When the Lights Go Out: An Analysis of a Hypothetical Vessel-Bridge Allision Through the Context of the Pennsylvania Rule, Salvage, Environmental and Insurance Issues

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By Hamzah Khan and Guyer Bogen[1]

The following paper was prepared in support of the MLA's Committee on Salvage Fall CLE presentation in New Orleans, Louisiana.[2] It begins, much like the classic law school exam, with a short hypothetical discussing a vessel's allision with a bridge that is caused by the failure of the bridge's navigational light system. The followings sections analyze: (1) whether the Pennsylvania rule can be invoked against the bridge interest; (2) recent developments in responder defenses pursuant to a federal action plan; (3) environmental damage considerations in a salvage award; and (4) insurance issues that could arise out of the hypothetical.

I. THE HYPOTHETICAL

The M/S Green Wave was sailing down the Bogue Chitto River in the navigable channel at night and approached a segment of the river spanned by a bridge. The vessel was not under pilot. During the Green Wave's approach to the bridge, the Master observed red lighting on the bridge, which he expected to mark the span under which the vessel would have sufficient air draft to safely navigate past the bridge. Unfortunately, the only span lit with red lights was not the center span, but a different span which did not have sufficient clearance for the vessel to

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[1] Mr. Khan is a third-year law student at Tulane University Law School and a Notes and Comments Editor on the Tulane Maritime Law Journal. He is a graduate of the University of Kentucky '14. Mr. Bogen is also a third-year law student at Tulane and is the Senior Online Editor for the Tulane Maritime Journal. He is a graduate of the University of Rhode Island, where he received a B.A. in Marine Affairs. The authors would like to thank the Maritime Law Association's Committee on Salvage for this opportunity and Mr. Jason R. Harris and Ms. Dagmar Etkin for their invaluable feedback.

[2] The MLA's Committee on Salvage is composed of: George J. Tsimis, Senior Vice President – General Counsel & Global Claims Director, American Club – New York; Elias Psyllos, Commercial Manager, T&T Salvage – Galveston, Texas; Dagmar Schmidt Etkin, PhD, Environmental Research Consulting – New York; Jason R. Harris, Partner, Rountree Losee LLP – Wilmington, North Carolina

safely pass. The vessel maintained its course for the lit span and, at a speed of approximately 8 knots, allided with the bridge.

Wedged under the span with a 5 knot tide pushing the Green Wave from behind, it only took minutes before the span collapsed and broke away from the adjoining spans of the bridge. Most of the steel structure and concrete roadway from the span fell onto the vessel, some settled on the vessel's deck and some hung over the sides of the vessel. Approximately 50 more tons of steel structure fell over the side and detached, crashing into the river and sinking to the bed of the navigable waterway.

The Master's already limited nighttime visibility was further impaired by the debris from the bridge. As a result, the vessel ran hard aground just outside the navigable channel and ruptured its bunker tanks. Fuel began to slowly leak from the tanks, which had been filled to their 3500 MT capacity just hours before the allision. The Master, in accordance with the shipowner's new vessel response plan, notified both the US Coast Guard as well as State environmental authorities. The new plan called for the use of Westeros Salvage Company, which deployed its spill response assets as well as other assets to refloat the vessel, remove remaining bunkers from the vessel's other bunker tanks, and remove the bridge debris from the vessel itself as well as from the seabed of the river's navigable channel. The salvage contract modelled the Lloyd's Standard Form of Salvage Agreement and incorporated by reference the 1989 International Convention on Salvage

Unbeknownst to the Master, the new vessel response plan had yet to be approved by the shipowner's P&I club, the Gulfport P&I Club. Gulfport was in a process of reviewing the shipowner's planned use of Westeros, a new player in the salvage world that had a reputation for using expensive, unproven technology. Under the stress of the situation, both the Master and

shipowner failed to contact Gulfport until the salvage and mitigation efforts were nearly complete.

Due to the quick work of Westeros, only 250 MTs of fuel escaped before the bunker tanks were emptied. Additionally, without consulting the shipowner, Westeros had placed some if its response assets down river, which blocked fuel oil from affecting sensitive wetland areas in the Bogue Chitto National Wildlife Refuge. The owner of Westeros, a Bogue Chitto local and outdoor enthusiast, knew that the Refuge provided habitat for numerous endangered avian and riparian species, including the rare ringed-sawback turtle.

