The Norwegian Government’s liability for oil pollution damage

A conception of justice

Candidate number: 800020
Supervisors: Mikaela Björkholm and Ellen Eftestøl-Wilhelmsson

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1 Introduction

1.1 Purpose and inspiration

The aim for the thesis is to determine whether there is possible to conclude in what extent the Norwegian government is liable for oil pollution damages caused by discharge or escape of oil from a ship when considering the imposed obligations for maintenance of lights and other navigational aids.

The starting point for the discussion is the Norwegian Maritime Code of 24 June, 1994, NO.39 with later amendments up to and including Act of 5 April 2002, NO.8 (NMC) chapter 10 dealing with liability for oil pollution damages, and especially section 192 1\textsuperscript{st} paragraph letter c). This paragraph is an exemption from the strict liability that the owner of a vessel has for oil pollution damages cf. section NMC191, and excuses the owner in case of negligence or wrongful act committed by a public authority in connection with maintenance of lights or other navigational aids. NMC 192 2\textsuperscript{nd} paragraph opens up for a connection to Norwegian Tort Law. If the injured party has contributed to the damages the liability of the owner could be abated according to the general rules governing damages.

To verify the possible extent of the liability the government has a historical development of case law must be included. Central question will be if the court decisions have set forth a threshold for in what extent the government has been liable in the course of time, if it has changed and if it reasonable to question if the current situation requires further adjustments. I will present the most relevant court decisions from Norwegian courts and a case from the Swedish Supreme Court where the government’s liability has been disputed.

One of the main inspirations for choosing this subject has been the tragic accident of M/S Rocknes. This Norwegian owned vessel capsized after running ashore on a shoal in Norwegian waters. The accident has again raised the question of the liability for oil pollution damages, and in what extent the Government shall be responsible for the navigational aids. Several different "experts" have stated they opinion of what caused the accident, and who should be held liable but the case has not bee tried in court yet.
I will not try to speculate on this matter, and therefore I have not included this case in my discussion - I leave this for the courts. Beside this case also the traditional comprehension of the Government and its role as the sovereign provider of public services has caught my interest, and especially the question of which requirements should be met when providing these services.

1.2 Delimitations
The title of the thesis opens up for a variety of possible liability issues for the Norwegian government. "Government" and "Oil pollution damage" could be construed in many different ways, so there is a certain need for delimitating these terms. When it comes to "Oil pollution damage" there will not be possible for an absolute delimitation of the term, since it is depending on the actual situation. Any other delimitation which is not general for the topic of the thesis will be discussed under the relevant section

1.2.1 Government – Executive Authority vs. Service and Control function
The government has a wide responsibility in keeping the Norwegian coast safe and clean. Various public institutions have been delegated authority and functions from the central government to ensure this. I will categorize this delegated authority in two groups; “Executive Authority” and "Service & Control function". The first group is the central governments power to establish legislative requirements such as the emergency preparedness in case of immediate pollution from vessels cf. Norwegian Pollution Act §42\(^1\) or the possibility to intervene in case pollution damage threatens to occur or is present\(^2\). In addition such executive authority is also the ones responsible for funding the various public operations. These are typical administrative functions and when discussing the NMC section 192 1\(^{st}\) paragraph I will not consider any possible liability in case central government would make invalid or wrongful administrative decision. These issues will be covered more or less extensive in various other sections.


\(^{2}\) Cf. Norwegian law of 13\(^{th}\) March, 1981, NO.6, section 74
Service functions is typically public authorities providing service such as maintenance and new building of roads or healthcare, while the control function is matters like building- and ship control. When analyzing the government's possible liability for oil pollution damage in connection with NMC section 192 paragraphs 1 and 2, I will focus on the authority public institutions have been delegated as service functions. By doing so the approach to possible liability for the government will develop from NMC section 192 1st paragraph letter c). Letter c) involves the effect of negligence or wrongful acts by public authority when maintaining navigational aids. The responsibility for such maintenance is divided between The Norwegian Coastal Administration and the “Statens Kartverk”. The Costal Administration is responsible for maintaining lights and other navigational aids except navigational charts, which is the responsibility of “Statens Kartverk”. When analyzing NMC 192 c) I will treat these two entities as one since they together constitute the public authority with responsibility of maintaining lights and other navigational aids. The public authority in this sense will therefore be these two entities in connection with their service functions.

1.2.2 Oil pollution damages

"Oil pollution damages" could have a rather wide scope depending on how it is interpreted. My basis for the use of oil pollution damages will be the NMC section 191 2nd paragraph letters a) and b) hence the 1992 Fund and Liability Conventions and their practice would be a guideline.³ The aim for this section is not to exhaustively debate every possible claim that could be accepted as claims for oil pollution damages according to the legislation, but to give the general principles which are applicable.

The term "oil" includes any persistent or non persistent oil of any kind.⁴ The oil pollution damages could be grouped according to the different types of damage; a) clean up costs and other preventive measures, b) property damage, c) economical loss and d) damage to natural resources and cost of restoration.⁵

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³ Some of the examples and guidelines discussed are from the 1971 Conventions, but the 1992 Conventions shall endeavour to not take decisions which are incompatible with the 1971 Conventions, cf. Anderson, Charles B. and De La Rue Colin, Shipping and the environment. London/Hong Kong, 1998, page 386
⁴ cf. NMC sections 191 3rd paragraph and 208 4th paragraph.
⁵ See for instance Anderson 1998, page 373
Before going more in detail on the different groups of damages some general principles would be useful. The starting point is that the damages or losses must be a consequence of contamination of oil escaping or being discharged from a vessel, hence other damages is not considered oil pollution damage. If for instance two vessels collide and oil catches fire whilst onboard, soot or personal injuries developing out of such is not considered as pollution damages. Neither would wreck removal after such an incident be covered by the term oil pollution damage. In addition to damages or losses also costs incurred when reasonable measures to minimize or prevent pollution damages are also compensated and consider as oil pollution damage. The important factor here is what is considered to be reasonable. This will vary according to the different circumstances so I will discuss this further under the different groups of damages.

The first mentioned group of damages is clean up costs and other preventive measures. In the legislation clean up cost is not explicitly mentioned a preventive measure, but it is recognized that such operations are minimizing the exposure and preventing further damages. As mentioned it is required that the measures taken are reasonable, and this will vary according to the factual circumstances present such as climatic conditions, the nature of the affected environment, weather conditions etc. From the viewpoint of oil spill compensating bodies, for instance the International Fund for compensation for oil pollution damage, “reasonable” could have another meaning than for the authorities which is engaged in the preventive measures. These authorities could initiate a variety of measures, effective or not, when trying to limit the possible damages. As a general guideline it will only be paid compensation for commonly recognized measures. Typical when assessing whether an offshore operation would be reasonable hence effective is if it could be taken promptly and under favorable weather conditions, since heavy weather and waves would make the oil spill hard to collect ashore. In general if it is predictable that such operations would be effective to minimize the oil spill, the cost incurred from such would be recoverable. Such cost would normally be in connection with deploying oil booms and operation of oil combating vessels including oil skimming devices. When off shore operations is not effective or additional measures is required onshore actions could be needed.

