PRIVATE SALVAGE AND PUBLIC RISK

by Mr. Justice Connolly*

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Salvage reward is claimed by the plaintiffs from the owners of *Oceanic Grandeur*. Such a reward is payable to those rendering salvage services, that is to say, to those whose voluntary services to another vessel either save or assist in saving that vessel when in danger or recover or assist in recovering it from actual loss.

> "The awarding of salvage is governed largely by considerations of public policy and by the desirability of encouraging seafaring folk to take risks for the purpose of saving property."

—Willmer J. in *The Sandefjord*.[1] However, although the courts look favourably on claims to salvage reward—*The "Sappho"*[2]—there are certain essential features which must be present before an entitlement to any reward can arise. There must be danger to the vessel salved. There must be a voluntary rendering of services in the sense that the services must not have been rendered pursuant to a contractual or official duty owed to the salved vessel. Again, in the absence of special contract, the services must turn out to have been successful, or to have contributed to success, before any reward can be earned.[3]

In salvage law the pre-requisite of necessary danger is customarily described as physical danger to the vessel—*Kennedy on Civil Salvage*, 4th ed. (1958), p. 14 et seq. However, it is not confined to cases of threatened destruction of or physical injury to the vessel. It includes also cases of threatened loss of the use of that vessel by those lawfully entitled to its use, whether as a result of acts of piracy or of the actions of revolutionaries—*Société Maritime Caledonienne* v. *The Cythera*;[4] and *The Lomonosoff*.[5] In the former, Macfarlan J. concluded,[6] after an extensive review of the authorities, that the essential element in the case of piracy was not that pirates might destroy or damage the ship but rather that they would deprive the owner of his rights of possession and control. In *The Lomonosoff*, Hill J. said[7] that the danger to the vessel was that it would be taken out of the possession and use of the owners for an indefinite time and perhaps permanently lost to them.[8]

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1. (1953) 2 Lloyd's Rep. 557, at p. 561.
2. (1871) L.R. 3 P.C. 690, at p. 695.
3. *Fisher* v. *The "Oceanic Grandeur"* (1972) 127 C.L.R. 312, at p. 318 per Stephen J.
4. [1965] N.S.W.R. 146.
5. [1921] P. 97.
6. Ibid., at p. 152.
7. Ibid., at p. 105.
8. *Fisher* v. *The "Oceanic Grandeur"*, ibid., at pp. 323-4.

In *Fisher* v. *The "Oceanic Grandeur"*[9] Stephen J. expressed the view that it could be concluded from *The Troilus*[10] that mere physical safety of the ship is not a fact negativing salvage services being capable of being rendered to her and that threatened immobilization is a factor to which regard should be had, together with threatened physical danger, in determining whether services rendered are in the nature of salvage services.

Voluntariness is an essential element of salvage in the sense that if a service is rendered solely under a pre-existing contractual or official duty owed to the owner of the salved property, or solely in the interest of self preservation, it is not a salvage service.[11] Apart from official duty to the owner of the salved property, the commonest case is that of the crew of the salved ship and the owner, master or crew of a vessel towing her or rendering services to her under contract. But if it be proved that they have done something outside the scope of their contracts or duties, they too may earn salvage reward.

It is clear that the statement of Lord Diplock in *The Tojo Maru*[12] that, except in the case of derelicts, the rendering of salvage services is consensual, cannot be accepted without reservation. There never was a contract between the crew and the salved vessel yet they were entitled to salvage reward and *Fisher* v. *The "Oceanic Grandeur"* shows that even where as between the owners there is, by reason of their contractual relations, no question of salvage, efforts of the nature of salvage by the master and crew, though performed in direct obedience to the orders of their owner, may lead to salvage reward.