II. ANALYSIS OF THE LIABILITY OF THE SHIPOWNER AND BRIDGE UNDER THE PENNSYLVANIA RULE

Applying the Pennsylvania rule, a party involved in an allision with a stationary object is burdened with a presumption of cause when a statutory rule intended to prevent accidents is violated.[3] Once triggered through an applicable statute, the burdened party must show the regulation could not have caused the loss.[4] Here, the presumption may be invoked against the vessel or the bridge in determining liability.[5]

The rights of the bridge spanning navigable waters come with obligations that the structure not be maintained or operated in a way to impede navigation.[6] When issuing a bridge permit, the Coast Guard also approves a lighting plan complaint with regulations.[7] At least one court has

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[3] 86 U.S. (19 Wall.) 125, 136 (1873).
[4] *The Pennsylvania*, 86 U.S. (19 Wall.) at 136.
[5] Broadly, the Pennsylvania rule applies "not only to ships, but also to those who do not properly mark an object in navigable waters." *Gele v. Chevron Oil Co.*, 574 F.2d 243 (5th Cir. 1978). Several courts have applied the rule specifically to bridge/vessel allisions. *Office of Communication v. FCC*, 560 F.2d 529 (2nd Cir. 1977); *Florida East. Coast Ry. Co. v. Revilo Corp.*, 637 F.2d 1060 (5th Cir. 1981); *Chicago & Western Indiana R. Co. v. Motorship Buko Maru*, 505 F.2d 579 (7th Cir. 1974).
[6] *Folkstone Maritime, Ltd. v. CSX Corp.*, 64 F.3d 1037, 1048 (7th Cir. 1995) (noting that the right of navigation is "paramount" relative to the right of the bridge to span).
[7] *In re Foss Maritime Company*, 114 F. Supp.3d 452, 454 (W.D. Ky. July 15, 2015).

held that non-compliance with the bridge permit is a sufficient violation.[8] Relevant regulations include 33 C.F.R. § 118.1, which provides that bridge owners or operators "*shall* maintain at their own expense the lights and other signals required by this party."[9]

Circuit courts have imposed differing language in assessing appropriate statutes, but generally require: (1) a statute or regulation imposing a duty (2) that involves marine safety or navigation (2) promulgated to prevent the injury suffered.[10]

Applying the rule does not exonerate a party's own liability and the rule can be applied to both sides when fault is shared.[11] So long as there is a statutory basis, invoking the Pennsylvania rule cannot estop the adversarial party from asserting it too.[12] When neither party can overcome the presumption, the court will resort principles of comparative negligence.[13]

III. Application of Recent Developments in Salvor Immunity Case Law

Following the *Exxon Valdez* spill, Congress enacted the Oil Pollution Act of 1990 ("OPA 90").[14] The cornerstone of the legislation was a "polluter pays" principle, that is, make avoiding liability for responsible parties difficult.[15] However, the statute includes immunity for responders to oil spills who may otherwise be exposed to "substantial financial risk and liability exposures associated with spill response [that] could deter vessel operators, cleanup contractors, and

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[8] *Chicago & Western Indiana R. Co.*, 505 F.2d at 584. The court reasoned that because a permit was statutorily required, violations of that permit could invoke the Pennsylvania's presumption. *See also* 33 U.S.C. §§ 491-494.
[9] *In re Foss Maritime Company*, 114 F. Supp.3d at 457 ("the navigational light scheme was intended to avert the very harm that resulted here), *but see Union Pacific R. Co. v. Kirby Inland Marine, Inc. of Mississippi*, 296 F.3d 671(8th Cir. 2002) (rejecting violations of the Truman-Hobbs Act as a prerequisite to applying the Pennsylvania rule because the statute did not further marine safety nor imposed a specific duty.)
[10] *Folkstone Maritime, Ltd.*, 64 F.3d at 1047.
[11] *In re G&G Shipping Co., Ltd. of Anguilla*, 767 F. Supp. 398 (D.P.R. 1991); *Beene v. Terrebonne Wireline Services, Inc.*, 909 F.2d 627 (5th Cir. 1993).
[12] *Otto Candies, Inc. v. M/V Madeline D*, 721 F.2d 1034, 1036 (5th Cir. 1983) ("[the rule is] not of clean hands-dirty hands blameworthiness.)
[13] *Terrebonne Wireline Services, Inc.*, 909 F.2d 627.
[14] Pub. L. No. 101-380, 104 Stat. 484 (1990) (codified as amended at 33 U.S.C. §§2701-2761) (2012)
[15] Jonathan K. Waldron, "*Deepwater Horizon* Good Samaritans Stuck in Litigation." Blank Rome, available at http://www.blankrome.com/siteFiles/Mainbrace-Sept2011.pdf

cleanup cooperatives from prompt, aggressive response."[16] In line with the polluter pays principle, any liability the shielded responder is immunized from becomes the obligation of the responsible party.[17] The next portion will contrast two different orders issued from Judge Carl Barbier of the Eastern District of Louisiana, centered on preemption relevant to responder immunity in the *Deepwater Horizon* spill. The first ("*Nalco* order") involved the use of chemical agents to disperse the oil in the water.[18] The second, issued September 7, 2016, resulted when a vessel struck orphaned anchors left behind in response to the spill ("*Winkler* order").[19]