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6 See Anderson 1998, page 391
7 See Anderson 1998, page 397
The most normal cost is the cost of employing personnel and equipment in collecting the oil from the coastline, and the disposal of this. Normally there is no dispute regarding compensation for such measures, but there must be done a thoroughly balancing between the benefits and disadvantages from the measures taken. In some cases clean up operations could do more harm than if a natural degrade of the oil is accepted.\(^8\)

The next type of damage is damage to property and has a wide range. Damage to property arises when oil spill reaches for instance fishing nets, vessels and beaches. The general principle is that all property damages caused by contamination of oil are to be compensated. Examples of property damage could be cleaning or replacement of fishing gear or fishing farms, cleaning of vessels hull or cleaning of private piers or beaches. Also consequential damages from preventive measures which not are a direct result of contamination from oil could be compensated. A typical example of this is if vehicles involved in removal of oil from beaches causes damage to surroundings, this would be a consequential damages compensated as oil pollution damage.

Economical loss is the third group of damages which are to be compensated in an event of oil spill. Economical loss is said to be loss or reduction in profits or earnings suffered as a result of the oil contamination.\(^9\) Traditionally such losses have been most frequently in connection with operations related to fishing and tourism, but also other forms of economical losses caused by delay when vessels have been unable to leave a port because of oil spill have been remunerated. The most difficult aspect of issues related to compensating economical losses is the questions of remoteness, causation and proximity. The question if not only directly affected business, but also ancillary business also is to be compensated their economical loss is often debated. There is no single answer to the extension of compensation of these "indirectly" injured parties, but a general comprehension in Norwegian legislation is that there must be a qualified connection between the economical loss and the damage.\(^10\)

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\(^8\) See Anderson 1998, page 399
\(^9\) See Anderson 1998, page 441
\(^10\) See Lødrup, Peter. Læreboek i erstatningsrett. 4.utg. Oslo 1999, page 294
If oil contamination leads to reduced supplies of fish to fish processors economical losses may be compensated, since there would be a "close" connection between the damage and the loss. On the other hand it may be questionable if a restaurant located in another country could claim economical losses from decreased supply of fish from such processors; normally they would be able to compensate the decrease in supply from other suppliers.

The last group of damages is the cost of restoration as a result of damage to the natural resources. This group differs from the others in two ways; they are not concerned with compensating loss or damage suffered by any particular claimant and they are not quantifiable in conventional economic terms. Damage to natural resources is typical mortalities of wildlife such as birds or fish. Basis for such claims is the value such wildlife has for the society, but the problem related to this is placing a financial value upon them. Restoration or reinstatement of the environment is costs occurred after a clean up operation is completed. Claims involve the cost of human intervention in natural processes in relation to accelerate natural recovery of the environment. In such claims the problem is not to quantify the cost, but in what extent the measures taken are reasonable. By reasonable the costs should be proportional to the results achieved or results which could be reasonable be expected, and that the measures should be appropriate and offer a reasonable prospect of success.

This section has indicated that oil pollution damage is not an exact term, but is depending upon the very situation. As a general remark I would add that when using the term oil pollution damage further in this thesis it would include such possible costs for damages and preventive measures, but limited to the above discussed. This rules out any other damage which is not consequence of contamination from oil other than discussed above.

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11 See for instance Anderson 1998 page 72 concerning the "Braer" case where such compensation was given the fish processors.
12 See Andreson 1998, page 511
2. The legal starting point

The chapter on Liability for oil pollution damages in the NMC is based on two international conventions; International Convention of 27 November 1992, on civil liability for oil pollution damage (1992 Liability convention) and International Convention of 27 November 1992, on the establishment of an international fund for compensation for oil pollution damage (1992 Fund convention). These conventions (see 2.2 below for details) were adapted to have a uniform international regime on liability and compensation for oil pollution damages originated from vessels carrying oil in bulk.

NMC Chapter 10 contains a numerous sections regulating the different aspects of liability issues. For the purpose of establishing a possible threshold for the government’s liability only a few sections, with some corresponding sections, are essential namely section 191 and especially section 192. Before going more into detail about the background and purpose of these conventions I will discuss the different sources of law.

2.1 Sources of law

There are several possible source of law when it comes to the subject of oil pollution damages. This section will identify sources of law used in my assessment of the subject in the thesis, and also explain the connections between them. It will not be an exhaustive list of all relevant sources related to the subject, but the most important ones will be included.

2.1.1 National law and court decisions

When legal conflicts should be resolved there is a general comprehension to apply the "lex specialis" as far as possible, hence in matters relating to the operational parts of the maritime sector the NMC is a natural starting point. As mentioned in the introduction the NMC chapter 10 regulates issues related to liability for oil pollution damages. Most of the sections are incorporated from and in accordance with the 1992 Liability Convention, while others are regulating different oil pollution damage than what is

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13 See for instance Falkanger, Thor and Bull, Hans Jacob, Innføring i sjørett. 6. utg. Oslo 2004, page 3
covered in the 1992 Liability convention. The 1992 Fund convention is not incorporated in the NMC, but section 201 makes a direct reference to this and it should be treated as law.\textsuperscript{14} When interpreting the wording of the law words should as a starting point be interpreted objectively. The everyday life use of the words should be applied, but in some situations terms are technical and especially adopted by the industry. In such case the industry's general comprehension should be applied, since it is natural that the legislators' purpose is to regulate a specific industry.\textsuperscript{15} NMC also occasionally gives directly the actual meaning of the terms used, for instance the meaning of the term "vessel" is explicitly described in section 191 2\textsuperscript{nd} paragraph, in reliance to oil pollution damages.

Additionally also the preparatory works would give guidance of how the text of the law should be understood. These works sometimes would explain in what way a certain word should be interpreted, or if the law is silent the preparatory work could give some guidance to the courts in what manners issues should be resolved. The most important preparatory work for issues related to oil pollution damage is NOU 1973:46.\textsuperscript{16} In this text there are both guidance of how specific terms should be interpreted, as well as which considerations to be made when assessing specific incidents.\textsuperscript{17}

NMC section 192 1\textsuperscript{st} paragraph letters a) to c) are only identifying situations where the ship owner is not liable for oil pollution damage. In cases where these exemptions are applicable the NMC does not give any further guidance of who should be liable for the damages. When considering a possible liability for the Government, especially when letter c) applies, the natural source of law is The Norwegian Torts act of 13 June 1969 NO.26. In the part of the thesis related to abatement of liability according to NMC section 192 2\textsuperscript{nd} paragraph the general principles of abatement according to national tort law this will be assessed. NMC directly refer to the use of general rules governing damages, and specifically the Norwegian Torts Act of 13 section 5-1.\textsuperscript{18}

\textsuperscript{14} Cf. NMC section 201 1\textsuperscript{st} paragraph
\textsuperscript{15} See Falkanger & Bull 2004, page 7
\textsuperscript{16} Norsk Offentlig Utredning (NOU) 1973:46 "Erstatningsansvar for skade ved oljesol fra skip"
\textsuperscript{17} See for instance NOU 1973:46 page 20 where the criterion for applying the exemption from liability caused by a natural phenomenon is discussed. Cf NMC 192 letter a)
\textsuperscript{18} Cf. NMC Section 192 2\textsuperscript{nd} paragraph, foot note reference.
Also court cases from Norwegian courts would be an important source of law. In general decisions made by the Supreme Court have been given the same importance as formal law.\(^\text{19}\) Court decisions could give clarification of how a law should be interpreted in a specific dispute, or questions in principle. An example of the latter is the Tirranna case,\(^\text{20}\) where the Norwegian Supreme Court answered the fundamental question of whether the Government is liable for its subordinate staffs negligent acts in connection with maintenance of lights. I will use this court case and some others when dealing with the issues related to the Governments liabilities concerning oil pollution damages. In addition to the ones directly related to maritime matters, also cases from other industries will be discussed. The reason for this is both lack of relevant maritime cases and the need of establishing prevailing law for law of tort matters like due care in connection with services provided by the Government.

