant to our *Sunna*-related topics.[35] But it is worth noting that after reviewing the historical part of the Rules, the Court dealt, under separate headings, with first, "The Hague Rules as an international agreement", second, "Reading the Hague Rules as a whole", and third, "Uniform construction".

Under this last point the Court reviewed American, Canadian, English, German and French case law.[36] That is noteworthy, since one could expect that the Court confined its review to (other) common law systems. That was not the case. German and French law belong to the civil law tradition. This point about legal traditions was expressly addressed (by Lord Kirby):

> "[The need for uniform harmony] is the reason why it would be a mistake to interpret the Hague Rules as a mere supplement to the operation of Australian law governing contracts of bailment. That law, derived from the common law of England, may not be reflected

32 Which in our context makes no difference from the HVR.

33 Para. 9.

34 Para. 38.

35 Perils of the sea belong to the so called Catalogue; HVR art. IV a)-q), see for a background to why this part was taken out in the Norwegian (and Nordic) legislation, Solvang (2021) pp. 57–58 and 93 (in small print). See for a broader account of the legislative policy behind the MC and its relation to the HVR (and the Hamburg Rules), Solvang (2020) p. 158 et seq, at pp. 167–174.

36 Paras. 43–48.

> in, or identical to, the equivalent law governing carriers' liability in civil law and other jurisdictions. The Hague Rules must operate in all jurisdictions, whatever their legal tradition."[37]

Moreover, caution was raised against letting construction of the Rules become influenced by domestic law principles. Lord Kirby stated:

> "Reflecting on the history and purpose of the Hague Rules, the Court should strive, so far as possible, to adopt for Australian cases an interpretation which conforms to any uniform understanding of the rules found in the decisions of the Courts of other trading countries. It would be deplorable if the hard won advantages, *secured by the rules*, were undone by serious disagreement between different national Courts."[38]

It seems clear that this statement of intended harmony "secured by the rules", envisages the rules themselves being essential, structurally and otherwise, as the respective nations' adoption of the HVR, a point which is entirely lost in the Norwegian Supreme Court's approach to the *Sunna*.

Moreover, these methodological statements made in the *Bunga Seroja* were referred to with approval by the New Zealand Supreme Court in the *Tasman Pioneer* (above). English cases concerning construction of the HVR contain similar statements of approach involving foreign law.[39]

3.4 Illustration of inadequate approach of construction taken by the Norwegian Supreme Court in the *Sunna*

In contrast to these foreign law elaborate considerations on the construction of the HVR, we may look at some examples of considerations of construction adopted by the Norwegian Supreme Court in the *Sunna*

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37 Para. 138.

38 Para. 137 – my emphasis.

39 See e.g. the *Jordan II,* 2005, 1, WLR 1363, and the *Libra* (below).

– with sole reference to the provisions of the MC, detached from their roots in the HVR.

One example concerns the Supreme Court's discussion of the privity reservation of the fire exception and its pendant to the nautical fault exception in MC s. 276. In that respect the Court states:

> "The exceptions in section 276 first paragraph only concerns nautical fault and fire *which are not attributable to the carrier's privity*. In the provision for fire this follows from the wording itself, cf. also Rt-1976-1002 (Høegh Heron). The same must also apply to nautical fault, cf. Thor Falkanger and Hans Jacob Bull: Sjørett (7th edition) page 262, 267 and 270 and Fredrik Sejersted: Haagreglene (the bill of lading convention) (3rd edition) page 64."[40]

Clearly that is right as a matter of law, but the mere fact of putting the question this way reveals a surprising lack of understanding, both as to the nature of a navigational fault exception and the scheme of the HVR. To say that "the same [a reservation of privity] must apply also to nautical fault", misses the point: nautical matters are within the prerogative of master and crew, hence outside of the owner's "direct control", as that phrase was used in the *Tasman Pioneer*.

It would therefore be a contradiction in terms to have the nautical fault exception supplemented with an express reservation of privity, as opposed to events of fire, since fire is not an "act" (of navigation or similar). It is simply what it is: fire. And clearly there is here a need for a reservation with respect to shipowners' privity, since otherwise the shipowner would (at least prima facie) be exempt from liability in all cases of fire, which clearly would not make sense.[41]

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[40] Para. 36 – my emphasis.

[41] A separate matter is that privity in this context must mean privity (proper) under English law, i.e. fault at the alter-ego level of the shipowning company, not fault by whoever servants or agents, such as the master, crew or ship personnel, see e.g. Cooke et al, Voyage Charters, 2007, p. 1027. Still a separate matter is that the general requirement that fire must not be attributable to negligence on the shipowner's part (or his servants) in making the ship initially seaworthy, applies also here.

This confusion concerning the concept of privity has ramifications. The City Court in the *Sunna* put up as a main question for discussion whether the superintendent of the shipowner belonged to the company's managerial (alter-ego) level for the purposes of asking whether the superintendent had taken sufficient steps to ensure that the master understood the seriousness of the situation, i.e. the importance of complying with the safety rules. The City Court found that the superintendent did belong to the managerial level of the company and that he had not taken such sufficient steps.[42]

One could then ask: if the City Court had found that the superintendent had *not* belonged to the managerial level but he still had not taken the required steps, should this mean that there was no basis for holding the shipowner liable, through negligence by its servant, i.e. the superintendent? As far as I can see, the shipowner would be so vicariously liable, as there is no basis in the HVR for operating with "privity" in this respect. The confusion seems to stem from the drafting technique behind MC s. 276.

The Supreme Court in the *Sunna* takes the same misconceived approach when stating: "Since the carrier must be vicariously responsible for the master's mistake, there is no need to go into whether the shipowning company itself [i.e. through privity] has committed a wrong, leading to liability."[43]

This premise does not make sense, since there would here be no need to prove privity.

Admittedly there may occasionally be questions of negligence on the the shipowner's part (through land based servants) being intermingled with nautical decision making by those on board, as illustrated in the Icelandic Supreme Court decision the *Vikartindur* from 2000.[44] The situation was that the master considered whether or not to accept tug boat assistance in a situation of distress caused by engine blackout. While in this situation of distress and while considering whether or not to accept the offer of assistance, he stayed in radio contact with the shipowner's office ashore. He ended up not accepting the offer of assistance as he believed the crew would succeed in restarting the engine

42 Or that the shipowner had not fulfilled its burden of proof in that respect, pp. 12–17 of the City Court's decision.

43 Para. 53.

44 ND 2009.91.

in time to avoid grounding. This did not happen; the ship grounded and the cargo was damaged. The decision not to accept assistance was clearly nautical in nature. The question was whether this decision was solely master's own or whether it was influenced by the shipowner's personnel ashore . The Court found that the decision was solely that of the master, based on his nautical considerations.

Even if such a decision were to be considered to have been (sufficiently) caused by shore side personnel, this would, as stated, not necessarily involve "privity" on the shipowner's side; those in the shore side office may not necessarily possess a position as the alter-ego of the shipowning company. However, in order not to dilute the navigation fault exception, it would require an unusual set of facts to end up in a situation where the master "surrenders" his prerogative of decision making to the shore side – see also comments to this effect in the above quote from the Court of Appeal in the *Tasman Pioneer*.

A separate point is that in the future world of remote controlled ships, navigational functions may be transposed to shore.[45] In that sense the navigational exception may become "shore based" and, if so, it may be that the delineation of navigational functions will be more intertwined than today with what is considered to be within a shipowner's "direct control". In other words, it may be that (today's) navigational functions will have a seamless transmission into other technical-strategic functions not naturally called navigation belonging to the sphere of "acts of seamanship".

The point in this respect is however that there is a double type of misconception on the part of the Supreme Court in the *Sunna:* a) that to ask, as the Court does, for a privity reservation in situations of nautical fault, makes limited sense, b) that if such a reservation were to be inserted, it would be a different kind of "privity" from that related to the liability exception for fire; it would be negligence, rather than "privity".

Another example of the Supreme Court's reasoning in the *Sunna* concerns the delineation between the shipowner's initial seaworthiness obligation and the nautical fault exemption. The Supreme Court found no reason to go into this as the case was decided on the basis that there was initial unseaworthiness held to override whatever nautical fault exception, but the Court still stated as a general point of construction:

[45] See e.g. Collin, Unmanned ships and fault as the basis of shipowner's liability, Autonomous Ships and the Law, (edited by Ringbom, Røsæg, Solvang), Routledge, 2021, p. 85 et seq.

> "According to section 276 second paragraph the carrier is nevertheless liable for losses resulting from unseaworthiness at the commencement of the voyage. The scope of this provision may appear somewhat uncertain. But it is in any event clear that it constitutes 'an exception from the exception' in that the carrier will be liable for initial unseaworthiness even if there is nautical fault falling within section 276 first paragraph."[46]

As a general statement, it is far from obvious that this is so. Also this concerns what is addressed by the New Zealand Supreme Court in the *Tasman Pioneer*: what is within the prerogative of the master in terms of navigation, is at the same time considered to be outside of the shipowner's "direct control". Therefore, there may well be situations of navigational decision making by the master which may occur (also) before departure from load port.

This pertains to a difficult dividing line to which we shall later return. The point in the present respect is that such a categorical statement as that set out by the Supreme Court, is not occasioned by the wording of the HVR in the way it (perhaps) is by MC s. 276. In the context of the HVR, there is a question of breach of art. III 1 as an "overriding obligation" which does not allow for application of the nautical fault exception. However, art. III 1 does not answer the point in any particular way, hence the editing of MC s. 276 may appear misleading. Put differently, art. III 1 sets out the obligation of the shipowner i.a. to properly man the ship, but this does not answer the question of the role of the master and the time aspect of his navigational decision making. Therefore, from the wording of the HVR and its general scheme (as e.g. expressed in the *Tasman Pioneer*), it is far from clear that a nautical fault cannot extend into matters which may be viewed as constituting initial unseaworthiness.

Another point of a similar nature goes to the Norwegian Supreme Court's making use of legal arguments taken from the MC but which do not form part of the HVR. The Court's line of arguments in the *Sunna*, ending up with liability for initial unseaworthiness, and the analysis of

[46] Para. 37.

the master's role in that respect, takes as a starting point that the master is subject to a duty, under MC s. 131, to ensure that the ship is seaworthy before embarking on a voyage.[47] This legislative duty forms no part of the HVR, as the governing scheme for deciding questions of liability for cargo damage. That is not to say that it would be "illegitimate" to take supporting arguments from other provisions of the MC than those implementing the HVR. However, an abnormality which may ensue is that MC s. 131 imposes a duty on the master also to retain the ship in a seaworthy state during the voyage, while here the nautical fault exception of the HVR and the MC clearly applies, thus rendering MC s. 131 nugatory for the purpose of the risk allocation system of the HVR, as implemented in MC s. 262, 275 and 276.

This type of argument therefore may lend a false premise to the role of the master as seen within the risk allocation system of the HVR.