In the *Nalco* order, injured plaintiffs brought claims under general maritime law and state law against Nalco, the manufacturer of the chemical dispersant, alleging that exposure to the chemical resulted lesions, burns, and respiratory problems.[20] The chemical had been pre-authorized as part of a regional response plan for the Gulf of Mexico.[21] Since the Federal On-Scene Coordinator ("FOSC") authorized the chemical and it had complied with regulatory laws, Judge Barbier concluded the National Contingency Plan for the spill and pre-OPA amendments of the CWA preempted the claims.[22] He noted, "it would be improper for the Court to second guess the FOSC's decision to use (or not use) [that] dispersant" through torts. Defendants in the *Winkler* case relied upon the *Nalco* order to claim a shield of liability for actions pursuant to a federal plan.

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[16] H.R. Rep. No. 101-653, at 45.
[17] 33 U.S.C. 1321(c)(4). The statute does not extend immunity in instances of gross negligence, willful misconduct, or personal injury causes.
[18] *In re Oil Spill by Oil Rig DEEPWATER HORIZION in Gulf of Mexico*, MDL No. 2179, 2012 WL 5960192, at *1 (E.D. La. Nov. 28, 2012). In the hypothetical set above, dispersants would not likely be used due to their potential harm to humans and general ineffectiveness in inland and fresh waters.
[19] *Winkler v. BP Exploration & Production, Inc.*, No. 16-2715, 2016 WL 4679946, at *1 (E.D. La. Sept. 7, 2016).
[20] *In re Oil Spill*, 2012 WL 5960192, at *1.
[21] *Id.*
[22] *Id.* at 21.

The *Winkler* case involved orphaned anchors, which were used to keep the containment booms in place in response to the spill.[23] While most anchors were retrieved, over 1,500 anchors were left at the bottom of the ocean (about 2-3%).[24] The FOSC recommended the anchors remain in place resulting in vessel striking it. Defendants, placing the boom and anchors pursuant to the federal plan, argued plaintiff's claims were preempted.[25] The court squarely rejected this contention noting the defendants lacked the shield of the preemption law because they were the responsible party. That is, BP causing the spill did not have immunity. Judge Barbier extended this logic to conclude that BP also cannot claim the shield of preemption because "These [immunity] provisions reflect that Congress intended that responsible parties like BP would be liable for damages that result from actions directed by the FOSC in response to an oil spill."[26]

Where scholars have argued for greater statutory protection for responders after *Deepwater Horizon*, preemption pursuant a federal plan offers a potential avenue for responders to duck as they are named with responsible parties in litigation.[27] Though immunity under OPA 90 remains in play, here, the responders may seek the shield of preemption where they are not the responsible party. *Deepwater Horizon* presented unique problems unlikely to occur in the hypothetical factual scenario. For instance, *Deepwater Horizon* litigation has prioritized claims against the responsible party (BP) rendering responder services in protracted opportunities to assert their defenses. [28]

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[23] *Winkler*, 2016 WL 4679946, at *1.
[24] *Id.*
[25] *Id.*
[26] *Id.* at *4.
[27] Waldron, *supra* note 15.
[28] *Id.*

IV. Analysis of Environmental Mitigation Efforts in a Westeros Salvage Award

As a result of the scenario outlined above, Westeros sends a bill to the shipowner. Citing the fact that only 250 MTs of fuel escaped before Westeros successfully emptied the bunker tanks and its efforts to protect the sensitive Bogue Chitto National Wildlife Refuge, the Westeros bill seeks a large sum for "environmental damages mitigation efforts." Although agreeing that both stopping the bunker leakage and cleaning up the immediate spill area were within the scope of the contract, the shipowner disputed Westeros' claim that tens of millions of dollars in potential liability had been averted by the salvor's efforts to protect the Bogue Chitto National Wildlife Refuge. In district court, on the shipowner's motion for partial summary judgment, the judge set aside the salvage contract on the grounds of mutual mistake.[29] Thus, Westeros was forced to pursue a salvage claim under the general maritime law.