2.1.2 Scandinavian maritime law and court decisions

There have been established a close connection and cooperation between the Nordic countries in development of maritime law. At the end of 19\textsuperscript{th} century the Nordic countries together developed common principles for the maritime law, which resulted in more or less identical national maritime laws in these countries.\(^\text{21}\) Over the years the development of these principles and the national laws has been very similar in the Nordic countries. Especially when it comes to the liability issues in matters concerning oil pollution damage the laws are very similar, since all of the Nordic Countries has ratified the 1992 Liability and Fund Conventions. It is worth mentioning that theses regulations is not necessarily a part of the maritime code in all countries, for instance Sweden has incorporated this in their Oil Pollution Act.

As a consequence of this common system of law, also court decisions from the other Nordic countries are frequently used by Norwegian courts when dealing with similar cases.\(^\text{22}\) Another reason for this is the common collection of Nordic judgments rendered, where judgments of importance has been published since early 1900.\(^\text{23}\)

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\(^{19}\) See Falkanger & Bull 2004, page 11  
\(^{20}\) See Rt. 1970.1154  
\(^{21}\) See Falkanger & Bull 2004, page [3]-4  
\(^{22}\) See Falkanger & Bull 2004, page 11  
\(^{23}\) See for instance Nordiske domme i sjøfartsanliggende årgang 1983, Oslo 1985
I have used some judgments from other Nordic countries, and especially one from the Swedish Supreme Court. When applying such case law it is not said that the outcome would be exactly the same, but it is helpful as guidance and support to a specific interpretation or a question of principle.\textsuperscript{24}

2.1.3 The Conventions and their preparatory works

As already mentioned the NMC has incorporated the 1992 Liability Convention, and makes direct reference to the 1992 Fund Convention. Since it is the NMC that is the direct applicable in matters related liability for oil pollution damage in Norway, the 1992 Liability convention text in it self has no jurisdiction. Despite so the text and the preparatory works can also be guidance in disputes of how it should be interpreted.

2.2 Uniform International regulations

The international community elaborated two conventions after the Torrey Canyon incident in 1969, namely the International Convention on Civil Liability for Oil Pollution damage in 1969 (1969 Liability Convention) and the International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage (1971 Fund Convention) in 1971. The grounding of the tanker Torrey Canyon highlighted lack of uniform regulations in private international law regarding oil pollution and the consequences of oil spills. First of all there was problematic to identify the appropriate party to claim compensation from, given the often complicated arrangements regarding ownership, chartering and operations of vessels. Second was the difficulty of deciding which law to apply. Lack of uniform regulations related to jurisdiction sometimes led to different regulation in respect of limitation rights for the ship owners depending on which global limitation regime governing. In addition such global limitation rules were considered inadequate to deal with the enormous damage that could occur from oil pollution. Last the principle of "pay to be paid" that the protection and indemnity insurances was based on could bring about a long and protracted process of obtaining compensation for the injured party with no guarantee of getting compensation at all.

\textsuperscript{24} See Falkanger & Bull 2004, page 11
Under the prevailing law system at that time the protection and indemnity insurer avoided to compensate damages unless the ship owner paid the claims. Hence if the owner did not have financial resources to do so this would leave the injured party without any compensation. As a result of the Torrey Canyon accident, and the different point of statutory construction arising from it, the need for a uniform international regime on liability and compensation for pollution damages from tanker accidents was obvious. After a diplomatic conference in 1969 in cooperation with the legal committee of the International Maritime Organization the 1969 Liability Convention was adopted. The 1969 Liability Convention governed the ship owners liability for a vessel constructed to carry oil in bulk. The main principle adopted was that the ship owner was strict liable, with some defined exceptions, for oil pollution damages, in the sense that the obligation to compensate for such damages was not depending on proof of fault or negligence on the part of the owner. The liability was though limited to an amount based on the tonnage of the vessel. To ensure that the victims of pollution damage would in fact be compensated the convention also obliged the owner to have insurance cover for his possible liability. Because of the owners right to limit his liability and the exemptions from liability the 1971 Fund Convention was established. The objective of the fund was to compensate any person suffering pollution damage not able to obtain full compensation for such under the 1969 Liability Convention.

Both the 1969 Liability Convention and the 1971 Fund Convention was revised by protocols adopted in 1992. The main changes made by the protocols were increase in the maximum limit of compensation payable, extension of the geographical scope of application and the inclusion of a procedure for updating the limitation amount. The protocols were adapted and the new Liability and Fund convention entered into force in 1996 (1992 Liability Convention and 1992 Fund Convention). Most of the countries that ratified the 1969 and 1971 convention also have ratified the 1992 conventions, as at June 1st 2005 109 States had ratified the 1992 Liability Convention and 94 had ratified the 1992 Fund Convention. Norway is amongst the countries that have ratified these two conventions, and these conventions have been incorporated in the Norwegian Maritime Code chapter 10.

25 The fund only paid compensation to victims if the damage occurred in a State which was a party to the 1971 Fund Convention cf. convention text article 3
2.3 Scope of application

The 1992 Liability and Fund Conventions are only applicable for vessels constructed or adapted to carry oil in bulk as cargo\(^{26}\). The geographical scope for pollution damages is within the territorial waters and exclusive economical zone of a Contracting State, while preventive measures would be covered wherever taken to prevent or minimize such damages.\(^{27}\)

The NMC has the same scope of application as the conventions\(^{28}\), but additionally it also includes oil pollution damages not covered by the conventions. First of all it also includes vessels\(^{29}\) carrying any other types of oil.\(^{30}\) Furthermore the NMC applies for all kinds of vessels regarding the rule on liability and exemptions from liability in NMC sections 191 and 192.\(^{31}\) The only difference between tanker vessels defined in section 191 carrying persistent oil as cargo and vessel carrying other types of oil or any other vessels, arises when considering the ship owners right of limitation of his liability. Owners of tanker vessels carrying persistent oil as cargo can limit their liability for oil pollution damages according to section 194. For vessels carrying any other oil as cargo or vessels not carrying oil the limitation shall be conducted according to the globalization rules in section 171\(^{32}\).

Secondly the geographical scope of application is expanded when it comes to non convention oil pollution damages.\(^{33}\) Damages occurring at the Norwegian continental shelf outside the EEZ or, as far as Norwegian tort law is applicable on the high seas, shall be compensated according to section 208 2\(^{nd}\) and 3\(^{rd}\) paragraphs.

\(^{26}\)Cf. 1992 Liability Convention Article I number 1, combined vessels which is actually carrying oil in bulk as cargo is also included. Oil is defined as any persistent hydrocarbon mineral oil cf. Article I number 5. The same definitions are used in NMC section 191.