Furthermore, the Supreme Court makes one reference only to the HVR, in connection with the background of the nautical fault exception in MC s. 276. Part of what is stated therein is simply not correct. The Supreme Court states:

> "[Section 276] is aligned to[48] [sic] the international bill of lading convention of 1924 as amended by protocol of 1968, the so called Hague-Visby-rules. The main rule in section 275 establishes an ordinary negligence and vicarious type of liability but with reversed burden of proof. The exemptions from liability[49] are peculiar to international sea carriage. They arose as compensation for the fact that the carriers during the negotiations for the Hague-Visby-rules had to accept the burden of proof rules in section 275, see Norsk Lovkommentar[50] – the maritime code, footnote 500."[51]

47 Para. 48, where it is stated that the duty under MC s. 131 also applies during the voyage.

48 Norwegian: 'er tilpasset', a term which is symptomatic of the Court's lack of reference to the HVR, although as a matter of fact Norway has ratified those rules, thus undertaking to be bound by them – 'alignment' is therefore not the appropriate legal term.

49 In Norwegian: 'ansvarsbegrensningen', which literally means 'the limitation of liability' but which is a separate matter from 'exemption from liability' ('ansvarsunntak').

50 Norwegian Statutory Commentary (to the MC Chapter 13).

51 Para. 34 – my translation.

This latter sentence simply does not make sense. The nautical fault and fire exceptions are left unamended from the inception of the Hague rules of 1924, and their insertion at that time came about as a compromise between the cargo merchants and the carriers – as stated above by the New Zealand Supreme Court, and as set out in numerous other sources, including Norwegian textbooks.[52]

These were some remarks on the structure and the manner of implementation of the HVR, which are of general importance to the below closer review of the *Sunna* case as analysed within such a wider context of the HVR and relevant international sources.

4 The nature of nautical fault and its relationship to initial seaworthiness

4.1 The problem

Returning again to the *Sunna*, the Supreme Court there held that there was no need to go into the nature and scope of nautical fault exceptions since there was in any event initial unseaworthiness for which the shipowner was liable – through the mistakes made by the master.

These topics are potentially complex and will be reviewed in the following. It is worth setting out the essence of the Court's reasoning on this point.

> "A prudent shipowner would not – had been aware of the subject matter [that a rule compliant bridge management system had not been implemented] – have allowed the ship to commence the voyage with a system of watch keeping which exposes the cargo to a significantly increased risk."[53]

[52] Falkanger/Bull, Sjørett, 2016, pp. 278–280.

[53] Para. 48 – my translation.

This involves the test of seaworthiness and the due diligence obligation imposed on the shipowner. The Court then goes on to state:

> "It is obvious that the master has not exercised due diligence in ensuring seaworthiness of the vessel. [The shipowner] is in this respect vicariously responsible for its captain so that his mistake is considered the mistake of the shipowner [reference to legal commentary and also Rt. 1993.965 *Faste Jarl*]. When a disposition by the master has led to unseaworthiness of the vessel at the beginning of the voyage it is, as stated, of no relevance whether his mistake also might be seen as a nautical fault covered by section 276 first paragraph. Accordingly it seems clear to me that the shipowner cannot relieve itself of liability on that basis. Since the shipowner is vicariously responsible for the mistakes of the master, it is not necessary for me to render a decision on whether or not there is privity on the shipowner's part."[54]

These statements are at the core of what will be discussed below. For the purpose of such discussion it is of interest to look at how the shipowner argued its case, contrary to the Court's finding as quoted above. The shipowner's arguments are summarised by the Court as follows:

> "Both the direct mistake leading to the grounding – the falling asleep of the second mate – and the master's decision not to keep double watch during night time sailing, are nautical faults for which the shipowner is not liable […]. Even if the master should have decided not to comply with the regulation about double watch keeping already before the vessel departed, it still constitutes part of his nautical management of the vessel which falls outside the scope of commercial fault for which the shipowner is responsible. The provision in section 276 second paragraph of the Maritime Code which imposes liability on the shipowner for unseaworthiness at the beginning of the voyage, is not applicable. The same condition cannot constitute both a nautical fault […] and entail initial unseaworthiness. If so, there will have to be a different, contributory [medvirkende] cause to the incident. It would lead to erosion of the exception for nautical fault if one and the same

[54] Paras 52–53 – my translation.

> mistake, committed by one and the same person, could also lead to liability under the provision for initial unseaworthiness."[55]

These remarks are interesting. They comprise the essence of the potential complexity of the matter when seen in the context of what may be called international sources related to the HVR, although, surprisingly, the views of the shipowner seem not to have been substantiated by such international sources.

As part of the above position taken by the shipowner it may be worth recalling that the City Court did seemingly not consider the master to be the shipowner's servant for purposes of making the ship seaworthy. If it had done so, it would be unnecessary to find privity[56] on the shipowner's part in not sufficiently ensuring that the master complied with the safety rules. It would have sufficed merely to refer to the master's mistake, just as the Supreme Court found it unnecessary to form a view on the question of privity.

Moreover, it is worth recalling the still differing view taken by the Court of Appeal; that the master was as such competent; that there was in place on board a manual, easily accessible, containing the safety rules; that the shipowner's inspectors had every reason to believe that the master knew about the rules – and that whatever happened during the voyage was a matter to be assessed by the nautical fault exception which the Court of Appeal found applicable.

For the purpose of our discussion the problem can therefore be summarized: What is nautical fault? What is the relationship between it and the shipowner's obligation of initial unseaworthiness? What are the duties delegable to the master as part of the shipowner's obligation of initial seaworthiness? In this latter respect, the problem in the *Sunna* was in a sense that the master himself was the cause of the unseaworthiness, and in that respect: can the master be the shipowner's delegate for the purpose of "rectifying himself" as a seaworthiness deficiency?

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55 Paras 22 and 23.

56 A separate point is that the use of the term privity is misconceived, as earlier explained.

4.2 The nature and scope of nautical fault

As a starting point it is worth highlighting the twofold nature of the fault in question. To simplify: if emphasis is placed on the master's mindset in relation to the upcoming voyage, that may point in the direction of a traditional situation of nautical fault. An isolated instance of not deploying double watch during the course of a voyage, would typically be categorized as a nautical fault, as it would be the result of the master prerogative and decision making. On the other hand, if emphasis is placed on a deficient bridge management system as a permanent state of affairs, the topic takes on the appearance of a traditional unseaworthiness defect, on a par with other systemic failures, which would typically be categorized as initial seaworthiness defects lying within the shipowner's "direct control" (as the point was formulated by the New Zealand Supreme Court). The facts of the *Sunna* seem to consist of a combination of both (above).

From this brief account of the complex nature of the factual aspects of the relevant fault, we turn to some central aspects of how the nautical fault exception is regulated in the HVR.

The system of the HVR may be recalled whereby under art. III the shipowner is, first, obliged to exercise due diligence to provide a seaworthy ship and, second, to properly care for the cargo while in his custody during the voyage – and with the basis of, and exceptions from, liability set out in art. IV, including that of the nautical fault exception, in terms of "act, neglect or default […] in the navigation or in the management of the ship."

It is worth noticing that this combination of setting out the obligations of the shipowner (in art. III) and immunities and exceptions from liability (in art. IV) does not explicitly regulate situations of overlap; e.g. whether nautical faults could be said to exist already at a time before the ship departs from load port.

Moreover, under the HVR, one delineation to be made has to do with whether the relevant fault primarily concerned management of the ship (for which liability is excepted in art. IV), or instead management of the cargo (constituting breach of art. III 2 with no exceptions applicable).

This delineation is of no direct concern for the present inquiry but it is worth noticing that on this point Norwegian and English case law seems to be well aligned.[57]

Another delineation concerns the nature of navigational fault itself. Under English law there is a fair number of cases dealing with this topic while under Norwegian law there seems to be none. Essentially, the point under English law is that in order to qualify as a navigational fault, the fault has to deal with seafaring aspects in a fairly narrow sense; it must involve matters of "seamanship". This kind of narrow construction should be seen in the light of general rules of construction pertaining to contractual exclusion clauses, which have their parallel under Norwegian law.

Moreover, these cases concerning the nature of navigational fault under English law, involve a different delineation from the one above concerning nautical mismanagement of the ship, as opposed to mismanagement of the cargo. If a fault is not sufficiently "seamanship-like" to qualify as a navigational fault, the shipowner is rendered liable by virtue of the fact that there is no exception from liability applicable to an act of negligence committed by the shipowner or his servants. It is, therefore, not so much that a non-qualifying navigational fault necessarily means that the fault relates to (mismanagement of) the cargo. The point is rather that within the context of the HVR, there will be liability if such non-qualifying navigational fault leads to damage or delay to cargo.

Not all the English cases of relevance in this respect deal with cargo damage. They may instead deal with claims for mere financial losses under charterparties incorporating the HVR through paramount clauses, or otherwise containing similarly worded liability exceptions for nautical fault as that of the HVR. These cases are however generally viewed as

[57] The English Commercial Court decision, the *Hector,* Lloyd's Rep. 1995, 2, 218 (pp. 234–235), concerned failure to properly tighten wedges for the purpose of holding the hatch covers in place. Such failure was found to constitute nautical fault as it primarily concerned safety of the ship. The case has its direct parallel in the Norwegian Court of Appeal decision, the *Ulla Dorte*, ND 1987.229.

being of relevance to the navigational fault exception also within the context of cargo damage and the HVR proper.[58]

The House of Lords case, the *Keifuku Maru*[59] from 1925, illustrates the point that the concept of navigational fault may have a narrower meaning than encompassing any decision making by the master while sailing en-route. In that case the master did not keep the required speed, due to failing to feed the machinery with sufficient bunkers coal. This failure was held to be of a general managerial nature, not sufficiently seamanship-like to qualify as an exception for navigational fault, hence the shipowner was held liable for the extra time spent under a time charter.[60] In that case terminology was used by the Court to the effect that the master's failure amounted to "general slackness" and did not relate to "acts of seamanship".

Another example is the *Renee Bayffil*[61] from 1916, holding that a master's decision to remain in port for a few extra days for no apparent reason relating to weather conditions or similar, did not qualify as a navigational fault, hence the shipowner was held liable for breach of a due dispatch provision of a voyage charter.

Still another example is the *Knutsfjord v. Tilmans*[62] from 1908, where the master misconstrued the way the destination port was formulated in the charter, thereby causing delay by sailing in the wrong direction. This type of fault was, understandably, not held to be of a navigational nature, hence the shipowner was held liable for the delay.

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58 See e.g. Cooke et al (2007) pp. 1022–1024: It is a fact that the HVR is essentially based on such contract provisions predating the H/HVR. Hence, a separate point of construction of the HVR concerns whether case law relating to such pre-dated clauses, should be considered (binding) authority also when construing the HVR. That is a question we shall not go into. The point is merely to illustrate the scope of nautical fault through case law shedding light on it.

59 *Suzuki & Co. v. T. Beynon & Co.,* Lloyd's Rep. 1926 Vol. 24, 29.

60 The case concerned appeal of an arbitration award and the facts as to the specific nature of the master's fault is somewhat obscure from that award. This led Justice Viscount Dunedin to the fairly harsh statement that the arbitration award was "couched in language which has all the appearance of stultification of expression resulting from confusion of thought."

61 1916 32 T.L.R 660.

62 1908, A.C. 406.

The most prominent and authoritative case dealing with the topic, is the House of Lords case the *Hill Harmony*[63] from 2001.