Westeros might first consider pointing to the 1989 International Convention on Salvage (the "Convention") to argue for "special" environmental compensation for its efforts to avoid damage to the Refuge. Several provisions of the Convention, which was ratified by the United States Senate in 1992 and entered into force in 1996, address the potential for salvage compensation for preventing "damage to the environment."[30] Although employing the Convention might seem appropriate in the abstract, especially because some courts have recognized the "skill and efforts of the salvors in preventing or minimizing damage to the

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[29] "It is well-settled that an admiralty court possesses authority to set aside a salvage contract that was procured through the salvor's misrepresentations or because of a mutual mistake of a material fact." *Black Gold Marine, Inc. v. Jackson Marine Co.*, 759 F.2d 466 (5th Cir. 1985).

[30] International Convention on Salvage, Apr. 28, 1989, S. Treaty Doc. NO. 102–12, 1953 U.N.T.S. 193. Article 13 of the Convention states that "the skill and efforts of the salvors in preventing or minimizing damage to the environment" should be factored into awards, but limits those awards to the "salved value of the vessel and other property." *Id.* Property is defined in Article 1 as "any property not permanently and intentionally attached to the shoreline." *Id.*

environment" as an additional *Blackwall* factor,[31] a significant limitation in application of the Convention exists in its text.[32] Article 1 states that "damage to the environment" only includes "*substantial* physical damage."[33] This has led to judicial and arbital decisions that have rejected consideration of environmental damage prevention because the risk of damage was not substantial enough.[34] This approach to application of the Convention has been approved by scholars, who have recognized that "substantial" would not seem to include small incidents.[35] When applying the common law instead of the Convention, U.S. courts have likewise rejected considering environmental damage prevention in salvage awards where the environmental risks were minimal.[36] However, in regards to rewards for averting significant environmental damages,

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[31] *Trico Marine Operators, Inc. v. Dow Chemical Co.*, 809 F. Supp. 440, 443-44 (E.D. La. 1992). When determining the amount of a voluntary salvage award, courts have long employed the "Blackwall factors," which include: "(1.) [t]he labor expended by the salvors in rendering the salvage service. (2.) The promptitude, skill, and energy displayed in rendering the service and saving the property. (3.) The value of the property employed by the salvors in rendering the service, and the danger to which such property was exposed. (4.) The risk incurred by the salvors in securing the property from the impending peril. (5.) The value of the property saved. (6.) The degree of danger from which the property was rescued." *The Blackwall*, 77 U.S. 1, 13–14, 10 Wall. 1.

[32] *Tow Tell Marine Serv., LLC v. M/V 28' Spencer, et. al.*, No. 13–20488–Civ., 2013 WL 6212192, at *2-3 (S.D. Fla. Nov. 27 2013).

[33] International Convention on Salvage.

[34] See *Tow Tell Marine*, 2013 WL 6212192, at *2-3 (salvor's prevention of 250 gallons of fuel from escaping from vessel was not substantial enough to be considered in salvage award); see also Archie Bishop, *The Development of Environmental Salvage and Review of the London Salvage Convention 1989*, 37 TUL. MAR. L.J. 65, 69-70 (2012) (noting that a recent Lloyd's Open Forum (LOF) appeal arbitrator decided that the prevention of 30,000 tons of petroleum from escaping into the marine environment was not "substantial" for purposes of the Convention). The unwillingness of a Lloyd's arbitrator to consider the prevention of 30,000 tons of petroleum escaping may be juxtaposed with the Lloyd's Standard Salvage Agreement, which states under Section 2 that "in construing the Agreement or on the making of any arbitral order or award regard shall be had to the overriding purposes of the Agreement namely . . . to prevent or minimise damage to the environment." Council of Lloyds, *Standard Form of Salvage Agreement: Standard Salvage and Arbitration Clauses*, 2011, https://www.lloyds.com/~/media/files/the%20market/tools%20and%20resources/agency/salvage%20arbitration%20branch/lssa%202011%20%20amended%2008042014.pdf

[35] Geoffrey Brice, MARITIME LAW OF SALVAGE, ¶¶ 6–99–6–100.