\(^{27}\) Cf. 1992 Liability Convention Article II and 1992 Fund Convention Article 3

\(^{28}\) Cf NMC section 206

\(^{29}\) Cf. NMC Section 208 1\(^{st}\) paragraph

\(^{30}\) Cf. NMC Sections 191 3\(^{rd}\) paragraph, 208 4\(^{th}\) paragraph

\(^{31}\) Vessels not constructed to carry oil according to NMC 191 is also governed by the liability and exemption rules in sections 191,192, cf. 208 1\(^{st}\) paragraph

\(^{32}\) Cf. NMC Section 208 3\(^{rd}\) paragraph

\(^{33}\) Cf. NMC section 208 2\(^{nd}\) paragraph
2.4 The ship owner is strictly liable

NMC section 191 1st paragraph clearly states that the owner of a ship\textsuperscript{34} shall be liable for oil pollution damages regardless of fault. Further on the paragraph letter a) defines oil pollution damages to be damages or loss caused outside the ship by the escape of oil.\textsuperscript{35} Damages to the environment shall be limited to the cost of reasonable measures of reinstatement whether actually performed or planned. In addition if an event occurs that exposes a risk for damages named in letter a) costs, damages or losses incurred when preventing such is defined as oil pollution damages cf. letter b).

The owner of a ship may limit his liability to a certain extent from damages occurring from the same event. The limitation amount varies in reliance to what kind of ship is causing the damage. For ships that are designed to carry oil in bulk as cargo the owner may limit the liability according to section 194, other ships are subject to global limitation according to section 171 cf. section 208.

This strict rule of liability for oil pollution damages is based upon the principle of rectification.\textsuperscript{36} The rationale of this principle is that the tortfeasor, the one who is deemed to have caused the damage, shall compensate such damages and indemnify the injured party. When using the term "deemed to have caused the damage" in this context the traditional consideration of negligence is not relevant. The appropriate consideration is which party should be liable for the damages caused by a high-risk operation.\textsuperscript{37} In case of oil pollution damages as defined above it is the ship owner who is deemed to bear such costs regardless of fault. As a consequence cost of damage will be transferred from the innocent injured party to the tortfeasor and anyone vicariously liable for his actions.

\textsuperscript{34} See discussion in section 2.2 with references to the different sections in NMC
\textsuperscript{35} NMC Section 191 3rd paragraph defines oil to be any persistent hydrocarbon-mineral oil, but also non-persistent oil and mixtures containing oil shall be included according to Section 208 4th paragraph
\textsuperscript{36} See Nygaard, Nils. Skade og ansvar. 5.utg. Bergen 2000, page 19-20
\textsuperscript{37} See Lødrup 1999 page 114 number 2).
2.5 Exclusionary provision

Although the owner is strictly liable for any oil pollution damages, certain situations will excuse him from this. These excused situations are caused by or a result of circumstances beyond the owners control. First paragraph of NMC section 192 letter a) to c) lists the four situations that exempt the owner from his liabilities. I will keep the main focus on letter c) and the 2nd paragraph of section 192 since this is the areas relevant when considering a possible liability for the government, which will be thoroughly debated in the sections 3 and 4.

The NMC does not give any legal basis for who is liable when the ship owner is exempted from his liability. In other words such legal basis must be established by the use of other relevant legislation and legal principles. I will go further in detail regarding this subject in section 3 below.

2.5.1 Force Majeur

Two different circumstances are defined as exemptions in letter a). First an act of war or a similar action in an armed conflict, civil war or insurrection excuses the owner in case this causes oil pollution damages from his vessel. Second the owner is relieved from his liability for oil pollution damages in case a natural phenomenon characterized as exceptional, inevitable and irresistible is the reason for the contamination.

2.5.2 Intentional act if third person

An act from a Third party with the intent to cause damages will also excuse the owner from liability. There is a standard of proof that the damages was entirely caused by this act, so if it’s proven otherwise or that some other factors contributed to the damage or loss this requirement is not fulfilled. In such cases the owner will be held liable for the damages, but he has the right to recourse action according to NMC section 193. Fourth paragraph opens up for recourse action against specified personnel cf. second paragraph letters a), b), d), and e) and f) who intentionally causes damage, and further on that otherwise ordinary legal principles of recourse shall apply.
2.5.3 Negligence by public authority

NMC section 192.1 letter c) sets forth the last situation which excuses the ship owner from the strict liability. In case actions from the public authority are considered to be negligent in connection with maintenance of lights or other navigational aids, the ship owner is exempted from his liability. A requirement for this exemption is that the damages in whole are caused by this negligent act. As already mentioned this will be the starting point when debating the Governments possible liability for oil pollution damages.

3 The Governments liability in negligence - Prevailing Law

The last exemption from the strict liability carried by the owners of a vessel is related to the public authorities’ duty to maintain navigational aids according to NMC section 192.1 letter c);

"The owner is exempted from liability if it is proved that the damage was entirely caused by the negligence or other wrongful act by a public authority in connection with the maintenance of lights or other navigational aids"

As mentioned above exempting the owner from liability does not automatically transfer this liability to the Government. For establishing a basis for a potential liability for oil pollution damage the starting point would be law of tort. The ordinary principle applied in the Norwegian legal order is that persons causing damages by negligent acts should compensate the injured party's loss caused by such acts. 38 This principle also founds the basis for liability for the Government, but in addition it is further specified in relation to the Government position as an employer. The Norwegian Torts Act section 2-1 regulates such liability, in the sections number 1) it is clearly stated that the employer is liable for damages caused by its employee's negligent acts. The extent of coverage of the said damages is set forth in section 4-1. Loss to be compensated for damage to property should be sufficient to cover the injured party's economical loss.

If the ship owner is exempted from his liability according to NMC 192.1 letter c), the legal basis for the Government liability for oil pollution damages would be a

38 See Lødrup 1999, page 122
natural consequence of excusing the owner from his liability. NMC 192.1 letter c) only exempt the owner if the oil pollution damage is caused because the Government has not fulfilled its obligation of maintaining navigational aids, hence through negligence. The fulfillment of this duty has historically been in controversy several times. One of the main issues has been to establish what is considered as negligent or wrongful act when it comes to the public’s responsibilities. A central question in this has been if the legal liability of the government have a different requirement of due care than other private institutions. Trying to answer or at least indicate an answer to this question I will first discuss some of the terms used in this paragraph, and then verify the condition for a possible liability based upon negligence or a wrongful act.

Section 3.3 will deliberate NMC section 192 2nd paragraph, which gives a direct reference to law of tort and the abatement of liability when the injured party has contributed to the damages.

3.1 Negligence by public authorities in connection with maintenance of navigational aids

Basically three terms in the paragraph need to be closely examined before debating the requirement of due care; respectively "Lights or other navigational aids", "Public Authority" and "Maintenance". As a basis for the examination it will be necessary to establish how the courts have interpreted these terms, as well as how other legislative sources understand them.

3.1.1 Navigational aids

According to the law text the term “lights” is only compromising lighthouses. Preparatory works does not give any further guidance on this specific term but the statutory provision of 15th January 1993 number 82 defines light to be; Lighthouses, radar beacons, radio beacons, light beacons and fog signals. This renders the possibility for a more extensive interpretation of the term "lights" than what is given by the law text, since the wording of the law should be interpreted objectively. When it comes to other navigational aids the statutory provision is silent. The NMC's

39 Cf. The Norwegian Statutory provision of 15th January 1993 number 82 Section 2 letter a)
preparatory works for gives some directions for the term “other navigational aids”. The convention and its preparatory works does not clearly state or define the exact interpretation of this, but the Norwegian Maritime Law Committee interpreted this to include all seamarks and beacons.