This concerned the HVR (art. IV, including the nautical fault exception) as incorporated as a rider clause in a time charter. The question concerned the relationship between the time charterer's right to give orders as to employment of the ship, and the master's prerogative of navigational decision making. In disregard of the charterer's sailing orders, the master took the longer route in crossing the Pacific from Canada to Japan. The charterer claimed damages for the extra time taken and bunkers consumed, alleging breach of contract in that the master had failed to prosecute the voyage with due dispatch. The shipowner put up as a defence that whatever the breach, it was covered by the HVR exception from liability for navigational fault.[64]

The House of Lords however disagreed. In order for a master's decision to be covered by the exception for nautical fault, it would have to involve some kind of seamanship aspects. A general decision, made before the commencement of the voyage, to take a longer route – not related to concrete safety considerations etc. – did not meet that requirement. The Court stated i.a.:

> "What is clear is that to use the word 'navigation' in this context as if it includes everything which involves the vessel proceeding through the water is both mistaken and unhelpful. As Lord Summer pointed out, 'where seamanship is in question, choices as to speed or steering of the vessel are matters of navigation, as will be the exercise of laying off a course on a chart. But it is erroneous to reason […] that what route to follow are questions of navigation.'"[65]

The *Hill Harmony* did not directly involve the question of nautical fault and its relationship to the HVR obligation of initial unseaworthiness. It may in that respect be said that there are different considerations in play:

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63 Lloyd's Rep. 2001, 1, 147.

64 I use that term here rather than 'nautical fault' since the master's conduct in that case related to navigation proper, not the alternative of management of the ship.

65 P. 159–160 of the decision.

the scope vis-à-vis a time charterer having to pay extra hire and bunkers consumed by reason of the master's conduct, and the delineation relating to cargo damage and obligations of seaworthiness under the HVR. Nevertheless, the finding in the *Hill Harmony* has in legal literature been held also to provide an answer to the scope of navigational fault under English law relating to the HVR as incorporated into the English COGSA,[66] and the case is referred to as authority to that effect by the New Zealand Supreme Court in the *Tasman Pioneer* (above) relating to the HVR as incorporated into the New Zealand Maritime Transport Act 1994.

If these considerations are applied to the *Sunna*, there is reason to go back to the previous analysis of the twofold nature of the relevant fault. Since, as emphasised by the Supreme Court, there was a general failure to have in place a prudent bridge management plan due to the rule-defying attitude of the master, such failure would, under the English law way of thinking, clearly not be of a navigational nature. There is little difference from the *Hill Harmony* where the master generally ignored the time charterer's orders as to sailing routes, and a similar general attitude of ignoring night time safety regulations. Such conduct would not involve "acts of seamanship".

If, on the other hand, we take the approach as adopted by the Court of Appeal, and look to the master's decision making on the night of the incident, this would probably be nautical in nature in the above sense. There was a concrete evaluation, taking into account the weather and the assessment of the crew's need for rest, etc., hence such considerations would probably involve "acts of seamanship". However, that approach taken by the Court of Appeal seems to miss the complicating factor, that had a prudent bridge management plan been in place, there would have been no room for such ad-hoc decision making.

[66] Cooke et al (2007) pp. 1022–1024.

4.3 The interrelation between nautical fault (navigational fault) and initial unseaworthiness

As already mentioned, in the *Sunna* the Supreme Court makes the general statement that whatever the nautical fault, it would be overridden by the shipowner's liability for initial unseaworthiness. In other words: if whatever nautical fault occurred before the ship's departure from load port, that nautical fault would at the same time constitute initial unseaworthiness, and the "exception to the exception" in MC s. 276 second paragraph, would apply. The shipowner in the *Sunna*, on the other hand, argued that one and the same fault (if assumed to be nautical in nature) cannot both be exempted from liability and also lead to liability (by reason of initial unseaworthiness).

Furthermore, and as matter of policy considerations, if one takes a functional view on the risk allocation embedded in the HVR, as e.g. expressed by the New Zealand Supreme Court in the *Tasman Pioneer*, the statement by the Norwegian Supreme Court becomes problematic. If one accepts as a premise for the risk allocation of the HVR that decision making involving navigation (in its narrow sense, as held above) forms part of the master's prerogative and thus falls outside of the shipowner's "direct control", it does not make good sense to let a mere temporal demarcation line decide whether or not the shipowner becomes liable. A functional approach, which as such is well recognized in Norwegian law, should instead lead to the nature of the fault being considered decisive.

This topic seems not to be addressed in either Norwegian legal literature or in case law, but it is addressed in English case law. In an earlier line of cases, English law took the view as expressed by the Norwegian Supreme Court in the *Sunna*, but that line of cases was criticized and overturned by the English House of Lords in the *Hill Harmony* (above).

In the *Hill Harmony*, the decision by the master to take the longer sailing route was made before departure, and the charterer in that case argued, supported by the earlier line of cases, that in order to qualify as a navigational fault exception, the relevant decision would have to

be made after the ship had embarked on its voyage. On this point, the House of Lords stated:

> "The character of the [navigational] decision cannot be determined by where the decision is made. A master, while his vessel is still at the berth, may, on the one hand, decide whether he needs the assistance of a tug to manæuvre while leaving or whether the vessel's draft will permit safe departure on a certain state of the tide and, on the other hand, what ocean route is consistent with his owners' obligation to execute the coming voyage with the utmost dispatch. The former come within the exception; the latter does not."[67]

Elsewhere the example is given that the nautical act of plotting of a course is navigational in nature, regardless of whether it is made before or after the time of departure.

It may be objected that these remarks are made in the context of what constitutes navigational fault, rather than whether such fault (being made before departure) curtails the shipowner's liability for initial unseaworthiness under the HVR, which was not up for decision in the *Hill Harmony*. Nevertheless, and as stated in the previous chapter, the statements by the House of Lords are submitted in legal literature as also forming the governing law in the context of the HVR and the shipowner's liability for initial unseaworthiness.[68] Such a position also makes good sense from a functional perspective: it would be inconvenient to operate with different concepts for the liability exclusion for navigational fault, depending on whether one deals with the HVR in the context of paramount clauses in charterparties, or in the context of the HVR applied "directly" under bills of lading.

Moreover, such a functional view accords with the general risk allocation of the HVR, whereby navigational decisions are viewed as falling within the master's prerogative and are as such considered to lie outside of the shipowner's "direct control".[69] Viewed in that way, such navigational

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67 P. 159 of the decision.

68 Cooke et al (2007) p. 1023.

69 As expressed by the New Zealand Supreme Court in the *Tasman Pioneer*, above

decisions will not really form part of the shipowner's obligation to procure a seaworthy ship under HVR art. III 1 – see, however, the recent English case the *Libra* (below).

If these considerations are applied to the *Sunna*, it follows that they would not affect the result but they would affect part of the reasoning by the Supreme Court. If the facts are changed to the effect that the master made detailed planning as to whether to deploy single or double watch keeping during the upcoming nights, depending on the weather forecast, etc., it might well be that the shipowner's argument would be meritorious. Such evaluations might be considered as sufficient "acts of seamanship" to qualify as nautical fault, and as argued by the shipowner: one and the same fault committed by one and the same person cannot both constitute a nautical fault, not being imputed to the shipowner, and constitute initial unseaworthiness, being imputed to the shipowner.

4.4 The interrelation between nautical fault (mismanagement of the ship) and initial seaworthiness

It is important to note that the said functional approach to the question of navigational fault has no similar bearing on the nautical fault alternative of "act, neglect or default […] in the management of the ship."[70]

Here a temporal dividing line would have to be drawn as to whether or not the ship has commenced the voyage, since these acts do not belong to the master's prerogative, as do the acts of navigation. Put differently, there is here no similar basis for adopting a functional approach to the act of mismanagement of the ship. The shipowner's obligation to make the ship seaworthy before departure under the HVR art. III 1 a) is non-delegable, in the sense that these acts may well be (and often are) delegated e.g. to the master and crew, but the due diligence obligation itself is non-delegable. In other words, these acts of making the ship seaworthy are considered to be within the shipowner's "direct control",[71] while (at the same) acts

[70] As expressed in MC s. 276 i.f. and in HVR art. IV 2 a).

[71] As expressed by the New Zealand Supreme Court in the *Tasman Pioneer*, above.

concerning management of the ship made by the master or crew after embarking on the voyage, are not. Therefore, a temporal dividing line is needed here.

This type of question seems, again, not to have been up for judgment under Norwegian law, but the English case the *Maurienne*[72] from 1969 may serve as illustration. After completion of loading but before the ship set sail, some scupper pipes were found to be frozen and were negligently defrosted by a crewmember by the use of an acetylene torch, which set fire to the insulation of the pipes. The fire spread to the rest of the ship, causing her to sink. The shipowner tried to argue that the due diligence obligation under HVR art. III 1 only arose at the beginning of loading and at the beginning of the voyage, not during the stage inbetween.[73] Not surprisingly, the Court disagreed; the duty of due diligence to make the ship seaworthy was found to last from at least the beginning of the loading until the ship starts on her voyage, and in this case the voyage had not begun.

Applying these considerations to the *Sunna* may also be of interest. Since we concluded above that the master's conduct in failing to have in place a prudent bridge management plan, probably was not nautical in nature, that means that the task of ensuring such a plan would be of a kind which lay within the sphere of the shipowner's "direct control" (as put by the New Zealand Supreme Court). In that sense the master would be the shipowner's delegate, for the purpose of procuring this type of characteristic of the vessel to be in order at the time of departure. This kind of task would, according to this line of thinking, be open for the shipowner to have anyone perform on its behalf. It would not lie within the prerogative of the master as a navigational task. Hence, this angle to the topic seems to strengthen the correctness of the Supreme Court's finding of initial unseaworthiness through the fault of the master, although via a slightly different route than taken by the Court.

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[72] *Maxine Footwear Co. v. Canadian Governant Merchant Marine* [1959] A.C. 589.

[73] As a semblance of the English doctrine of stages, which is set aside by the adoption of the HVR in the English COGSA and which we do not go further into here.

This, at the same time, illustrates that the approach taken by the City Court in the *Sunna* was slightly misconceived. The City Court found that the shipowner had not sufficiently demonstrated that, through its superintendent, sufficient steps had been taken to ensure that the master would comply with the safety rules. Hence the shipowner was found liable on the basis of privity with reference to MC s. 275. A contrario, this seems to imply that if sufficient evidence had been adduced to that effect, but the master had still not complied with the safety rules, then there would be no basis on which to hold the shipowner liable, as the shipowner would have fulfilled its due diligence obligation under s. 275. That would however not have been right, since it overlooks the role of the master as a delegate of the shipowner under MC s. 275. In other words, the approach by the City Court seems, on the one hand, to misconceive the concept of privity ('egenfeil')[74] and, on the other hand, to misconceive who are delegates of the shipowner for the purpose of ensuring the ship's seaworthiness.

Aa stated earler, it seems that the way these points are structured in the MC, by having s. 275 as a kind of base rule with s. 276 as an "add-on", leads to this kind of confusion – more so than by reading HVR art. III 1 in conjunction with art. IV. Notably, HVR art. III 1 does not operate with any concept of "privity".[75]

[74] See pp. 12 and 13 of the City Court's decision, also with unfortunate considerations about burdens of proof (p. 17) which, on this kind of matter, with the evidence so informative as to what happened, seems to be a way of "dodging" the determinative legal questions. As to such "dodging" of legal questions by hiding behind burden of proof rules, see examples in Solvang (2021) pp. 90–94.

[75] See Solvang (2021) on the discussion of the English case the *Muncaster Castle* in relation to identifying the class of delegates of the shipowner "back in time" (from long before the relevant cargo voyage commenced). Also in that respect English law, naturally, starts out from the wording of HVR. art. III, and also in that respect Norwegian law through the MC has "hidden" the relevant part of the Rules – Solvang (2021) pp. 38–39 and 65–67.