The next general observation which should be made is in relation to success. "The first distinctive feature is that the person rendering salvage services is not entitled to any remuneration unless he saves the property in whole or in part."[13] The principles relating to success are summarized as follows by Kennedy:

A. "Success is necessary for salvage reward."[14]

B. "Contributions to that success, or as it is sometimes expressed, meritorious contributions to that success give a title to salvage reward. Services, however meritorious, which do not contribute to the ultimate success, do not give a title to salvage reward. Services which rescue a vessel from one danger but end by leaving her in a position of as great or nearly as great a danger though of another kind, are held not to contribute to the ultimate success and do not entitle to salvage reward."[14]

C. "If a salvor is employed to do anything and does it, and the property is ultimately saved, he may claim a salvage award, though

9. Ibid., at p. 326.
10. [1950] P. 92.
11. *Kennedy on Civil Savage*, 4th ed., at p. 25.
12. [1972] A.C. 242, at p. 292.
13. Ibid., at p. 293.
14. *The Melanie* (*Owners*) v. *The San Onofre* (*Owners*) [1925] A.C. 246, at p. 262, per Lord Phillimore; something must be saved.

the thing which he does, in the events which happen, produces no good effect. If a salvor is employed to complete a salvage and does not, but, without any misconduct on his part, fails after he has performed a beneficial service, he is entitled also to a salvage award. If a salvor is employed to do a thing and does not do it, and no doubt uses strenuous exertions and makes sacrifices but does no good at all, then it seems to me he is not entitled to salvage"[15]

The next general observation relevant to this problem is the characteristic that the salvor's remuneration cannot exceed the value of the property saved.[16] This well established principle does not however, mean that the measure of the ship owner's liability to a successful salvor is the value of the benefit he has gained from the salvor's services. For the public policy of encouraging salvors to offer their services to vessels in distress was held to justify generous awards to successful salvors reflected in more favourable treatment than that accorded to those who render services to other people's property on land.[17]

The third general observation which can usefully be made is that salvors are liable to the owners for negligence. The public policy referred to earlier is reflected in leniency in condemning as negligent acts or omissions of a salvor occurring in the course of salvage operations. Every allowance is made for the exigencies of the circumstances in which the operations are carried out but if when all such allowances have been made, the conduct of the salvor manifestly falls short of the standard of care which would be observed in the circumstances by a prudent and reasonable man, he is liable for his negligence and the salvage award should determine, first the proper remuneration of the salvor had he not been negligent and second, the damages recoverable by the owners for the negligence, any excess of damages over remuneration being awarded to the owners: *The Tojo Maru*. The principles stated above are wholly consistent with the Brussels Convention on Salvage 1910 and the provisions of Pt. VII of the *Navigation Act* (Cth) which in this respect do not call for separate examination.

The Salvage Contract

Undoubtedly, in these days in European waters at least, most salvage services other than that of standing by a vessel in distress are performed by professional salvors under a salvage agreement in Lloyd's Standard Form. Its full title is Lloyd's Standard Form of Salvage Agreement—"No Cure—No Pay". It is commonly referred to as Lloyd's Open Form. By cl. 1 the salvor agrees to use his best endeavours to salve the ship and/or her cargo. It has been pointed out that the immediate effect of this clause is to change the character of the salvage service so that it ceases to be

15. *The Dart* (1899) 8 Asp. 481, at p. 483 per Phillimore J.
16. Cf. Art. 2 of the Brussels Convention 1910; M. N. Howard, "Valuation in Salvage Cases" 91 L.Q.R. 502.
17. *The Tojo Maru*, ibid., at pp. 293-4 per Lord Diplock.

discretionary with both parties free to withdraw.[18] Clause 1 characterizes the services to be rendered and accepted as salvage services. This is conclusive as between the parties.[19] Clause 1 does not give the salvor an exclusive right and accordingly the other parties are free to engage additional or alternative assistance if, for any reason, it proves that the salvor is unlikely successfully to complete the service. Another point to be made in respect of cl. 1 is that it contemplates in terms that salvage services may already be under way when it is entered into.