On the other hand the Committee finds it doubtful whether navigational charts also should be considered as other navigational aids, but they did not rule out the idea of such. Their conclusion in this was that it is for the courts to decide based upon the actual case. In Scandinavian courts some practice related to this question has been established. The most conspicuous, and also controversial in some people's opinion, is the case from Swedish Supreme Court M/T Tsesis. This case interpreted the similar Swedish regulations regarding the ship owner's exemption from liability when the Government was said to be negligent in connection with maintenance of lights and other navigational aids. Regarding the question whether navigational charts should be considered as other navigational aids the court made a thoroughly examination. The court concluded, though not unanimously, that navigational charts is deemed to be included as other navigational aids, and misconduct in maintaining and updating charts

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40 See discussion in section 2.1.1
41 Norsk Offentlig Utredning (NOU) 1973:46 "Erstatningsansvar for skade ved oljesøl fra skip"
42 Cf. NOU 1973:46 page 20
43 Cf. NOU 1973:46 page 21
44 Cf. NOU 1973:46 page 20-21
45 For instance Wetterstein, Peter. Redarens miljöskadeansvar. Åbo 2004 page 79 fl.
47 ND 1983.1 - M/T Tsesis page: 16-27
48 The court was split 3-3, but the vote of the presiding judge was conclusive for the chart to be considered as a navigational aid
in this case held the ship owner immune from liability. It was justified by arguments that charts is an aid for navigation, and for many seafarers the only available information for depths etc. The court supplemented this by stating that the chart is a designation which is central in regards of the term navigational aids. If it was meant to exclude chart from this term it would by all probability have been done by the legislators when the law was established.\textsuperscript{49} In addition the Governments argument that the word "maintenance" in this context was aiming at physical maintenance required for installations like lighthouses, beacons and seamarks and not update of charts was rejected. To the contrary the court said that maintenance also naturally points towards upholding charts with correct information from new surveys of the waters so this navigational aid is trustworthy. It was also referred to statements from two specialists that the preferred opinion amongst the people participating in the establishment of the 1969 Liability Convention was that charts should be regarded as a navigational aid.\textsuperscript{50} There is no direct reference in the NMC, 1992 Liability Convention or other legislative sources whether charts should be reckoned as the Swedish courts ruled, or any other court decisions regarding this particular topic. The Tsesis case rendered the possibility for other aids to be look upon as navigational aids. The most obvious example is the pilot, which in many parts of Norwegian waters is a requirement by law.\textsuperscript{51} One of the pilot service purposes is to provide guidance and information for safe navigation to the master based upon local knowledge. Could the pilot also be included as other navigational aids according to the law? In a court case the M/T José Marti\textsuperscript{52} from lower Swedish courts this was debated. The vessel grounded when guided by a Swedish pilot and the courts found that navigational error on behalf of the pilot caused the grounding. The owner of the vessel claimed that it is the government's responsibility to maintain correct information of the shipping lane to the pilot. If not it should be considered to be negligence in the government’s duty to maintain navigational aids. The courts dismissed the argument because neither the law

\textsuperscript{49} Cf. ND 1983.1, page 26
\textsuperscript{50} Cf. ND 1987.64 M/T José Marti
\textsuperscript{51} The Swedish Oil Pollution damage act (oljeansvarighetslagen) Section 3 is similar to the NMC 192 and is also based upon the Liability Convention.
\textsuperscript{52} Cf. Norwegian Law of 16\textsuperscript{th} June 1989 number 54 regarding pilot services - Lov om lostjenester m.v - Section 13
nor the convention, which the law is based upon, considered the pilot or pilot services to be other navigational aids.

3.1.2 Public Authority

As mentioned in section 1.2.1 it’s the Norwegian Costal Administration who has the responsibility for lights and other navigational aids, and the “Sjøkartverket” for the navigational charts.\(^{53}\) These two institutions will therefore together represent the term public authority in Norway. The Norwegian government funds both institutions and their operations are depending on budget appropriation. Their specific duties are not directly regulated by law, but The Coastal Administration has been delegated its general obligation for maintenance and supervision of navigational aids by law. Taking this a step further the question is which persons are theses institutions, hence the Government vicarious liable for as an employer. I will start by going briefly through the historical development of this question, before going into the prevailing law.

The principle question if the Government was responsible for its employees actions were tried in a court case in 1913.\(^{54}\) After a vessel had grounded because the lighthouse was showing white sector instead of red a dispute regarding if the Central Government should be held responsible for negligent acts committed by their employees. For private companies and local governmental employees it was court practice that they were strict liable for their employees negligent acts. In this case the courts said that the Government could not be responsible for negligent acts committed by its subordinate civil servants/employees. It was not tried if the employee self was personally responsible for his actions, but in a later court case the question was raised;\(^{55}\) Can a subordinate employee be liable for damages caused by his negligence, despite the fact that the Government is not strict liable for its employees? The courts confirmed this, and the employee was held personally liable for the damages caused. This view was altered in 1952 when a similar case came up.\(^{56}\) The Government was found liable because of the mistakes carried out by its employee, not based upon the principle of

\(^{53}\) Public approved navigational charts published by “Statens Kartverk”, included any public approved digital/electronic charts

\(^{54}\) Cf. Rt.1913.656 - "Fyrlyktdommen"

\(^{55}\) Cf. Rt.1925.526 - "Konsuldom I"

\(^{56}\) Cf. Rt.1952.535 - "Konsuldom II"
strict liability though. The question of personal fault on behalf of the employee was dismissed upon procedural grounds, so it was not established whether a possible joint and several liability could be applied. The Tirranna case discussed the Governments liability for its employees. This case was tried in court after 1969, but since the incident occurred before this year the Torts Act was not applied. Despite this it is reasonable to say that the principles of this act was used, and that the judgment rendered would have been the same as if the act was applied directly.\textsuperscript{57} The judge stated that "I assume that also in the Fyr- and merkevesen the rule of liability for deliberately or negligent acts committed in the service, which has with adequate causation in a course of events resulted in damages, could lead to liability for such by the Government".\textsuperscript{58}

As mentioned in the previous section the liability for employees' actions causing damage to third parties have developed gradually. In 1969 the Torts Act was established.\textsuperscript{59} The starting point is that an employer is strictly liable for damages caused by its employee's negligent or deliberate acts.\textsuperscript{60} Employers are hence vicariously liable for damages caused negligently or deliberately by the employee in connection with his work, when taking into consideration if reasonable requirements the injured party can demand from such operations is neglected.\textsuperscript{61} An employer is said to be the public and any other having somebody employed and the public includes government and local authorities as well as governmental enterprises.\textsuperscript{62} Anyone conducting work, services or position of trust in the service of an employer is to be considered as an employee.\textsuperscript{63}

The Norwegian Costal Administration and Kartverket are vicariously liable for their employees according to chapter 2 of the Torts Act.\textsuperscript{64} In connection with maintenance of navigational aids different situations can effectuate such basis for liability, and typical omissions when physically performing maintenance would be such. The above mentioned Tirranna case settled the principle question of whether The

\textsuperscript{57} See Nygaard 2000 page 236 and Lødrup 1999 page 189
\textsuperscript{58} Cf Rt.1970.1154 - page 1156 (my translation)
\textsuperscript{59} Norwegian law of 1969 13\textsuperscript{th} June number 26 – “Lov om skadeerstatning, kapittel 2. Det offentliges og andre arbeidsgiveres ansvar mv.”
\textsuperscript{60} See Nygaard 2000 page 216 number 1) letter a)
\textsuperscript{61} Cf. Norwegian law of 1969 13\textsuperscript{th} June number 26 section 2-1 number 1
\textsuperscript{62} Cf. Norwegian law of 1969 13\textsuperscript{th} June number 26 section 2-1 number 2
\textsuperscript{63} Cf. Norwegian law of 1969 13\textsuperscript{th} June number 26 section 2-1 number 3
\textsuperscript{64} Cf. Norwegian law of 1969 13\textsuperscript{th} June number 26
Norwegian Costal Administration (Fyrverket is included in this organization) also should be liable for the employees acts or omissions. I will not go into the details of the extent of the employer liability here, this will be reverted back to later on in a section below.