4.5 Is the topic resolved through the English Court of Appeal case, the *Libra*?

The above illustration of the relationship between nautical fault and initial unseaworthiness is based on general considerations relating to the system of risk allocation of the HVR. There is however a specific case which deserves mentioning in that respect, namely the English Court of Appeal case, the *Libra*.[76] That case, from 2020, appeared long after the *Sunna* but the factual and legal questions bear semblance. The *Libra* is interesting because the outcome is very much in line with that of the *Sunna*, although the reasoning is, unsurprisingly, quite different. The English Court takes arguments from the wording of the HVR (as implemented into the English COGSA) and from a selection of English law authorities in the periphery of the topic at hand.

The case concerned the shipowner's claim for general average contribution following the ship's grounding after departure from the Chinese port, Xiamen. The grounding itself was held to have been caused by negligent navigation by the master in that he departed from the marked fairway and into shallow waters, which turned out not to have sufficient depth for the ship's draft.

Such negligent navigation would have exempted the shipowner from liability under the HVR art. IV 2 a) (nautical fault). The crucial point was however the following: The captain's passage plan and working chart was held to be insufficiently prepared, and negligently so, by failing to show in a conspicuous way recent information contained in a Notice to Mariners, according to which depths marked on the official chart, outside of the stipulated fairway, were incorrect; the area was much shallower than what appeared from the official chart. Furthermore, the Court held that if the passage plan and working chart had been prudently updated with this information, the grounding would most likely have been avoided, since the master would then, in the decisive moment of navigational decision making, have been reminded that the route he was about to select was not a safe one.

[76] [2020] EWCA Civ. 293.

Hence, there was a question of initially unseaworthiness through the passage plan and working chart not being in an adequate working order, thus increasing the risk of something going wrong during the voyage. In other words, it was, as in the *Sunna*, a question of a mistake, made by the master, which could be seen as having a dual aspect; the direct cause of the incident was a nautical fault but the underlying cause stemmed from a failure in existence at the time of departure, i.e. initial unseaworthiness.

The Court of Appeal upheld the lower Court's decision by holding that the shipowner was not exempted from liability for the incident, and therefore not entitled to general average contribution. The reasoning was essentially that the shipowner's due diligence obligation to make the ship initially seaworthy pursuant to HVR art. III 1 overrode whatever nautical fault exception otherwise in existence, and that the master was the shipowner's servant for the purpose of fulfilling the obligation to make the ship initially seaworthy – all of which accords well with the Norwegian Supreme Court's findings in the *Sunna*.

On a methodological score, which forms the primary interest in this article, various aspects are however of interest.

First, the Court found as a matter of construction of the wording of the HVR that art. III 1, unlike art. III 2, made no express reservation for the liability exceptions in art. IV 2 a), hence there was, according to the Court, no basis for introducing any argument about nautical fault exceptions being applicable in respect of a shipowner's obligation to make the ship initially seaworthy.

Second, this line of argument was coupled with the test of initial unseaworthiness under English law, which entailed the question: would a prudent shipowner have let the ship sail with knowledge of the relevant facts (that the passage plan and working chart were inadequate), something which was answered in the negative.

Third, the question then arose whether the master was the shipowner's servant for the purpose of the shipowner's due diligence obligation to make the ship seaworthy. This was answered in the affirmative, with added remarks that in this respect it did not matter whether the task by the master (which failed, thus making the ship unseaworthy) belonged

to the master's nautical sphere of expertise. According to the Court, it followed from the English House of Lords case the *Muncaster Castle*,[77] that such a due diligence obligation was non-delegable, hence it did not matter by whom, on the shipowner's behalf, the negligent mistake causing initial unseaworthiness was made.

This line of reasoning shows how complex, and diverse, these topics are – and it invites criticism, from a non-English perspective.

As to the first point above concerning literal interpretation of the HVR: It is, of course, true that art. III 2, unlike art. III 1, contains reference to the liability exceptions in art. IV. But to impute such significance to this detail in drafting appears, at least to the writer, not to be persuasive. If that lack of reference in art. III 1 shall be given such significance, it would be natural to ask: would not such an important point have been expressed in clearer terms by the drafters of the Rules?

Moreover, this detail in wording is not in a similar way picked up e.g. by the New Zealand Supreme Court in its fairly extensive review of the legislative history of the HVR in the *Tasman Pioneer*. Likewise, it is telling that the reference in art. III 2 to art. IV does not form part of the wording of the US COGSA, which essentially implements the Hague Rules verbatim. Hence, the English law argument is on this point not available under U.S. law,[78] which is also capable of explaining the reservation about the US law position in the *Libra* (below).

As to the second point above, one reflection is that the fact English law authorities establishing the test of what shall constitute initial unseaworthiness under English law (and under the HVR), does not in itself answer the more complex question at hand: shall, despite such definition of unseaworthiness, nautical faults occurring before departure constitute exceptions to the (otherwise) liability for unseaworthiness, e.g. along the lines of a functional approach as set out in chapter 4.3 above?

In other words, it appears formalistic to say that the test of unseaworthiness (that a prudent shipowner would not have let the ship sail with knowledge of the relevant facts) automatically resolves the question of

[77] Lloyd's Rep. 1961, 1, 57.

[78] Cooke et al (2007) p. 976, see also fn. 187.

liability for such unseaworthiness, if/when the failing task of a navigational nature constitutes the unseaworthiness.

This has a side to the third point above concerning the Court's reference to the *Muncaster Castle*. That reference seems to be an English law peculiarity for the reason that the *Muncaster Castle* deals with delimitation as to who is the shipowner's servant back in time, involving ship repair situations, and similar. Although the *Muncaster Castle* contains general statements as to non-delegable duties on the shipowner's part to exercise diligence to make the ship seaworthy, this does not, in the writer's view, answer the question at hand. Put differently, there is no basis in the wording of the HVR to say that a shipowner is responsible for servants back in time – or where such line is to be drawn. Hence, that type of arguments (including the English authorities on the point) cannot as a matter of analysis be said to resolve the interrelation and grey zones concerning the master's potential dual roles in connection with the vessel's unseaworthiness before departure. Put still differently, no one would doubt that the master is generally speaking a servant of the shipowner; he is a servant also during the voyage, but the question concerns the exception from liability for nautical faults, and *that* is a question clearly not applicable to the situation being decided in the *Muncaster Castle*, namely a shipowner's vicarious liability for the fault of a ship repair worker; a ship repair worker is not capable of committing a nautical fault.

The English approach is therefore marked with an idiosyncratic narrow type of construction, not looking at the (clashing) policy considerations in play under the HVR. And it is to be noted that the *Libra* is a Court of Appeal decision, with the English Supreme Court often taking a different, and wider, approach to central HVR questions, as was amply illustrated in the *Muncaster Castle* itself.[79]

The reference in the *Libra* to the *Muncaster Castle* is an English law peculiarity also for the reason that under Norwegian (and Nordic) law it is questionable indeed whether the *Muncaster Castle* would be followed.[80] Hence, this argument under English law would likely not be available

[79] Solvang (2021) chapter 2.2.

[80] Which is discussed in some detail in Solvang (2021).

under Norwegian law, as, tellingly, it was not even raised in the similar discussion in the *Sunna*.

The *Libra* contains also some other points worth observing. The Court discusses foreign law sources including considerations about what can be derived from the New Zealand Supreme Court's review of the risk allocation system of the HVR in the *Tasman Pioneer*,[81] and of the U.S. law position, which seems to take a different approach to that taken by the Court in the *Libra*. The U.S. law position is therefore of interest.

The U.S. case referred to is the *Jalavihar*.[82] The circumstances were that the court of the first instance had held cargo damage to be caused by nautical fault, in that the master of the *Jalavihar* had failed to properly communicate with the pilot. This miscommunication, constituting negligence, was held to be the proximate cause of the incident. The cargo side had argued before the court of the first instance that the master should have made the relevant communication with the pilot already before departure, the failure of which constituted initial unseaworthiness for which the shipowner would be vicariously liable. On this point, the court of the first instance made obiter remarks to the effect that the fault would, even if made before departure, still be navigational in nature, hence not lead to liability for the shipowner. Upon appeal the Appeals Court upheld the finding by the court of the first instance on causation, and did not express any view on the question whether a nautical fault committed before departure, thus constituting initial unseaworthiness, would lead to liability.

The question seems therefore not to be authoritatively decided under U.S. law, but – as the Court in the *Libra* stated – even if it had been, and it had gone in a different direction than that of the *Libra*, "it would be inconsistence with English law".[83]

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81 Paras 55–58 of the decision with, in the writer's view, a fairly narrow discussion of what can be inferred from the statement by Wilson J, quoted in chapter 3.2 above.

82 Court of Appeals for the Fifth Circuit, [1997] USCA5 1466; 118 F.3d 328 – discussed at paras 68–70 in the *Libra*.

83 Para 70.

4.6 Shipowners' vicarious liability for master's fault – "latent human defect" and unseaworthiness

4.6.1 General considerations

Once more returning to the *Sunna*, the Supreme Court there held, in connection with the shipowner's due diligence obligation to make the ship seaworthy, that the shipowner was vicariously liable for the master's wrong in having established a practice of disregarding the night time sailing rules. This topic of a shipowner's vicarious liability for the master's conduct in respect of the requirement of initial seaworthiness deserves a separate analysis. Admittedly, that question would become moot if the reasoning of the English Court of Appeal in the *Libra* were to control, but as discussed in the previous chapter, the reasoning of the Court – including the significance given to the English case, the *Muncaster Castle* – is in the writer's view not persuasive, at least not under Norwegian law.

The Supreme Court in the *Sunna* first set out the due diligence obligation of the shipowner as applied to the facts, by stating:

> "A prudent shipowner would not – had he been aware of the subject matter – have allowed the ship to commence the voyage with a system of watch keeping which exposes the cargo to a significantly increased risk."[84]

The Court found it unnecessary to decide whether or not the shipowner, through privity,[85] had knowledge of the relevant facts, since the master was to be deemed a servant of the shipowner for the purpose of ensuring the vessel's seaworthiness. The Court stated:

> "It is obvious that the master has not exercised due diligence in ensuring seaworthiness of the vessel. [The shipowner] is in this respect vicariously responsible for its captain so that his mistake is

[84] Para. 48 – my translation.

[85] Although the use of this term seems misconceived, see above.

> considered the mistake of the shipowner [reference to legal commentary and also Rt. 1993.965 Faste Jarl]. When a disposition by the master has led to unseaworthiness of the vessel at the beginning of the voyage it is, as stated, of no relevance whether his mistake also might be seen as a nautical fault covered by section 276 first paragraph. Accordingly, it seems clear to me that the shipowner cannot relieve itself of liability on that basis. Since the shipowner is vicariously responsible for the mistakes of the master, it is not necessary for me to render a decision on whether or not there is privity[86] on the shipowner's part."[87]

This statement of the law seems unproblematic on the facts as found by the Court: to have in place a proper bridge management system would go to the root of seaworthiness of ship and crew, hence it would be considered to lie within the shipowner's "direct control", in the parlance of the New Zealand Supreme Court in the *Tasman Pioneer*.