Not only in the heading to the form but in cl. 1 the principle of success as the foundation of salvage reward is recognized and adopted. Clause 1 provides that the services shall be rendered upon the principle of "No Cure—No Pay". By the same clause the salvor's remuneration is to be fixed by arbitration in London "in the event of success".

The current edition of Lloyd's Open Form was issued in 1972. Unlike previous standard form documents it makes no provision for a stipulated salvage reward. Indeed, the essential feature of the agreement lies in its elaborate machinery for the resolution of any difference arising out of the agreement or the operations thereunder as well as the salvors remuneration by arbitration in London. No doubt this has been found to be a highly satisfactory means of resolving such questions. The arbitrator will be appointed by the Committee of Lloyd's from a panel consisting of Queen's Counsel practising at the Admiralty Bar. The Lloyd's form provides for an appeal arbitration from the award of the original arbitrator and the appeal arbitrator has similar standing. It appears that the present appeal arbitrator, who hears all such appeals, was for many years on the panel of original arbitrators.[20] Quite apart from the requirement to arbitrate in London however, the Lloyd's form clearly requires resort to London for other essential features, the most important of which is the security. By cl. 4 the salvor is required, at latest immediately after the termination of the services, to notify the Committee of Lloyd's of the amount in which he requires security. The sanction for his requiring excessive security is that the arbitrator may penalize him by condemning him in the cost of providing excessive security. Nonetheless, the security required by the salvor must be provided to the Committee of Lloyd's in a form and by persons approved by it. The provision of security is of great importance. Clause 5 gives the salvor a maritime lien on the property salved for his remuneration, a provision which would appear to add nothing to the general law.[21] The salvor however agrees not to arrest or detain the property salved unless the security be not given within 14 days of the termination of the services or the salvor has reason to believe that the removal of the property salved is contemplated.

18. D. R. Thomas, "Lloyd's Standard Form of Salvage Agreement—A descriptive and analytical scrutiny" (1978) *Lloyd's Maritime & Commercial Law Quarterly* (L.M.C.L.Q.), at p. 279.
19. *The Beaverford* v. *The Kafiristan* [1938] A.C. 136, at p. 140 per Lord Atkin.
20. J. G. R. Grigg, "An examination of Lloyd's Standard Form of Salvage Agreement" (1974) L.M.C.L.Q. 138.
21. *The Goulandris* [1927] P. 182.

The security is important in another way. By cl. 6, if the Committee of Lloyd's has not, within 42 days from the completion of the security received notice of a claim for arbitration, it shall "call upon the party or parties concerned to pay the amount thereof and in the event of non-payment shall realise or enforce the security and pay over the amount thereof to the contractor". It would appear that this provision, which might have irremediable consequences in the event of an inadvertent failure to refer to arbitration, was strongly opposed by the English profession[22] and that, in its present form at least, it represents a distinctly undesirable feature of the Lloyd's Open Form.

By cl. 12 a right of appeal from the award of an original arbitrator is given. The appeal is initiated by a notice to be given within 14 working days of the publication of the award. The appeal arbitrator, as has already been seen, would appear also to be a member of the Admiralty Bar.

Among the many points decided by *The Tojo Maru* was the principle that an arbitrator under Lloyd's Open Form, in making his award, is not entitled to take into account a devaluation of sterling between the date when the services were rendered and the date of the award. Clause 17 of the 1972 edition of the form accordingly makes provision for this factor to be taken into account. The same result is achieved by the decision of the Court of Appeal in *The Kozara*,[23] permitting arbitrators to make an award in "the proper currency of the contract".

It is clear therefore, that the Lloyd's Open Form is London oriented and it may be that in time there will be pressure to establish similar machinery in the Pacific region. In the short term however, it must be acknowledged that the form and the machinery which it calls into operation are almost universally used and that global trust is rightly placed in Lloyd's as the administrator of the system. The arbitral machinery is satisfactory in being as simple as is possible, relatively inexpensive and speedy and those who would seek to find a substitute for it will find themselves faced with a difficult task. One particular advantage of an agreement such as the Lloyd's Open Form is that it avoids complex issues relating to the proper law of the contract.