3.1.3 Maintenance

Having established who is responsible for the maintenance it is also necessary to take a closer look on the term maintenance. The wording of NMC section 192.1 c) is that the negligence or wrongful act must be in connection with the maintenance, in other words if interpreting this literally it means only failure made when maintaining existing navigational aids, or failing to maintain such. Improvements or establishment of new aids would therefore be excluded. The 1992 Liability Convention has a slightly different wording and uses the term “in the exercise of that function”\(^{65}\) instead of “in connection with the maintenance”. There have been few court cases deciding if maintenance consists of more than maintaining existing navigational aids. In the "Irish Stardust", a court case from Canadian Federal Court, the ruling substantiated that the Government was not responsible for the lack of lights in a recommended traffic scheme.\(^{66}\) The owners of the vessel claimed to be mislead into a recommended scheme, which was dangerous and unsafe for navigation, since the Government had not installed the required navigational aids (sector lights - my remark). The court validated their ruling by stating that the owners (on board crew) had not been misled, since all existing navigational aids in the scheme was duly published on notices and charts. To look for non-existing navigational aids that they should have known where not there, and to claim that if it had been present the accident would have been avoided was insufficient. It was added that if a navigational aid, which was appropriately published, had been removed or malfunctioning, one could have looked for unfulfilled responsibilities. This court case is not from a State, which has ratified the 1992 Liability Convention, but the analogy is clear regarding the term maintenance. The distinction between improvement and maintenance of navigational aids is not always clear. The mentioned Swedish Supreme Court case Tsesis highlighted this when dealing with navigational charts. Is it

\(^{65}\) Cf. 1992 Liability Convention Article III number 2 letter c)  
\(^{66}\) Cf. The Irish Stardust, [1977] 1 Lloyds Report page 195
to be considered that modification of a chart is maintenance like the Swedish courts judgment said, or is it outside the application of the term? Applying the facts from Tsesis in the context of The Irish Stardust it would not have been considered maintenance if the reason for updating the chart was to add new information. The situation would have been opposite if the rationale for the update was to avoid misleading navigation data that is present at the chart. A parallel to this would also be appropriate for the traditional navigational aids. If a safe passage indicated by marker boys becomes misleading because of shifting sandbanks, and the marker buoys is left as is this could constitute a similar problem. The consequence of such is that the buoys will maintain its functions, but they will be giving misleading information.

3.2 The requirements of due care

In this part of the discussion I will examine the requirement of due care, but before entering into this I will comment briefly on the requirement of proof

First paragraph of section 192 letter c) contains a standard of proof. It must be proved that the damage was entirely caused by the negligence or other wrongful act by a public authority in connection with maintenance of lights or other navigational aids. In Norwegian courts the burden of proof is based upon the balance of probability and free adducing of evidence. If the courts do not find it in all probability that negligence or wrongful act from the public authority alone caused the damages, or that some other cause was concurring to the damages, the exemption would not apply. Despite this there are some possible events that would justify excusing the owner from his liability. If the concurring cause/s could be categorized as one of two other exemptions cf. letter a) and b), and this together constitutes the whole cause to the damages the exemption would nevertheless apply.67

3.2.1 The general principle

As referred to above the general principle of tort law is that the one who has acted negligent will become liable for compensating the consequential damages arising from such negligent acts. When assessing in what extent an act is to be considered wrongful

67 Cf. NOU 1973:46, page 21
or negligent there are certain elements to reflect on. The NMC chapter 10 does not set any standards for the threshold regarding negligent acts. Some guidelines have been established through Court practice and generally acknowledged principles, and this will be a basis for this discussion. Due care is a relative term with no exact definition, and the extent of it has gradually developed when it comes to the Government. Courts have tried to set an absolute or general threshold for what a negligent act or action is, but instead they have evaluated the act in relation to the given circumstances.

As a general guidance the same basic condition when dealing with principle of fault has been used; the tortfeasor must have disregarded rational requirements and expectations in relations to the actual risk for damage on the injured party's interests if he's actions are to be considered negligent. The term rational requirements and expectations reflect back on the tortfeasor's actual role or function. First of all the position or role the tortfeasor generates some expectations to his behavior. It is a general comprehension that some situations would require more or an alternative act from professionals or a professional institution than others. The profession and expertise of such individuals or organizations aggravate the requirement of due care in situations were it is reasonable to expect that the tortfeasor should have acted alternatively to eliminated a risk from turning into damages. In the court case "Ubåt-dommen" the judgment was based on this principle. A Norwegian submarine KNM Uthaug damaged a Dutch trawl when operating. The officers onboard the submarine relied on the sonar when navigating, and the trawl was not detected by the use of this. After the accident it was investigated whether the sonar actually was accurately enough so it could be used for detecting trawls, and the result was negative. When the judges made their assessment, they concluded that the master onboard had not been negligent in his operation of the submarine. This was rationalized by the fact that at the stage of the accident, based upon the available knowledge, the master acted according to regulations and normal practice. The fact that it at a later stage was proved that the sonar was not reliable could not be taken into consideration. Any other master would have relied on the sonar just like the master of KNM Uthaug, hence he had acted with due care and according to normal procedures.

68 See Nygaard 2000, page 175 e)
69 See Lødrup 1999, page 127
70 Cf. Rt.1973.1364
When it comes to the term actual risk two main aspects are normally reflected upon by the courts, respectively the nature of it and the likelihood for it to materialize. The nature of a risk is evaluated in the context of the tortfeasors action, and if the risk of damages his actions create could lead to damages of a certain degree. The magnitude of the damage will impact on how the requirement of due care is evaluated – generally speaking a greater extent of possible damage will intensify the requirement of due care. Damage could include both economical aspects, such as actual economical damage as well as more social aspects, like loss of human life or damage to the environment. When it comes to the likelihood for damages, the requirement of due care will be more stringent if the tortfeasors actions increases the possibility for the damage to happen, in other words if an alternative action would have reduced or eliminated the risk for damages. A judgment from the Norwegian Supreme Court illustrates this aspect. A local authority was held liable for not disposing toxic/dangerous materials in an acceptable and safe manner. They hired a contractor for the job, but he disposed the material close to a river. First the judges stated that due to the large quantity of dangerous materials it represented a great risk of loss, hence a risk for possible damages to people and animals health and other damages was immense. Further they also took into consideration the seasonal factors. Since it was summer, thus the hottest time of the year, the risk of damages was intensified, when not disposing the materials properly. Lastly they added that since the farmers was finished with their spring farming the local authorities should have know that it would be difficult for the contractor to dispose the materials safely.