However, the statement by the Supreme Court seems overly broad. If we slightly shift emphasis on the relevant facts, in the direction of the master's intentions concerning how to deploy the crew during the upcoming voyage, the statement becomes less clear.

This gives occasion to discussing another point of relevance concerning the division of risks embedded in the HVR and how that division is, or may have been, distorted through the legislators' rewriting of the HVR when implemented into the MC. This point concerns what could be called "human latent defects" of the master or crew.

The factual premise for the discussion is that we assume that a master by outward appearance is considered competent (his papers being in order, there being no record of prior mishaps, etc.) but that he has a mindset, concealed from observers, of being rule defiant. Would this characteristic of "human latent defect" be something for which a shipowner would be vicariously liable?

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86 Norwegian: 'egenfeil', which is a dubious term, since it could both mean privity in the proper sense (decision making at the alter-ego level of the company) or fault through the negligence of servants being someone else than the master, see chapter 3.4.

87 Paras 52 and 53 – my translation.

The example may appear artificial but is not too far from the facts of the *Sunna*, and it is essentially in line with how the shipowner argued its case.[88] For the purpose of analysis, the facts may be slightly twisted: a master has a mindset of not complying with safety rules requiring double watch during night time sailing (but rather relies on ad-hoc decision making as to whether a double watch is needed), hence the ship is unseaworthy due to the ensuing increased risk of something going wrong. This mindset is however not made known to anyone, and cannot be inferred from any deficient bridge management plan at the time of departure. Would then the shipowner be vicariously liable for such (wilful) rule defying intentions by the master?

When looking at the scheme of the MC, the answer may appear to be clear. MC s. 276 states that the shipowner is liable for the consequences of unseaworthiness if "caused by the carrier personally or by someone for whom the carrier is responsible [failing] to take proper care to make the ship seaworthy at the commencement of the voyage." In this sense, it seems natural to say in our example that the master fails to take "proper care" to ensure seaworthiness, i.e. to ensure that he does not have the intention of defying the safety rules.

If, on the other hand, we look to the scheme of HVR, the answer becomes less obvious. The instrumental provision in art. III 1 sets out the shipowner's *obligations* in terms of exercising due diligence to: a) make the ship seaworthy; b) properly man and equip the ship; c) make it cargoworthy. This instrumental part concerning the shipowner's obligations, is diluted when transformed into the MC, being inconspicuously placed in a general provision obliging the shipowner to care for the cargo in MC s. 262.

With the scheme of the HVR art. III 1, separating the shipowner's obligations relating to the ship and the crew, general questions concerning "latent defects" in both respects, spring to mind.

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[88] The shipowner argued that a nautical mistake cannot be something for which the shipowner becomes vicariously liable, even though the mistake may constitute unseaworthiness, see chapter 4.1.

With respect to the provision of a seaworthy ship, the position would be that if the ship suffers a structural defect which is not reasonably discoverable at the time of commencement of the voyage, the ship would be considered unseaworthy, but there would be no breach of the due diligence obligation by the shipowner. Moreover, the legal test concerning whether or not the shipowner has exercised due diligence would clearly extend to its servants, including the master and crew,[89] but on the premise that the defect is not reasonably discoverable by the shipowner (including its servants), there would be no basis for liability.[90]

With respect to the shipowner's obligation to properly man the ship, the position may be different. HVR art. III 1 b) could here be rewritten, by setting out its essence:

> "The shipowner shall exercise due diligence in providing a competent master at the time of commencement of the voyage".

If then the master is competent by all external characteristics, is the shipowner liable if the master has some concealed intention of doing a wrong during the voyage? It would seem unnatural to consider the master the servant of the shipowner in relation to the duty of the shipowner to provide a competent master.[91] Put differently, is the subject matter of the obligation of performance by a shipowner (a competent master) at the same time the servant of the shipowner for the purposes of fulfilling that obligation?

The answer seems to be no. Perhaps such an answer may seem absurd, in the context of contract law: why should not a shipowner be responsible for a master with (wilful) damage creating potential? However, in

[89] Who often play an important part in ensuring the seaworthiness of the ship, including that of checking its condition before departure. In this respect the Supreme Court's reference in the *Sunna* to MC s. 131 concerning the master's seaworthiness duties, is apposite, but not within the risk allocation system of the HVR, see chapter 3.3.

[90] For a review of the concept of latent defect of the ship within the context of initial seaworthiness and the HVR, see Solvang (2021) pp. 20–22 and 52.

[91] See the *Eurasian Dream*, Lloyd's Rep. 2002, 2, 692, as an example where the master was found, due to being inexperienced in the relevant trade, to be incompetent, and that this should have been detected and rectified by the shipowner.

most instances such "absurdity" would not materialize, since normally the shipowner, as principal, would be liable for the negligent or wilful fault caused by its servant at the time when such fault materializes. The point only arises when there is, as in the HVR, this kind of formulated obligation directed towards a specific time of performance (making the vessel seaworthy at the commencement of the voyage), combined with exceptions from liability for specific faults thereafter (nautical faults during the voyage).[92]

Similar formulations can be found in modern standard charterparties, such as Shelltime 4. Here the specific obligation of the shipowner is split up between the obligations during the currency of the charter, and at the time of tendering of the ship. The seaworthiness obligation at the time of tendering of the ship is separated into various headings, dealing with the ship as such (clause 1) and the officers and crew (clause 2). With respect to the officers and crew, the obligation is formulated as that of providing a competent crew with specified characteristics given in the clause. Whatever "hidden" defect of an officer or crew member, would in this case be of no particular relevance, since if/when such "hidden" defect materializes into a wrongful act during subsequent performance, the shipowner would at that stage normally be liable for the wrong committed by his servant. The stated "absurdity" would terefore again only arise if there is an exception from liability – for example under a paramount clause – for such later committed wrong. There is often such a paramount clause, as illustrated by the English case, the *Hill Harmony* (above).

In such time charter cases it would however be unusual to have constellations where such nautical fault committed during the currency of the charter, would be linked back to the shipowner's obligations at the time of tendering of the ship. In other words, it would be unusual to have facts fit the situation where the subsequent fault can be linked back to the state of mind of the relevant crew member at the time of tendering of the ship, and crew. The time charter example is nonetheless capable of illustrating the point relating to the HVR. In respect of the HVR, the link in time between a fault committed during the upcoming voyage and the master's state of mind at the time of commencement of the voyage (i.e. when the shipowner's due diligence seaworthiness obligation attaches), would normally be closer than in a time charter situation.

[92] The fact that such nautical faults may be intertwined with the concept of initial unseaworthiness is immaterial for the present purposes.

The point is not to conduct any in depth research on this point of liability for "latent human defect", but to point to the fact that there is no necessary parallel to ordinary Norwegian principles of vicarious liability in contract law, hence the risk allocation system must be analysed within the parameters of the HVR – as highlighted e.g. by the Australian and the New Zealand Supreme Courts (above).

It is, moreover, worth underscoring that the question being discussed here has a connecting factor to those previously discussed. It makes sense to say that what is within the shipowner's "direct control" would be the ensuring that a competent master is employed, as reflected in HVR art. III 1 b). The mindset of the master relating to nautical matters is considered to be outside of such control and within the nautical sphere of the master's expertise. Therefore, in order to have a functional approach relating to his nautical decision making (chapter 4.3), this requires a link to what we have addressed here concerning "latent human defects". In the context of a shipowner's vicarious liability, the master is, as a starting point and liability-wise, not a servant of the shipowner with respect to seaworthiness aspects which relate to his role and functions in nautical decision making. On the other hand, blatant disregard for rules or orders would probably not be considered nautical in nature, since this concept requires some kind of concrete evaluations ("acts of seamanship").

Our question is, therefore: provided the intention of the master is of a nautical nature and provided it is concealed from observers, would the shipowner be vicariously responsible for it as part of its initial seaworthiness obligation?

In the *Sunna* this was not considered in its pure form, since the master did not have in place a prudent bridge management plan at the time of commencement of the voyage. This fact was not "hidden", and the first officer was even privy to it. Hence, this task was probably something within the shipowner's "direct control", and could thus be seen as having been delegated to the master. Put differently, this failing task could have been detected by some (other) representative of the shipowner, and was in that sense "patent" rather than "latent".

There is, therefore, probably no reason to criticize the Supreme Court's finding in this respect. However, the case involved nuances of facts, and the shipowner argued essentially along the lines as discussed here. In response to such arguments, the Supreme Court's general statement that the master is the servant of the shipowner for the purposes of all matters relating to initial seaworthiness, appears overly broad.

4.6.2 The Norwegian Supreme Court case, the *Faste Jarl*

The above discussion about "latent human defects" has relevance to another Norwegian Supreme Court case, the *Faste Jarl*[93] from 1993. Also in that case the Supreme Court seems to be missing central legal points concerning the HVR and its risk allocation system.

The ship grounded shortly after departure from the load port due to the first mate, who was alone on the bridge, being intoxicated. The cargo was not damaged, but the shipowner's claimed general average contribution for the costs of having the vessel salvaged. The cargo refused to contribute in general average, alleging breach of the shipowner's obligation for initial seaworthiness under the HVR, as implemented into the then MC. The shipowner, on the other hand, claimed that the grounding was due to a nautical fault, which absolved them from liability and made them entitled to general average contribution. We deal with the issue of cargo liability only. [94]

Since the first mate, who was alone on the bridge, had already been drinking before departure (and fell asleep, after having set the ship on autopilot), the Court held that the incident was not to be considered a nautical fault but rather a situation of initial unseaworthiness.

The shipowner argued that the intoxication formed part of the first mate's conduct in his nautical capacity and should therefore be separated from his role as the shipowner's delegate for the purpose of making the

[93] ND 1993.162.

[94] The primary question was that of entitlement to set off losses resulting from breach of initial unseaworthiness, against general average contribution claims, as here: cargo would not have had any claim for contribution against it, if the vessel had not been unseaworthy and grounded. The Court held that such set-off right existed.

ship initially seaworthy. Such an argument was dismissed by the Court in a few words (see below). There was also a factual question whether the master, who went to rest at his cabin when the first mate took over the watch on the bridge, should have detected the mate's incapacitation. This the Court found unnecessary to decide, on the basis that the shipowner would in any event be vicariously liable for the first mate's fault of intoxicating himself.

The arguments submitted by the parties are only briefly referred to in the decision. The reasoning by the Court is also very brief. We shall set it out.

The shipowner referred to the, at the time, relevant provision of the MC, which incorporated the HVR Catalogue, including art. IV 2 a), and argued that:

> "the shipowner is not liable for navigational fault even if that is attributable to intoxication. That does not apply if the intoxication existed at the commencement of the voyage. There is however no reason to believe that the first mate was incapable of operating the ship already at that time. According to [the MC corresponding to HVR art. IV 2 q)] there is an additional requirement that someone for whom the shipowner is responsible, is to blame for the unseaworthiness. No one can be blamed for possible unseaworthiness by reason of the first mate's intoxication. This person's own knowledge that he was intoxicated, will have to be disregarded."[95]

Although, as we have seen, Norwegian argumentation is conspicuously void of any reference to HVR art. III (as this is "hidden" in the provisions of the Code), what is here argued is in essence that the shipowner's obligation, according to art. III 1, consists in providing a ship with a competent crew, and that if the characteristic of a crew member is "latent" (as it possibly was), then no one is to blame for it other than the crewmember himself, and that the crewmember is not the shipowner's servant for the purpose of being (himself) a competent crewmember.