Are the current Law and Practice relating to Salvage Contracts satisfactory?

Following the Amoco Cadiz incident (March, 1978) there has been much criticism of the current law and practice relating to salvage, attended by arguments for intervention by coastal States rather than leaving the situation to the private salvor. In the discussion which follows I have drawn heavily on Dr. D. W. Abecassis' book, *Oil Pollution From Ships*, Butterworths, 1978 and also on the same author's paper "Some Topical Considerations in the Event of a Casualty to an Oil Tanker".[24]

22. J. G. R. Griggs, op. cit., at p. 140.
23. (1973) 2 Lloyd's Rep. 1. Cf. J. G. R. Griggs, op. cit., at p. 144.
24. (1979) L.M.C.L.Q. 449.

It may be accepted that the object of the system must be to enable the action necessary to protect all the interests involved to be taken as quickly and efficiently as possible.[25] Any feature therefore which would tend to dissuade the potential salvor from undertaking the enterprise or delay his decision may be regarded as an unsatisfactory feature as also any factor which will tend, in either a practical or a legal sense, to delay the decision of the owner to enter into the salvage contract. These problems have of course, been given a new dimension by the immensity of the risks involved in cases of major oil spillage and the value of the cargo in recent years. Some at least of the questions which call for discussion in relation to the salvors position are as follows:

(a) Is the prize worth the effort?

(b) Could the salvor be exposed to criminal liability?

(c) Could he be exposed to civil liability?

(d) Can he limit his liability?

(e) If anti-pollution measures are necessary, can he get security for their cost?

(f) Can he anticipate a reward for anti-pollution measures?

From the ship owner's point of view, an early decision to enter into a salvage contract may, at least in a practical sense, depend upon the concurrence of his underwriters. If there is a prospect of the salvor's being rewarded for anti-pollution measures, there would seem to be room for doubt whether it is the hull or the P. & I. underwriters to whom the ship owner would look and a time factor could well be involved while this is being looked into.

By way of general introduction, it may be said that these days deliberate jettison of oil would be a last resort if only because of its current value, and, of course, where the jettison occurs for the benefit of the hull and freight as well as the cargo, the fact that cargo of such value, if jettisoned, is likely to be a general average sacrifice will add to the unlikelihood. In addition, if the proposed jettison is close enough to land to be capable of causing oil pollution damage to the territory of a coastal State there are the additional features of the criminal liability of the master under the domestic law of the coastal State and civil liability under either the legislation passed in compliance with the international obligation of the coastal State under The International Convention on Civil Liability for Oil Pollution Damage 1969 if adopted by the coastal State or under other domestic law of that State.

In relation to criminal liability the Commonwealth has enacted the *Pollution of the Sea by Oil Act* 1960-1973 to give effect to the International Convention for the Prevention of Pollution of the Sea by Oil 1954 as amended in 1962 and 1969. Section 6 in the form it has taken since s. 4 of the amending Act of 1972 came into operation on 20th January, 1978,

25. Op. cit., at p. 450.

imposes criminal liability on the owner and the master for any discharge of oil or of an oily mixture from an Australian ship into the sea outside territorial waters. Each is liable to a fine not exceeding $50,000. It is however a defence that, amongst other things, the discharge was for the purpose of securing the safety of the ship, preventing damage to ship or cargo or saving life at sea; or that the escape was in consequence of damage to the ship or unavoidable leakage and that all reasonable precautions were taken after the occurrence of the damage or the discovery of the leakage for the purpose of preventing or minimizing the escape: s. 6 (5). In relation to the territorial sea the Commonwealth would appear to have left the matter to be regulated by the *Pollution of Waters by Oil Act* 1973 (Qld.) which makes similar provision in relation to waters of the sea "within the jurisdiction". Section 4 of the Commonwealth Act in terms preserves such laws. There is of course room for argument about the expression "within the jurisdiction" since the decision of the High Court in *New South Wales* v. *Commonwealth*.[26] Apart from this point however the State Act is significant in that the definition of "master" is wide enough to include a salvor having "command, charge or management of the ship".