Though having established these general evaluation criterions some additional contemplation is needed. A minimum standard for the said risk is that it must be greater than what is normal for the specific operation; even if the nature is high it must also exceed the normal dangers that could be expected. This principle was established in a Norwegian Supreme Court decision when the Norwegian road authorities were sued for compensatory damages when a car accident caused the death of a person. The

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71 See Lødrup 1999 page 139 number 3)  
72 See Nygaard 2000 page 187 letter d)  
73 See Lødrup 1999 page 135 number 2  
74 Cf. Rt.1967.697 "Lierdommen"  
75 See Nygaard 2000 page 189 letter g)  
76 Cf. Rt 1957.1011 (Utforkjøring i Åsane)
accident happened on a road without safety fence and the plaintiff claimed that the road authorities had not fulfilled its duties in keeping the road safe. The judge stated, “(…) lack of safety fence in relation to driving does not represent a distinctive or abnormal risk. This case is not relating to extraordinary or inevitable dangers that drivers should not take into account. Even if the bridge did not have safety fences I cannot see that this represented a greater danger or more difficult conditions for the driver than what is ordinary on Norwegian roads”. 77

There is absolutely no doubt that the daily operation in the shipping industry represents a dangerous environment for the seafarers. Before misconduct on behalf of the public authority is said to be negligent it will as a minimum have to exceed this “normal” level of risks. In the M/S Tirranna case 78 this was one important element when the judgment was rendered. The vessel M/S Tirranna grounded in the northern parts of Norway, and the owners claimed that the public authorities neglected its duty of maintaining a light buoy, hence caused the accident. Judge Gundersen stated "Errors or misconduct resulting in a legal liability must be of a nature that exposes the seafarers to a considerably deviation from the level of safety that the operation is aiming to provide". 79 Further on he stated, “The shipping industry must at any times be prepared for such light buoys being out of order, and not make them a condition for safe navigation”. 80 First of all the court did not find the misconduct on behalf of the public authority to be of a nature that exposed the seafarers from a greater danger than what is normal, and secondly the seafarers did rely too much on one of the available navigational aids.

The latter raises another interesting perspective in the evaluation of due care. As mentioned the role of the public authorities forms the basis for what could be expected from their services. Also the injured party, in the above-mentioned case seafarers, is expected to act in a certain way to eliminate risks in a given situation. Judge Gundersens statement indicates that the seafarers should not have relied on and made the light buoy a condition for navigation. He substantiated this with the fact that such a navigational aid is a floating object that can be brought out of position or order at any

77 Cf. Rt 1957 page 1012-1013 (my translation).
78 ND1970.82
79 ND1970.82 page 84-85 (my translation).
80 ND1970.82 page 86 (my translation)
time; this was also informed by the authorities in the publication “Norsk Fyrliste”. This case sets the warning example of injured parties’ duties and expectations to them of acting in a certain way to reduce risks. When not fulfilling such expectations they will contribute to the risk materializing, hence it would be an extenuating factor in the assessment of due care.

3.2.2 Special considerations influential on Governmental acts

After having determined what the Courts use as general guidelines when assessing the threshold for due care more specific criterions used when dealing with public authorities would be appropriate. Traditionally available resources and the purpose of the operation and the service provided have been used as mitigating factors. A general comprehension has been that lack of grants for public service functions raises the threshold of due care. Lack of funds makes the public authorities possibility of fulfilling what is expected of them hard or even impossible. This point of view was emphasized in the M/S Tirranna court case "(...) citizens can expect - and act accordantly with confidence - that the proper public authority fulfill a defensible professional and administrative standard within the resolutions and the granted resources decided by the central Government". Consequently claims, which exceed this requirement, hence imposing the public authority to maintain a wider responsibility than what they have intended, would be rejected. Further on the court stated that the errors or faults committed must cause a significant deviation from the level of security the public authority is aiming to maintain.

When it comes to the service provided, or in other words the nature of the operation the question of a mitigated requirement of due care has been raised. The general comprehension is that when a public authority has taken on a responsibility for services, which serves communal social benefits and has the purpose of preventing

81 See for instance Nygaard 2000 page 238
82 When the accident happened in this court case the Torts Act of 13th June 1969 number 68 was not in force. Despite this it is likely that problems related to Governmental liability and the requirement of due care was treated according to this law, see Nygaard 2000 page 236
84 Cf. ND 1970.82, Judge Gundersen assessments page 84 fl.
damages from occurring, a mitigated requirement of due care could be applied.\textsuperscript{85} This was the situation in the above mentioned Tirranna case. A principle question in this case was if the Government should be immune of the liability for negligence committed by its employee, because of the nature of the operation. The majority of the court answered confirming to this, and the reasons given was that a public authority, who strives to contribute for traffic at sea or land to be safe, the negligence must result in considerably deviation from the level of safety they aim to provide.\textsuperscript{86}

3.3 Abatement of liability

Second paragraph in NMC section 192 opens up for abatement according to section 5-1 of the Torts Act.\textsuperscript{87} The requirement for such is that the owner proves that the injured party deliberately or negligently contributed to the damages. When concerning oil pollution damage the Government is often one of the injured parties as the one performing the clean up operations. I would briefly debate two possible scenarios where the rule of abatement could be applicable. In the first scenario I presume that the act on behalf of the Government is to be considered negligent, and the reasoning would be equal to the one debated under section 3.2 above.

3.3.1 The injured party's contribution

The general concept is that the injured party's right to compensation could be partially or completely abated if he by own fault has contributed to the damages inflicted upon him.\textsuperscript{88} In addition to this fundamental principle also the preventive effect of abatement is an important justification for the rule. The concept is that if a potential damage would not be wholly compensated, the injured party would do what is reasonable to prevent such damages. The reasonableness of indemnifying the injured party by transferring the cost of the damage from the injured party to the tortfeasor would burst when the injured party negligently has contributed to it. There is also a requirement of causal connection

\textsuperscript{85} See Lødrup 1999 page 188  
\textsuperscript{86} Cf. Rt.1972.1154 - page 1156  
\textsuperscript{87} Cf. NMC Section 192 2\textsuperscript{nd} paragraph (foot note reference to Norwegian Law 1969 June 13\textsuperscript{th} number 26 section 5-1)  
\textsuperscript{88} Cf. Norwegian Law of 1969 13\textsuperscript{th} June number 26 section 5-1
when assessing if the injured party have contributed to the damage. There must be a causal connection between the negligent act on behalf of the injured party and the said damages. If negligence acts committed by the injured party increases the risk for the tortfeasor of causing damages, such causal connection could be established.\textsuperscript{89} Also lack of actions to minimize the potential damages could be treated equal; for instance if the injured party does not take reasonable measures to minimize the damages inflicting him.

The first scenario I would debate is in case the damage is caused to some extent by a negligent act on behalf of the Government regarding maintenance of the navigational aids, for instance not updating a chart after a new measurement of the waters. Given that a vessel grounds because of this and of navigational error, in other words concurring causes, the exemption from liability in NMC 192 letter c) would not be applicable. Fist of all apportion of guilt must be settled, if the negligence on behalf of the Government is said to be gross, and the faulty navigation is minor it may justify abatement of the compensation the Government is entitled for.