The cargo side, on the other hand, argued:

[95] P. 968 – my translation.

> "In this case the first mate was intoxicated already upon the ship's departure from Oslo. Consequently, the ship was unseaworthy. Since the first mate was also aware of his condition, and the shipowner obviously is vicariously responsible for the first mate's fault, the shipowner is liable pursuant to [the then MC s. 118 corresponding to HVR art. IV 2 q)]. Apart from this, the shipowner has not demonstrated that the master should not have understood that the first mate was intoxicated […]."[96]

In other words, the cargo side argued along the lines of ordinary Norwegian law conceptions of a principal's vicarious liability for the fault of his servants, i.e. that the first mate was the shipowner's servant for fulfilling the shipowner's due diligence obligation to make the ship seaworthy.

The Court stated:

> "According to [MC s. 118 corresponding to HVR art. IV 2 a)] the shipowner is not liable for damage caused by navigational fault on the part of the crew, provided that that fault is not attributable to unseaworthiness at the commencement of the voyage, and that the shipowner or someone for whom he is responsible is to blame for this. The requirement of seaworthiness according to MC 118 means i.a. that the ship shall be sufficiently manned. […] The crew must be able to perform the voyage without the ship and/or cargo being exposed to greater danger than must be expected in the carriage of goods by sea. Also sickness or intoxication may, depending on the circumstances, lead to the ship being unseaworthy. […] Since the first mate was the only officer on the bridge, there existed already at the time of departure a considerable risk for damage. The ship was therefore not seaworthy. That the first mate 'has not exercised due diligence to ensure that the ship was seaworthy', is obvious."[97]

These remarks are as such straightforward. The Court then discussed the shipowner's arguments:

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96 Ibid – my translation.

97 P. 969 – my translation.

> "The appellant has claimed that the shipowner is not responsible for the first mate getting intoxicated during service. This concerns a criminal offence, in contradiction of the employer's interests, which has no reasonable connection to the first mate's working tasks, and which for that reason are unforeseeable. I do not agree. In my view, the fact that a crewmember is intoxicated during service, with its ensuing dangers, is a not an unforeseeable risk in connection with ship operation, a risk it must be assumed that shipowners are generally aware of. The appellant has also submitted that the shipowner is not responsible because, in the assessment of whether the unseaworthiness was caused by negligence, one must disregard the first mate's own knowledge that he was intoxicated. I cannot see that this submission has any merit to it."[98]

Some reflections can be made on this brief review of the case, in line with the overall ambition of this article.

First, it is telling that the argumentation revolves around Norwegian sources of law and ways of thinking, such as the shipowner's argument that it should be acquitted on the basis of notions of the first mate having acted beyond the scope of his employment. This is taken from Norwegian tort law relating to a principal's (an employer's) vicarious liability,[99] but has little, if any, relevance in the context of risk allocation embedded in the HVR. It is worth reiterating the comments by both the Australian and New Zealand Supreme Courts in their cautioning of construing the HVR in a national law context.

Second, it is telling that the important aspect of HVR art. III is totally lost in the discussion. This provision, together with art. IV, forms the essence of the HVR risk allocation system and of important international law sources on the topic, but is virtually absent in Norwegian law discussion. Hence, the Supreme Court dismisses in one sentence an argument by the shipowner to the effect that the shipowner cannot be held vicariously liable for the first mate's fault in incapacitating himself

[98] P. 970 – my translation. The last sentence reads in Norwegian: 'jeg kan ikke se at denne anførselen har noe for seg', which is the only reasoning given by the Court on this point.

[99] Concerning this tort law topic on a comparative law basis, see Solvang (2021) pp. 76 et seq.

through intoxication. That argument, according to the Court, "has no merits to it".

It is, furthermore, telling that in the *Sunna* an important part of the Supreme Court's reasoning consisted of referring back to the *Faste Jarl* decision on a similar point of construction.[100] In that way the lack of reasoning in the *Faste Jarl* multiplied itself by becoming part of the reasoning in the *Sunna*.

The argument which the Supreme Court in the *Faste Jarl* found "has no merits to it" lies, ironically, at the core of the complexity of the HVR. Here we shall review that very question in light of some of the main findings based on the international sources, as earlier discussed. This could be approached from different angles.

It might be convenient to start with the simple: if the condition of intoxication of the first mate was patent at the time of the ship's departure, hence reasonably discoverable by other crewmembers, then a failure to take action by such other crewmembers would clearly be imputed to the shipowner. However, officers and crewmembers are generally not required to "check one another" for possible signs of incapacitation, hence to establish negligence in this respect would necessarily be fact specific.[101]

The more difficult question arises if, in such circumstances, the patent incapacitation was not discovered by anyone, and the circumstances were such that no one onboard could be blamed for not discovering it (as seems to have been the position in the *Faste Jarl*). On the one hand, we are within the general notion of it being within the shipowner's "direct control" to detect such patent deficiencies before departure. However, a complicating factor is that the very crewmember intoxicating himself, would seemingly not be deemed the shipowner's servant for the purpose of not intoxicating himself, as discussed in the previous chapter relating to HVR art. III 1 b), and as seems to have been the rationale for the shipowner's argument in the *Faste Jarl*.

[100] Paras 52–53 of the *Sunna*.

[101] In the *Faste Jarl* it was up for discussion whether the master should have detected the first mate's intoxication. However, as a general observation; he would probably not have gone to his cabin to rest if he had suspicion that the first mate was in a state which would bring him (and the other crewmembers and the ship) into danger.

The question would in this respect be whether general notions of the shipowner's "direct control" relating to seaworthiness matters before the ship's departure, would lead to an inference of liability on the shipowner's part, based on constructive knowledge, along the lines that there could have been people on the bridge checking the seaworthiness of the ship (i.e. the first mate's condition) on behalf of the shipowner, and the fact that there were none, should not work in the shipowner's favour. However, such a principle of constructive knowledge is not easily compatible with negligence in the stricter sense.[102]

The above conundrum should however be seen in conjunction with some further examples. If one assumes that the master had decided to start drinking shortly after departure (e.g. because there were others on the bridge upon departure while he would later be alone), and that the rest of the facts were as in the *Faste Jarl*, how should that be considered? Since the master's intention in this example was in existence already upon departure, the ship would be unseaworthy; there was an increased risk of something going wrong just as much as if the drinking had already started – and a prudent shipowner would not, with knowledge of the facts, have allowed the ship to sail.

This brings up another aspect. In the *Faste Jarl*, the shipowner argued that the first mate's intoxication was related to his navigational capacity, hence should be seen within the parameters of what later happened; navigational fault and the ship's grounding. That seems not to be the right way of looking at it. Clearly, the act of making oneself intoxicated is not "navigational" and cannot in that respect be linked to what the intoxication may later lead to. Rather, the argument should be taken from HVR art. III and possible (human) latent defects, as discussed above.[103]

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[102] Liability based on constructive knowledge would be more compatible with what is known under Norwegian law as "control liability" (kontrollansvar) as found e.g in sale of goods law. Or it might fall within notions of cumulative fault or other doctrines of inferred negligence, as in the English doctrine of res ipsa loquitor, see Solvang (2021) pp. 90–93.

[103] On this point the approach in the *Libra* of adopting the principle of non-delegable duties, taken from the *Muncaster Castle*, would dispose of the question – but that way of approaching it is not persuasive, as earlier set out.

4.7 Summarising remarks – with a look to the Norwegian Supreme Court case, the *Vågland*

As has been illustrated, the question of the relationship between nautical fault and initial unseaworthiness is potentially complex, and with no clear-cut solution either in the original drafting of the HVR, or through international legal sources. Various perspectives may be adopted, and the following may serve as summary.

If the relevant fault in existence at the time of departure, making the ship unseaworthy, is not of a nautical nature proper, i.e. not "seamanship-like", then there would be no grounds for liability exemption under the HVR. A question in such situations may still be whether, depending on the circumstances, the relevant defect is "hidden" to the shipowner, as discussed in relation to the *Faste Jarl*.

If the relevant fault in existence at the time of departure, making the ship unseaworthy, is of a nautical nature proper, then further questions arise. One could here take a functional approach, to the effect that the due diligence obligation of the shipowner to make the ship initially seaworthy, is somehow "eclipsed": rather than an arbitrary dividing line based on the exact time when the relevant nautical fault were to occur, the decisive criterion would be the nature of the relevant fault itself. Such an approach, giving effect to the nature of the fault, seems to be reflected in the U.S decision the *Jalavihar* (albeit obiter remarks in the first instance court). It seems, moreover, to be envisaged by the New Zealand Supreme Court in the *Tasman Pioneer*, with the notion of a shipowner's "direct control", which seemingly would not encompass nautical faults belonging to the nautical expertise and prerogative of the master and officers. Likewise, it seems to be reflected in the English House of Lords decision in the *Hill Harmony* (although that decision did not involve the HVR question of initial unseaworthiness).

Such a functional approach does in turn open for additional questions: would it be compatible with a shipowner's obligation under HVR art. III 1 to make the ship seaworthy, that certain faults (nautical faults proper) committed by certain servants, are not to be imputed to the shipowner?

These questions were addressed by the English Court of Appeal in the *Libra*, holding against the shipowner, essentially along the following line of arguments: a) literal construction of the HVR art. III 1 and 2 points towards not allowing art. III 1 to be eclipsed by art. IV exceptions; b) English law authorities on the test of unseaworthiness encompass also nautical faults proper; c) the English law authority of the *Muncaster Castle* establishes that a shipowner's duty of due diligence to make the ship initially seaworthy, is non-delegable, which means that also nautical faults proper are covered by such non-delegable duties.

For reasons earlier explained, that English law position is not necessarily apposite under Norwegian law. This in turn means that the issue is as a matter of international legal sources fairly "open", hence capable of being resolved in more than one direction. This fact is perhaps not surprising in view of the history of the Rules, which comprised a compromise between opposing interests and with no coherent drafting style to merge these opposing interests. Rather, the drafting was marked by a peculiar composition of textual pieces representing the respective interests.[104] That being so, one could perhaps say that the Norwegian Supreme Court's decisions in both the *Sunna* and the *Faste Jarl* are practically and legally sound, and should therefore be immune to criticism. However, the point remains that a legal discussion should be rooted in legal sources of relevance, regardless in what direction they may turn out to go. It is in that respect that the two decisions are unsatisfactory – and the same applies to the *Sunny Lady* (next chapter).

This methodological aspect involves what generally may be seen as a strength of Norwegian Supreme Court adjudication; that of adopting a fairly open (and pragmatic) policy consideration of the matter at hand. But also that aspect seems here to be missing. Put differently: also such policy considerations require that the considerations to be weighed are derived from the legal instrument governing the legal subject matter, i.e. the HVR. When that part is missing, what might have been good policy considerations becomes stultified.

[104] See the review of the *Tasman Pioneer*, above.

With respect to such policy considerations, it is worth looking at another Supreme Court decision, the *Vågland* from 1954.[105] That case did not deal with exception from liability under the HVR but a similar question of a shipowner's limitation rights in case of nautical fault, and it concerned the peculiar questions which might arise in relation to single-person shipowning companies (Norwegian: skipper-reder). Here, one and the same person fulfills the dual role of being the navigator and the person preparing the ship for sea.[106] Hence, a functional approach to questions of navigation becomes, as it were, distilled, and for that reason illustrative of policy considerations.