So far as civil liability is concerned the International Convention on Civil Liability for Oil Pollution Damage 1969 (C.L.C. 1969) has not been adopted by the Commonwealth.[27] By Pt. VIIA of the *Navigation Act* 1912-1973 the Minister is given substantial powers of intervention if satisfied that oil is likely to escape from a ship, for the purpose of preventing or reducing the extent of the pollution or likely pollution by the oil of any Australian coastal waters, any part of the Australian coast or any Australian reef. See s. 329E. By sub-s. (6) the ship must either be registered in Australia or be in Australian coastal waters which means Australian territorial waters and the internal tidal waters of Australia. By s. 329J where a notice is not complied with the Minister may cause such things to be done as he thinks proper for carrying out the action required by the notice. By s. 329K where oil escapes from a ship carrying oil in bulk as cargo (whether in Australian coastal waters or elsewhere), the Minister may, independently of s. 329E cause such things to be done as he thinks proper to prevent, or reduce the extent of, the pollution by the oil of any Australian coastal waters, any part of the Australian coast or any Australian reef (being a reef in Australian coastal waters or on the continental shelf) or to remove or reduce the effects of the pollution by the oil of any such waters, coast or reef. Expenses and other liabilities incurred by the Minister in the exercise of his powers are a debt due to the Commonwealth recoverable from the owner and a charge upon the ship which, except where the ship is not registered in Australia and is not in Australian coastal waters, may be detained until the amount is paid or security provided. Where the escape of oil did not occur as a result of the actual fault or privity of the owner the maximum liability is limited to $120 per adjusted net ton, no

26. (1975) 135 C.L.R. 337.
27. Its adoption is understood to be currently under active consideration.

deduction being made in respect of engine room space or $12,600,000 whichever is the less. It is a defence that the escape of oil resulted, in effect, from war, insurrection or an act of God or was wholly caused by the deliberate act of a third party with intent to cause damage or by the negligence of government or navigation authorities. This legislation differs from C.L.C. 1969 (which was of course introduced following the Torrey Canyon incident in 1967) in that it applies to bulk oil carriers and is not confined to carriers of persistent bulk oil but the expedient adopted is essentially that of coastal State intervention. C.L.C. 1969 imposes, with limited exceptions, strict civil liability for pollution damage caused by the escape of oil. Like the Commonwealth provisions a limitation of liability is provided for which in 1978 was of the order of $17,000,000.[28] As with the Australian legislation the right to limit applied only in the absence of actual fault or privity of the owner. As with C.L.C. 1969, s. 329K does not apply to oil escaping from installations and pipelines, from dry cargo ships and tankers not carrying oil in bulk as cargo and, most significant for present purposes, it does not apply to salvors and bare boat charterers. Moreover, as Australia is not a party to C.L.C. 1969 the Commonwealth is not eligible to become a party to the International Convention on the Establishment of an International Fund for Compensation for Pollution Damage 1971 which is raised by levying oil imports into member States and which is designed to give ship owners some relief from the burden of C.L.C. 1969 and to provide a further source of compensation for oil pollution claimants.

The Australian position is that civil actions for oil pollution are governed by the common law. The cause of action would ordinarily be in nuisance or negligence and the difficulties which face a plaintiff are formidable indeed. An admirable analysis of the legal problems will be found in Chapter 9 of Dr. Abecassis' book referred to earlier. To illustrate the point it is necessary only to refer to the three best known of the modern cases. In *Esso Petroleum Co. Ltd.* v. *Southport Corporation*[29] an oil tanker's steering gear failed because her stern frame was cracked. The master, knowing weather conditions to be unfavourable, brought her into the Ribble estuary and attempted to navigate a comparatively narrow and shallow channel. She ran aground on a revetment wall and was in danger of breaking her back. The safety of the ship was at stake and the lives of her crew were in peril. The master therefore jettisoned 400 tons of oil cargo which occasioned damage to the foreshore. The foreshore owners fail in an action based on trespass, nuisance and negligence. The speeches in the House of Lords deal with the case as one of negligence or no negligence in terms of the pleadings and the way in which the case was conducted. Various observations in the speeches do however point to the difficulty of establishing nuisance, advantageous as it is to the plaintiff in shifting the burden of