[36] *See New Bedford Marine Rescue, Inc. v. Cape Jeweler's Inc.*, 240 F. Supp. 2d 101, 117 (D. Mass. 2003) (including environmental damage mitigation as a seventh *Blackwall* factor but ultimately determining that the clean up a small fuel leak from a pleasure boat was too minimal to include in a salvage award). For a comprehensive comparison of the Convention and the common law, *see* Martin Davis, *Whatever Happened to the Salvage Convention 1989?*, 39 J. Mar. L. & Com. 463, 474 (2008). The estimation of potential natural resource damages to the Refuge's wetlands could be made with modeling. The amount of damage that the 250 MT oil would have made to the refuge had it not been protectively boomed would depend on the location of the refuge relative to the oil release site, the properties of the oil, currents, winds, etc. These considerations would aid in determining the amount of oil that would have reached the wetland and the damages that would have been done. Depending on the distance from incident, it would be assumed in any spill response that these type of protective measures would be taken. The

the International conventions tend to limit the recognition of any monetary value for environmental damages averted (or caused), while the United States is the only nation that recognizes natural resource damages, which are included as part of OPA 90.

Considering the hypothetical again, there may be room for Westeros to claim a large award for protecting the Refuge, however, the salvor would likely have to show that both the spill and the risks to the Refuge were substantial. One possible key towards a solution to an environmental disaster avoidance claim may be to hire a seasoned expert to model the potential effects of the fuel on the Refuge's sensitive wetlands, if not for the booming efforts of Westeros.

V. Analysis of a Potential Insurance Dispute Arising Out of the Hypothetical

Instead of the dispute outlined in Section III, the shipowner has agreed that it is contractually responsible for the exorbitant Westeros salvage bill. Additionally, through written notice, Westeros invoked SCOPIC during the salvage operation seeking "special compensation" for its prevention of environmental damage to the Refuge and the river system as a whole.

Warren T. Johnson, chairman of Gulfport's management firm, stares at the Gulf of Mexico from his office. At first, although engaged in an intense dispute with the shipowners hull insurer over who should pay for the damage to the bridge,[37] he had considered approving full coverage for the environmental aspects of the incident on the Bogue Chitto. He was now having second thoughts. The shipowner had failed to call Gulfport until the cleanup was nearly completed and had used Westeros without Club approval. Additionally, the shipowner had twice paid its call significantly past the deadline, an infraction that had not escaped the board's notice. Even though the shipowner's contract with Westeros had incorporated SCOPIC, which had

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way in which environmental damages would have been averted from the salvage, as opposed to response operations would be affected by the volume of oil that was effectively removed from the wreck, which may have spilled had it not been properly removed in the salvage operations.

[37] FFO (allision) issues often lead to P&I and hull insurance disputes.

removed much of Gulfport's ability to dispute the environmental damages mitigation, could Gulfport still find a way to avoid some or all of the payment?[38]

Looking at the language of SCOPIC, Clause 14 seems to suggest that unnecessary efforts outside of the scope of the immediate vicinity of the vessel may not be compensable.[39] Clause 10 also could provide grounds for an arbitrator reducing the award, which states that it is the duty of the salvor to use their "best endeavours" to save the property first, seeming to relegate environmental damages mitigation efforts to lower priority status.[40]

Another potential argument Gulfport might make could be found in its contract with the shipowner. Under the traditional sue and labor clause, the shipowner should be covered for salvage expenses including environmental preservation efforts. However, coverage under a sue and labor clause may be voided where the insured (1) fails to get club approval for expenses incurred or (2) where expenses were not incurred solely for the purpose of minimizing a covered loss.[41] Here, Gulfport had not approved the new vessel response plan due to its concerns over Westeros and the shipowner failed to notify Gulfport until near the conclusion of response efforts. Therefore, Gulfport may have a potential argument for withholding coverage.

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[38] For a comprehensive analysis of the potential issues arising out of P&I insurance and the hypothetical spill, *see* Charles B. Anderson & Colin de la Rue, *The Role of P&I Clubs in Marine Pollution Incidents*, 85 Tul. L. Rev. 1257 (2011).

[39] "Pollution Prevention. The assessment of SCOPIC remuneration shall include the prevention of pollution as well as the removal of pollution in the immediate vicinity of the vessel insofar as this is necessary for the proper execution of the salvage but not otherwise." SCOPIC, Clause 14.

[40] "Duties of Contractor. The duties and liabilities of the Contractor shall remain the same as under the Main Agreement, namely to use his best endeavours to salve the vessel and property thereon and in so doing to prevent or minimise damage to the environment." SCOPIC, Clause 10.

[41] *See* Anderson, *supra* note 35, at 1283.

VI. CONCLUSION

Unsurprisingly, a hypothetical vessel-bridge allision resulting in significant damage to both the bridge and the vessel creates a complex salvage response situation. This scenario is further complicated by environmental mitigation efforts and insurance concerns. As this short, academic gloss on these issues has demonstrated, a multitude of legal issues could be waiting around every bend in a river.