The facts of the case were that the ship *Vågland* was to blame in a ship collision. The immediate cause of the collision was navigational fault on the part of the master, while the underlying cause was intoxication on his part, in existence already before departure. The relevant rules concerned limitation of liability, which had no specific provision regulating the stage of initial unseaworthiness, but granted limitation of liability for nautical fault in master-owner constellations.

In the relevant consideration of causation, the Supreme Court found the intoxication to be the proximate cause of the incident, which meant that limitation rights were not granted. The Supreme Court's reasoning is succinct:

> "[NN's] grave violation of the COLREG[107] has in my view […] its cause in his voluntary intoxication, and could – as I see it – hardly have been committed by an experienced master in a sober condition. Under the influence of alcohol he set to sea with his ship with himself at the helm, and under the influence of alcohol he retained command and was on the bridge when the collision happened. What […] led to the collision was – as mentioned – [NN's] intoxication, and for this fault he must be held personally responsible.

[105] ND 1954.65.

[106] As Falkanger points out, these constellations could arise in situations of genuine one-persons companies or in corporations where the main shareholder of the company is the master, which in the context of HVR related transport probably would be more realistic – Falkanger/Bull (2016) p. 175.

[107] Norwegian: sjøveisreglene – which incorporate the COLREG.

> […] That being the case, he cannot be absolved from liability by the fact that the intoxication led to faulty navigation which in itself is a nautical fault."[108]

That case led to discussion among legal scholars. The Norwegian lawyer Alex Rein disagreed with the outcome of the case, arguing that the shipowner's protection by nautical fault thereby risked being eroded, and compared the situation of being intoxicated to the situation of being overly tired, which would have led to ensuing nautical fault giving rise to limitation rights. Mr. Rein stated:

> "For a master-owner's protection to be effective pursuant to the preparatory works, one cannot deny him limitation of liability in all instances where he qua owner would have had a duty to prevent a nautical fault qua master. It cannot therefore in itself constitute a basis for liability that the master-owner's owner-ego did not grasp his master-ego by the neck."[109]

That view elicited reactions. The Danish nautical expert Rud. Nilsson strongly disagreed and stated i.a.:

> "When it is stated [by Mr. Rein]: 'It cannot be disputed that the intoxication was an error in the nautical service', that may in my opinion be correct only in relation to the master-owner in his capacity as master, not in his capacity as owner. As owner his mistake consisted in the fact that he drank the master (in casu himself) under the table,[110] despite knowing that the master was going out sailing. If there had been a question of two persons involved, and the master had shown up drunk at the owner's offices to say goodbye, then the owner would have had a duty to stop him. The situation would have been even worse if the owner had sat down and started drinking heavily with the master before he was going

[108] P. 67–68 – my translation.

[109] Alex Rein, Skipper-rederens rett til ansvarsbegrensning for nautisk feil – Noen bemerkninger til en høyesterettsdom, AfS Bind I 1954 p. 560–563 (561) – my translation.

[110] Danish: 'drak skipperen på pelsen' – which is hard to translate.

> out sailing, and that is actually what has happened here where the master and the owner is one and the same person."[111]

It is to be noted that this view is very much in line with the reasoning by the Supreme Court in the *Faste Jarl*, in that intoxication by the navigator having occurred before commencement of the voyage, could not be seen as navigational in nature, and therefor belonged to the shipowner's sphere of responsibility – as was the essence of the reasoning also in the *Vågland* decision.

Alex Rein gave a further reply where he disagreed with Rud. Nilsson's view, stating i.a.:

> "I am sorry to note that in my previous article I expressed myself so unclearly that even senior officer Rud. Nilsson was not able to follow me. On the other hand, I believe Mr. Nilsson too quickly draws the conclusion that my argumentation for that reason is untenable.[112] Rather than repeating my argumentation in more elaborate terms, I think it will be helpful to take another route and demonstrate where Mr. Nilsson goes wrong in his argumentation."[113]

Alex Rein then gave another analysis of the various constellations in, and consequences of, the master-ego's and the owner-ego's possible prevention of each other's mistakes, and maintained his earlier view that the master-ego's nautical fault should on the facts of the *Vågland* have been decisive, leading to limitation rights being granted.

Mr. Rud. Nilsson again responded, maintaining his earlier view, and stating in response to Mr. Rein's example of tiredness being tantamount to intoxication:

> "Tiredness would be accumulated during performance of the master's duties; if he had been dead-tired before the ship's departure, it might have been reasonable to compare these two situations,

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111 Rud. Nilsson, Diskusjonsinnlegg, AfS Bind 2 1955 p. 163 – my translation.

112 Which is a twisted type of logic: that a person too quickly draws a conclusion *because* he is unable to follow the logic of his antagonist.

113 Ibid. P. 166 – my translation.

> but I would like to see that master who would go to bed when the ship enters dire straights, even if he has already had a strenuous day. It is probable that I do not view these questions sufficiently legally,[114] but as a practitioner I cannot accept viewing these situations on an equal footing. […] The ship is not seaworthy when under command of an intoxicated master, and it is on this point that the owner must take the full responsibility for not having let his alter-ego stay on shore and sleep it off."[115]

As part of this Norwegian-Danish debate, also the Swedish scholar Tage Zetterlöf expressed his views, essentially agreeing with Rud. Nilsson. Mr. Zetterlöf discussed various policy considerations involved in the *Vågland,* e.g. on the one hand that a master-owner's owner-ego may be said to be disadvantaged vis-à-vis a regular owner, who would be entitled to invoke limitation rights in case of nautical fault committed by its master – but on the other hand that a master-owner's master-ego would be unduly favourably treated compared to his nautical colleagues, who would not be protected by limitation rights in a situation such as the present one.[116]

As stated, the discussion concerned the limitation rules as applicable at the time,[117] not the HVR. However, the discussion revolving around the phenomenon of dual tasks performed by one and the same person in master-owner constellations, is of general interest.

First, the phenomenon has an intriguing theoretical side: Should one – in the spirit of Mr. Rein's idea – split the two egos in the sense that the test of due diligence by the master-ego starts only after that ego has been intoxicated by the owner-ego? This way of putting the question goes to the core of fundamental principles found in other legal areas, such as in criminal law, where in case of voluntary intoxication a person's

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114 Which clearly is mockery of Mr. Rein's formalistic argumentation.

115 Ibid p. 168 – my translation.

116 Ibid p. 165 – however, and as Mr. Zetterlöf pointed out, with possible protection through the rules of abatement according to MC s. 151 second paragraph.

117 For a further discussion on the subsequent development in this area of law, including the current MC chapter 9 based on the 1976 Convention, see Solvang, Rederiorganisering og ansvar – rettslige utviklingstrekk, MarIus 484, 2018, pp. 35–37.

acts are assessed as if he/she was not intoxicated. Conceptually, it seems close to impossible (even in master-owner constellations) to envisage an "input-threshold" of intoxication which is to be taken into account so that a nautical fault occasioned by intoxication is not to be deemed negligent because such "input-threshold" is not to be imputed to the nautical master-ego (solely to the owner-ego) and therefore shall not form part of the overall assessment of negligence, including the assessment of exceptions from liability for negligence. That type of logical (and psycho-logical) delimitation, bordering to absurdity, is hardly tenable within legal reality.

Second, this conception of an "acting-ego" in a master-owner constellation, has some relevance to "normal" constellations of dual functions to be performed, e.g. in the context of the HVR.

The *Vågland* bears resemblance to the *Faste Jarl*. If the shipowner in the *Faste Jarl* had been a one-person master-owner, the reasoning in the *Vågland* would have governed.[118] Fundamental ideas of contract law lead to the same result: if a corporation engages employees to undertake the relevant tasks, i.e. both preparing the ship for sea and navigating the ship, there should in principle be no difference from a one-person company. The basic idea is that a party subject to certain duties by undertaking certain functions, shall not be allowed to escape liability by engaging someone else – and correspondingly if the failure of performance of certain functions is exempt from liability.

In other words, when intoxication before departure was not seen as (the preceding stage of) a nautical fault in a master-owner situation in the *Vågland*, that consideration should turn out no differently if servants are engaged in doing the relevant task – as in the *Faste Jarl*. Conversely, if the task is of nautical nature proper, whether the failure in performing it is committed before or after commencement of the voyage, should according to this line of reasoning make no difference. This essentially points towards what we have called a functional approach in the context

[118] I do in that respect not follow the view by Falkanger/Bull that the outcome in the *Vågland* has been set aside by subsequent remarks in the preparatory works to the later enacted limitation rules, Solvang, Ibid p. 36.

of the HVR, to the effect that a nautical fault proper committed before departure would lead to liability exemption for nautical fault – as illustrated by the examples given in the *Hill Harmony* and the *Jalavihar* (above).

This, moreover, means that the *Faste Jarl* and S*unna* were soundly decided in the sense that in those cases there was no question of an initial seaworthiness defect being of a nautical nature proper. But it also means that the reasoning in both cases was unsatisfactory in not touching upon the complicated aspects of the interlink between HVR art. III and art. IV.

5 The concept of seaworthiness and Norwegian courts' use of foreign law definitions – the *Sunny Lady*

In the *Sunna*, the Supreme Court did not attempt to formulate any definition of unseaworthiness – and in the writer's view, rightly so.[119] Rather the essential point was put in terms of whether a prudent shipowner would have allowed the ship to sail with knowledge of the relevant deficiency – something which, on the relevant facts, was answered in the negative.

The Court of Appeal took a different approach to this question of assessing the foreseeable risk during the upcoming voyage, i.a. by adopting the approach taken by the Supreme Court in the *Sunny Lady* from 1975.[120] What in the *Sunna* may be seen as a prima facie deficiency of seaworthiness in terms of the master's lack of implementation of a proper bridge management system, could, according the Court of Appeal, have been rectified during the course of the voyage, in the same way that a prima

[119] The seaworthiness test is complex, in many ways reflecting that of a general test of negligence, and one finds – understandably – no attempts by the Supreme Court to "define" the concept of negligence.

[120] ND 1975.85=Rt. 1975.61. See the extensive quote from the *Sunny Lady* on p. 11 of the Court of Appeal's decision.

facie deficiency in the *Sunny Lady* could have been rectified.[121] Hence, the requirement for seaworthiness was, according to the Court of Appeal with reference to the *Sunny Lady*, "not perfection, but reasonable fitness".[122]

This phrase – that the requirement for seaworthiness is "not perfection, but reasonable fitness" – as used by the Supreme Court in the *Sunny Lady* was, in turn, taken by the Supreme Court from the U.S. Supreme Court's decision in the *Racer*.[123] We shall return to the *Racer* but first set out the essential facts of *Sunny Lady*.

The facts were that during an intermediate call of 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 their identity, and there were other crewmembers than the one making the mistake (who was new on the ship) that could have instructed him if asked to. The Supreme Court found the ship not to have been initially unseaworthy and the shipowner was held entitled to invoke the nautical fault exception through error in management of the ship during the voyage, HVR art. IV 2 a).

As part of its reasoning relating to the seaworthiness test, the Supreme Court put the question of "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."[124] On the facts of the case, the Court answered this in the affirmative: there was reason to believe that 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. Moreover,

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121 After the quote from the *Sunny Lady*, the Court of Appeal in the *Sunna* states (ibid): "Transferred to our case, it must be considered as a fact ['legges til grunn'] that the master could have easily provided for outlook while sailing in the dark by utilizing the crew as envisaged in the plan for manning." (my translation)

122 As quoted from the *Sunny Lady*, ibid.

123 *Mitchell vs. Trawler Racer Inc.,* 1960 A.M.C. 1503.