28. Cf. Dr. D. W. Abecassis, op. cit., at p. 191. The figure is for a ship of 100,000 limitation tons reducing for smaller vessels.
29. [1956] A.C. 218.

proof to the defendant, where danger to human life is involved. In *The Wagon Mound* (No. 1)[30] furnace oil escaped from the Wagon Mound due to the negligence of the charterers' servants. It ultimately caught fire and did considerable damage. On a finding that the charterers of the Wagon Mound did not know and could not reasonably be expected to have known that the oil on the water was capable of being set on fire, the charterers were held not to be liable in negligence, the damage not being foreseeable. The unsuccessful action had been brought by the owners of the Sheer Legs Wharf. In *The Wagon Mound* (No. 2)[31] the owners of two other vessels, the Corrimal and the Audrey D., which also sustained damage in the fire, framed their action against the charterers of the Wagon Mound both in negligence and in nuisance. The action in negligence failed at first instance before Walsh J. (then a judge of the Supreme Court of New South Wales sitting in the Commercial Causes Jurisdiction). The plaintiff succeeded however in nuisance on the footing that foreseeability is not an element of liability in nuisance. His Honour's finding on foreseeability differs somewhat from that in *The Wagon Mound* (No. 1). He held that the officers of the Wagon Mound would, if they had given attention to the risk of fire from the spillage, have regarded it as a possibility but one which could become an actuality only in very exceptional circumstances. On appeal and cross appeal, their Lordships held that in the class of nuisance which included the case before them, foreseeability is an essential element in determining liability so that Walsh J. was wrong in sustaining the claim in nuisance on the footing that foreseeability was not required. On the other hand they held that the claim in negligence should succeed on the footing that the finding involved a real and not a far fetched risk, being foreseeable. Why this conclusion did not involve the decision in nuisance being correct, whatever the views of Walsh J. on the law, does not appear.

These three cases alone indicate that the problem of establishing liability for oil pollution at the suit of a foreshore proprietor or ship owner are very great. Section 329K of the *Navigation Act* does nothing to dispel them. But, by the same token, it does nothing to improve the situation of the salvor. If the owner or bare boat charterer on the one hand, or the salvor on the other, has negligence or foreseeable nuisance sheeted home to him he is liable in damages to the foreshore proprietor or to the owner of other vessels or installations.

This then raises the question of limitation of liability. By s. 104 (2) of the *Navigation Amendment Act* 1979 (Cth) approval is given to the ratification by Australia of the International Convention relating to the limitation of the liability of owners of sea going vessels signed at Brussels on 10th October, 1957. Section 65 (1) of the amending Act of 1979 introduces a new Pt. VIII, headed "*Limitation and Exclusion of Ship Owners' Liability*".

30. [1961] A.C. 388.
31. [1967] 1 A.C. 617.

Section 65 (1), and therefore the new Pt. VIII are to come into operation on a date to be fixed by proclamation, being a date not earlier than the ratification of the Convention by Australia. When it comes into operation the new s. 333 of the *Navigation Act* will give to the provisions of the Convention, with an exception which is not presently material, the force of law as part of the law of the Commonwealth. By Art. 1 (1) the owner of a sea going ship may limit his liability (actual fault or privity of the owner apart) in respect of claims arising from:

(a) loss of life of, or personal injury to, any person being carried in the ship, and loss of or damage to any property on board the ship; and

(b) loss of life of, or personal injury to, any other person, whether on land or on water, loss of or damage to any other property or infringement of any rights caused by the act, neglect or default of any person on board the ship for whose act, neglect or default the owner is responsible or any person not on board the ship for whose act, neglect or default the owner is responsible: provided however that in regard to the act, neglect or default of this last class of persons, the owner shall only be entitled to limit his liability when the act, neglect or default is one which occurs in the navigation or the management of the ship or in the loading, carriage or discharge of its cargo or in the embarkation, carriage or disembarkation of its passengers.

By Art. 6 (2) the provisions of the Convention apply to the charterer, manager and operator of the ship and to the master, members of the crew and other servants of the owner, charterer, manager or operator acting in the course of their employment, in the same way as they apply to an owner himself. By Art. 3 the amounts to which liability may be limited where property claims only are involved is an aggregate of 1,000 Poincare francs per limitation ton. In relation to personal claims only the aggregate amount is 3,100 Poincare francs and where both personal and property claims are involved the aggregate again is 3,100 Poincare francs, the personal claims being largely preferred. Maximum liability for oil pollution property damage, expressed in 1978 values is of the order of $8,500,000 for a ship of 100,000 limitation tons reducing for smaller vessels.[32]

When it comes into operation, Pt. VIII of the *Navigation Act* will doubtless have the effect of repealing by implication s. 503 of the *Merchant Shipping Act* (Imp.) as in force in Australia. It should be noted, in reading the English authorities, that the United Kingdom gave effect to its obligation under the 1957 Limitation Convention by recasting s. 503 of the *Merchant Shipping Act* as enforced in the United Kingdom. Decisions on that provision are therefore illuminating in relation to the operation of the Convention pursuant to the new s. 333 of the *Navigation Act* of the Commonwealth. In particular it is to be noted that the right to limit is not available in respect of acts neither performed on board the ship in

32. Cf. Dr. D. W. Abeccasis, op. cit., at p. 146.

respect of which limitation is sought nor performed in connection with the management or navigation of that ship. Thus in *The Tojo Maru* the salvor's diver left the tug from which he was operating and negligently caused an explosion aboard the Tojo Maru by firing a bolt through her plates into a tank which had not been gas-freed. The salvors were not entitled to limit because the negligent act of the diver was not done either in the management of or on board the salving tug. The acts of the salvor on board the salved vessel would appear therefore plainly not to be covered by Art. 1 (1) of the 1957 Convention unless it be possible to describe him as the manager or operator of the ship within the meaning of Art. 6 (2).

It is understandable therefore that salvors were unwilling to attempt salvage of a tanker without taking a full indemnity from the owner of the tanker in distress. The owner in turn, tended to delay in making this decision while seeking the concurrence of his P. & I. underwriter. In 1972 however, as is set out in Dr. Abecassis' book the P. & I. underwriters accepted a form of indemnity clause for insertion in the standard salvage agreements known as the P. & I. Oil Pollution Indemnity Clause (P.I.O.P.I.C.).[33] For convenience it is set out in full. It reads:

> The owners shall be responsible for and shall indemnify the Contractor, unless guilty of personal wilful misconduct, in respect of all claims for oil pollution damage, including preventative measures, howsoever arising (including contractual liabilities to sub-contractors) out of the services performed hereunder provided always that the Owners' total liability arising under this indemnity shall in no circumstances exceed (a) US $15 million less the aggregate amount of all liabilities, costs and expenses for or in respect of oil pollution damage, including preventive measures (otherwise than under this indemnity or similar indemnities given to other persons performing salvage operations in connection with the vessel) incurred or to be incurred by the Owners arising out of or in connection with the casualty to the vessel or the consequence thereof or (b) US $10 million, whichever is the greater; Provided always that if the Owners' total liability arising under this and any other similar indemnities given or to be given to other persons performing salvage operations in connection with the vessel exceeds the amount of the applicable limit of liability referred to above such amount shall be distributed rateably among the Contractor and such other persons and the Owners' liability hereunder shall be reduced accordingly. This Clause shall be construed in accordance with English Law.