124 Page 92–93 of the decision – my translation.

the Supreme Court adopted the phrase from the *Racer* in relation to the initial deficiency of the flanges being painted over: seaworthiness "is not perfection, but reasonable fitness".[125]

As mentioned, the Court of Appeal in the *Sunna* adopted that very phrase from the *Sunny Lady* in support for its finding that the *Sunna* was not initially unseaworthy. This type of reasoning and use of legal sources by the Court of Appeal, invites criticism.

A first point concerns the Court's adaptation of the considerations in the *Sunny Lady,* which is hardly appropriate to cover the situation in the *Sunna*. In the *Sunny Lady* there was a question of fairly minor shortcomings (overpainted flanges of gauging pipes) combined with a crew expected to learn about this characteristic during the upcoming voyage – while in the *Sunna* a deficiency in terms of lack of implementation of safety rules, could hardly be considered minor; it was no lack of "perfection" as this phrase was put in the *Sunny Lady*.

A second point, which will be addressed in some detail, concerns the very use of phrases (or definitions) like the one used by the Supreme Court in the *Sunny Lady* – that the test of seaworthiness is "not perfection, but reasonable fitness" – as taken from U.S. law and the *Racer*.

This taking of singular quotes from foreign law decisions is unfortunate because it is wholly inapt as a stand-alone quote. Looking to e.g. U.S. or English courts' use of previous cases (precedents), one hardly ever finds this type of stand-alone quote, lacking any reference to the facts of the case from which the quotes are taken, hence also lacking any discussion as to whether such facts – combined with statements of the law – may be used as guidance to the case at hand.[126] Nor is it generally in line with Norwegian methodology to use such stand-alone quotes; one hardly sees the Norwegian Supreme Court using quotes from its own prior decisions in such a way, with no guidance as to the factual context

[125] Rt. 1975.61 (p. 65).

[126] See the *Racer* decision itself, containing extensive discussion of prior cases, and no stand-alone quotes.

in which the quoted passage is made.[127] It is in respect worth noticing that the stand-alone quote – that the standard of seaworthiness "is not perfection, but reasonable fitness" – has found its way into standard volumes of Norwegian maritime law.[128]

Moreover, such use of singular quotes is unfortunate because when looking at the context of the *Racer*, it becomes apparent that the quote is hardly adequate to the context of the *Sunny Lady* (and even less so of the *Sunna*). The *Racer* did not concern a due diligence obligation to make the ship seaworthy as in the *Sunny Lady*. It concerned the U.S. common law strict seaworthiness obligation in relation to personal injury suffered by crewmembers. Likewise, the *Racer* did not concern questions of initial unseaworthiness – as in the *Sunny Lady* – but instances of subsequent unseaworthiness arising during the course of a voyage, which in the *Racer* concerned the task of landing a catch of fish from a fishing vessel. This discussion has in that sense no parallel to Norwegian law, nor to the HVR, but must be seen as a peculiar feature of U.S. law.

It is in that respect worth noticing that in the *Racer* the ship was found to be initially *seaworthy* and that the incident leading to the personal injury was considered an unavoidable consequence of the normal use of a ship being in itself seaworthy.

The injury happened in the following way: As part of ordinary discharge of a catch of fish, slime and spawn had dripped and accumulated onto the ship's rail. After having taken part in the discharge, the claimant changed clothes to go ashore. "He made his way to the side of the vessel which abutted the dock, and in accord with recognized custom stepped

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127 One may find it as a mere guidance to certain legal topics, such as that of gross negligence: "a marked departure from what is considered prudent", as quoted by the Supreme Court in the *Nordland* case, ND 1995.238, from their earlier case in Rt. 1989.1318, see Falkanger/Bull (2016) p. 155.

128 The English version of the volume, Falkanger/Bull, Scandinavian maritime law, 2017, p. 350 states: "An American decision regarding the duty of seaworthiness stated: 'the standard of seaworthiness is not perfection, but reasonable fitness.' This *principle* has been adopted by the Norwegian Supreme Court, see ND 1975.85 SUNNY LADY […]." (my emphasis of 'principle'). As an aside: it is remarkable how often students at the Institute of Maritime Law adopt this very phrase when resolving case-based exams involving unseaworthiness.

onto the ship's rail in order to reach a ladder attached to the pier. He was injured when his foot slipped off the rail as he grasped the ladder."[129]

Hence, there was nothing to criticize the shipowner for not having removed the spawn and slime from the rail when the incident happened, and there was nothing untoward about the condition of the ship or the way the catch had been handled during discharge. The question of the case concerned the extent of a shipowner's absolute and continuous obligation of seaworthiness at common law, relating to personal injury suffered by seamen.

This leads to a further point, namely that the quote itself – that the seaworthiness test is "not perfection, but reasonable fitness" – is made by the majority of the U.S. Supreme Court in defence to criticism of their view by dissenting opinions. The point by the minority was essentially that a state of law imposing a continuous and absolute obligation of seaworthiness would serve no deterring purposes, as illustrated by the facts of the *Racer*, and that such an absolute obligation was scarcely supported by prior case law. Hence, the minority disagreed that liability should ensue in the present case, and pointed to:

> "the unfairness of holding the vessel accountable for losses resulting from damage, detectible or otherwise, caused, without fault of the vessel, by perils of the sea; the likelihood that those whose safety depends on the vessel […] in any event use every reasonable precaution to preserve it, and that in the circumstances of operation of the vessel no additional care could be exacted by the imposition of absolute liability; and determination that to impose absolute liability for injuries caused by defects arising without fault in the complex operation of a vessel would be, in all the circumstances, unduly burdensome."[130]

Moreover, the minority pointed to the difference between this type of unreasonable application of strict liability rules in respect of unseaworthiness, and the more sensible due diligence obligation of seaworthiness

[129] P. 1504 of the decision.

[130] Page 527.

in the context of carriage of goods by sea, including the Hague Rules as adopted in U.S. law. The minority stated in this respect:

> "As to the cases decided, however, we are told that even though there is no claim that the vessel should have made different provisions for the unloading of its catch or the debarking of its crew, the shipowner is liable for an injury caused by a temporary unsafe condition and arising from the normal operation of the vessel, not the result of fault or mismanagement of anyone onboard, and which no one had a reasonable opportunity to remedy. Had there been negligence, either in permitting the spawn to accumulate or in failing to remove it, the admiralty principles developed in the cargo cases, and taken over into personal injury cases, would warrant an imposition of liability, although as to cargo damage the Harter Act and the Carriage of Goods by Sea Act [i.e. the Hague Rules], of course, bar recovery."[131]

In other words, the minority highlighted the more sensible approach of due diligence obligation of seaworthiness in the cargo carriage regimes, while pointing to the fact that nautical fault during the course of the voyage under such regimes would exempt the shipowner from such liability.

As an answer to this criticism by the minority, the majority toned down in general terms the requirement for seaworthiness. What the majority stated in this respect was more extensive than the stand-alone quote used by the Norwegian Supreme Court in the *Sunny Lady* (and with unfortunate knock-on effects by the Court of Appeal in the *Sunna*). The entire statement by the majority starts by giving an account of the U.S. common law position:

> "There is ample room for argument, in the light of history, as to how the law of unseaworthiness should have or could have developed. Such theories might be made to fill a volume of logic. But, in view of the decisions in this court over the last 15 years, we can find no room for argument as to what the law is. *What has evolved is a*

[131] Page 529.

> *complete divorcement of unseaworthiness liability from concepts of negligence*. To hold otherwise now would be to erase more than just a page of history."[132]

From these general remarks – emphasizing the separation of the common law position from concepts of negligence – the majority then continuous with the following passage from which the quote in the *Sunny Lady* is taken:

> "What has been said is not to suggest that the owner is obligated to furnish an accident-free ship. The duty is absolute, but it is a duty only to furnish a ship and impertinences reasonably fit for their intended use. The standard is not perfection, but reasonable fitness; not a ship that will weather every conceivable storm or withstand every imaginable peril of the sea, but a vessel reasonably suitable for her intended service."[133]

That is the context of the quote from the *Racer*. The reservation made that the ship may not withstand "every *conceivable* storm or withstand every *imaginable* peril of the sea", is hardly apt in relation to the facts of the *Sunny Lady*, and even less so in relation to the facts of the *Sunna* (as the quote was used by the Court of Appeal in that case).

This leads to still another point concerning the unfortunate use by the Norwegian Supreme Court (with a knock-on effect to the Court of Appeal in the *Sunna* – and in standard volumes on maritime law)[134] of such stand-alone quotes from foreign law. It must be seen as questionable indeed whether the U.S. Supreme Court would hold that the facts of the *Sunny Lady* would not lead to a finding of unseaworthiness – if in the U.S. context such deficiencies would, hypothetically, lead to personal injury by crewmembers. Rather, based on the facts of the *Racer*, the matter of unseaworthiness would be close to "perfection": there was nothing wrong with the ship as such, and the accumulation of spawn and slime on its rail

[132] Page 512 – my emphasis.

[133] Page 512–513

[134] See the reference to Falkanger/Bull, above.

was part of ordinary cargo handling. When despite this fact that there was nothing wrong with the ship as such, the vessel was still found to be unseaworthy, how should the *Sunny Lady* (with its overpainted flanges of gauging pipes and inexperienced crew) survive such a test?[135]

To the writer it is therefore close to a mystery why and how a quote from the U.S. *Racer* found its way into the Norwegian Supreme Court's reasoning in the *Sunny Lady*. The *Racer* is, for natural reasons, not referred to in any U.S. (or English) authorities on the concept of seaworthiness in the context of carriage of goods, so why should the Norwegian Supreme Court find reasons to refer to it? Clearly, formulations of the seaworthiness concept within the context of carriage of goods and the HVR, can be found, both under U.S. and English law, in plenty of cases much more apposite than the *Racer* – if one sees a need for a "definition" of unseaworthiness.

Furthermore, this uninformed use of foreign law in the *Sunny Lady* is accompanied by an unfortunate statement by the Supreme Court, as follows:

> "I add that the United States of America have not ratified the Hague Rules but it is clear that the country has in place corresponding legislation."[136]

That is incorrect, since the U.S. had ratified the Hague Rules long before the *Sunny Lady* case. The Hague Rules were incorporated into the U.S. COGSA of 1936. This incorrect statement yields a kind of double irony – first, that since the U.S. had ratified the Hague Rules, reference to U.S. cases under these Rules would be of relevance to Norwegian law, rather than reference to the common law position relating to personal injury to seamen, being a peculiarity of U.S law – second, that the U.S. Supreme Court stated in the *Racer* that this seaworthiness obligation

[135] This is not to say that the Supreme Court meant to deduce that kind of findings from the stand-alone quote. Rather the Supreme Court referred to other U.S. law cases in support for its concrete finding, but, again, with no reference to the context of such other cases, see Rt. 1975.61 (pp. 66–67).

[136] Rt. 1976.61 (p. 65) – my translation.

at common law was *entirely detached* from the negligence-based seaworthiness obligation in the U.S. COGSA, corresponding to the HVR-implementation into the Norwegian MC.