Two other points should be made in relation to the 1957 Limitation Convention. First, the right to limit does not apply to claims for salvage or to claims for contribution in general average. See Art. 1 (4) (a). Second, there is no basis on which the owner or salvor can claim to set off against the limitation fund the cost of preventive measures taken to minimize the pollution effect of the spill. The situation is otherwise under C.L.C. 1969 but, as has been seen, that Convention has yet to be adopted by Australia.

33. Dr. D. W. Abecassis, op. cit., at p. 150.

It is now possible to attempt a few random conclusions in terms of the questions posed earlier in this paper. In relation to oil tankers, the "small prize" factor is obviously minimal. The very value of the cargo makes the salvage contract attractive and at the same time minimizes the likelihood of unnecessary jettison of the cargo.

The salvor is prima facie liable criminally for the discharge of oil under both Commonwealth and State legislation for the definition of "master" in the *Navigation Act* looks to the person having command or charge of the ship. The definition under the State legislation has already been discussed. It is felt however that the defences under both acts should cover him for any reasonable conduct. It is unlikely that the possibility of criminal liability will inhibit or delay the making of salvage contracts.

While the salvor is liable for negligence or foreseeable nuisance, the possibility is more theoretical than real in the present state of the law. Not only are formidable obstacles placed in the way of potential plaintiffs by the state of the common law but the problems of providing something akin to negligence will obviously loom large in an action against a salvor. Nevertheless, bearing in mind the risk involved and the unsatisfactory state of the law relating to limitation of liability, a salvor, if not carrying permanent cover, should insist on the P.I.O.P.I.C. clause being inserted in the salvage contract.

So far as security is concerned, the security which is dealt with by Lloyd's Open Form is obviously security for the salvor's remuneration. The maritime lien recognized by cl. 5 is a lien for that remuneration and the remuneration in turn is, as a matter of construction of the agreement, remuneration for the services undertaken by cl. 1, viz. the salving of the ship and/or her cargo and taking them into a nominated port. While it is understood that Lloyd's arbitrators have in fact enhanced awards for anti-pollution measures, it may be doubted whether strictly speaking this can be justified except where the measures taken are casually related to the saving of the hull or cargo. From the point of view of encouraging steps to minimize oil pollution therefore, there would seem to be considerable merit in the solution which was canvassed in 1979. This was that the Lloyd's Open Form should be amended by adding clauses to apply when laden tankers receive salvage services in circumstances where an oil pollution risk exists. These would require the salvor to use his best endeavours to prevent oil outflow. They would provide for security for the necessary expenditure; and finally the "No Cure—No Pay" principle would be modified so that if property is saved, the arbitrator could enhance the award for expenditure on anti-pollution measures, while if no property is saved he would be bound to award the salvor his expenses of the operation.[34]

The tentative conclusion to which one is led by a consideration of the matters canvassed in this paper is that the private salvage system, backed by the world's underwriters, is capable of an adequate response to the

34. D. W. Abecassis, op. cit., at pp. 451-2.

problem, although there are areas in which the law, and in this context this means international as well as domestic law, could be improved in the interests of salvors. Indeed, should C.L.C. 1969 be adopted in Australia the extensions of liability limitation and exclusion enacted in England in consequence of the adoption of that convention should be seriously considered. Coastal State intervention may be a necessary solution where, as in Australia, there is not a widely deployed professional salvage system. Indeed, s. 329K of the *Navigation Act* and the 1973 Queensland Act virtually go as far in this direction as the French proposals for amendment of the International Convention relating to Intervention on the High Seas in Cases of Oil Pollution Casualties 1969. This legislation was adopted in 1970 in the aftermath of the "Oceanic Grandeur" incident. It is impossible to generalize from one incident that it may be of interest that the costs and charges billed by the Governments for their efforts in that instance were thought of by those who had to pay the bills to have produced very little of tangible value.