Scenario number two is when the Government is said to be contributing to damage by not mitigating the damages after an oil spill. If an injured party by reasonable measures fails to limit the present damage the liability of the tortfeasor could be abated.\textsuperscript{90} A practical example is in case of an oil spill and the Government takes the responsibility and control of the mitigation and clean up operation. If the measures, both technical and practical, taken are not according to acknowledged standards and because of this the operation is ineffective it could be looked upon as failure of limiting the damages. It is known that several methods are less effective and also costly when dealing clean up operations.\textsuperscript{91} In a situation when the Government is aware of this it may be more justifiable that their claim for compensation for this operation could be decreased, hence the liability of the owner abated.

\begin{footnotes}
\item[89] See Lødrup 1999, page 365
\item[90] Cf. The Norwegian Torts Act section 5-1 number 2) and Lødrup 1999, page 363
\item[91] See Anderson 1998, page [381]-383
\end{footnotes}
3.3.2 The reach of the abatement

The rule on abatement is general and would be applicable for all kinds of damages regardless of the dimensions. As a general principle and starting point the injured party shall have full compensation for the damages, but two alternatives can justify the compensation for being decreased. Section 5-2 in Norwegian Torts Act sets forth these two alternatives for such decreased compensation. First alternative highlights the question if it would be an unreasonable burden for the one responsible for causing the damage. The term "responsible" reflects back both on the tortfeasor as well as the injured party who has contributed causing the damage. When quantifying the term "unreasonable burden" both the financial situation of the injured party and the tortfeasor must be considered in comparison to the economical extent of the damage. In an event where a ship owner is deemed to be responsible for oil pollution, in case of concurring causes as described above in section 3.3.1, and his financial situation would be struck hard if he was to compensate the whole damage, the possibility for abatement for the liability towards the Government could arise. The rational would be that since the Government contributed to the damage, and their financial position is said to sustain regardless of if they were to be compensated, it could justify such abatement.

In addition to the financial consideration also the possibility of insurance coverage of such damages is important. The previous example of the ship owner liable for oil pollution damage would in all probability have included an insurance company who would be liable covering his liability. In such case it is normally not justifiable to consider the "unreasonable burden", but in some cases for instance huge disasters in pollution matters this could nevertheless be applicable. As a last consideration of whether it would be an unreasonable burden is the "question of liability" on behalf of the tortfeasor. If in the given example the ship owner was only little to blame for what caused the damage, and the Governments negligence contributed in a great extent, the ship owner would nevertheless be strict liable. In such situation it could be excusable to abate this liability for compensating damages accordingly.

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92 Cf. Norwegian law of 1969 13th June number 26 section 5-1
93 See Lødrup 1999 page 383
94 See Lødrup 1999 page 383
95 See Lødrup 1999, page 384
96 See Lødrup 1999, page 384
The second alternative for the compensation to be abated is if it reasonable that the injured party in special circumstances partially or in whole should bear the damages.\textsuperscript{97} In practice this could include the same circumstances as mentioned above, but not necessarily taking into the consideration that it would be an "unreasonable burden" for the responsible parties. Even if it would not be an unreasonable burden for the ship owner, for instance because they have a strong financial position, abatement could be applied if it is reasonable that the injured party contributing in causing the damage.

4 The governments liability - Conception of justice

In the above sections I have tried to highlight the aspects which together found the prevailing law in matters of the Governments liability for oil pollution damages. Now I will focus more on the conception of justice, and how reflections of the discussion above could give the basis for a nuanced picture. The intention is to show that alternative and modified interpretations of the basis for prevailing law could be appropriate. As the above assessments has shown there are very few court cases which has established the practice in cases involving the Governments responsibility of maintaining navigational aids. The cases debated are also of "elder origin" and therefore today's expectations and rational requirements may alter the concept of liability in negligence when it comes to the Government.

On the one hand it is important to remember the general idea of the law being consistent in the meaning that similar instances would require for similar reactions.\textsuperscript{98} This will maintain the society's requirement for regularity and set forth the standards for in which way people should act. On the other hand the individual adjustments are needed for the specific circumstances, since no situations are identical.

A parallel to this dilemma is the very interpretation of certain terms, which in certain situation would create unnecessary uncertainty and unexpected results.

\textsuperscript{97} Cf Norwegian law of 1969 13\textsuperscript{th} June number 26 section 5-2 second sentence

\textsuperscript{98} See Nyggard 2000 page 179
4.1 Negligent acts and due care - finances as mitigating factor

In the above assessment in section 3.2 the general concept was that the tortfeasor must have disregarded rational requirements and expectations in relation to the actual risk for damage on the injured party's interests if he's actions are to be considered negligent. Additionally, in 3.2.2 I discussed the special considerations made by courts when it comes to Governmental acts. The first question that arises out of this is whether economical factors should be taken into considerations when assessing the requirement of due care. In the Tirranna case this consideration was made when the judge stated "(...) citizens can expect - and act accordantly with confidence - that the proper public authority fulfill a defensible professional and administrative standard within the resolutions and the granted resources decided by the central Government".\(^9\) What it all comes down to is the level of safety the public authorities actually can provide is not necessarily what they are aiming for, but is given within the limited resources and the allocation of them. Does this then justify that the level of safety is lowered if the funding from the central government decreases or is insufficient? A practical example could be useful highlighting this question and its dilemmas. If the government decreases its funds to the Costal Administration, and because of this they will have to neglect maintenance and supervision of a lighthouse, could this defend a lower level of safety for the seafarers? Given that the Costal Administration informs the user of this lighthouse through a public alert/notification that it should not be trusted when navigating in the waters it may be justifiable. In case the administration relies on the technology and claims that this would not affect the level of safety for the seafarers the opposite should be the conclusion in case of an accident.

In general I do not think it is rational that the threshold of the safety level should correlate with the available funds. The seafarers can not consider if the aids which they depend up on when navigating are more or less reliable because of the economical state of the institutions which are liable for maintaining such.

4.1.1 Commercial vs. Governmental institutions

As already indicated economical considerations have traditionally been made when assessing the threshold for negligent acts on behalf of public authorities. Especially such

\(^9\) Cf. Rt 1970.1154 , page 1156, (my translation)
has been made when it comes to the service functions. Private institutions or companies are also service providers, but the distinction commonly used is based upon an economical perspective. When for instance the public authorities provide navigational aids to seafarers it is not founded on any economical interest, but the interest lies in providing safe guidance to prevent accidents. Typical commercial institutions also have the interest of providing services but it's common to also have an economical interest in earning a profit. Shall the legislation and courts distinguish between the interests institutions have when providing services – can the application of a lower liability threshold for a non-profit institutions serving the common interest be justified.

The obvious dilemma here is whether an injured party can require more of a party that has an economical interest in providing services than of a non-profit operation. The reasoning could be that if making a profit the possibility of improving the services is present, while for non-profit institutions lack of resources limits such. To a certain extent this makes sense, but in case a public service is privatized would the same principle apply? A private enterprise is given the responsibility the Costal Administration has for maintaining navigational aids, and the government compensates the enterprise exactly the same sum as they have funded before. Because the enterprise manages to do this more efficiently, they provide an equal safety level but to a lower cost and consequently they earn a profit. Would this situation defend that seafarers could demand an even higher level of safety in contrast to what the Costal Administration previously provided? Turning this the other way around would a private service provider loosing money such operations be allowed to lower the safety level without being considered negligent?

In my opinion the requirement of due care for public and private institutions should as a general principle be the same, the injured party should expect the Government to fulfill its duties with the same care as other institutions. This opinion is supported by Lødrup. In his opinion the threshold for due care should be equal. I think that the basis for establishing a general threshold for due care, for public as well as private corporations, was emphasized by slightly modifying the ruling in the Tirranna

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100 See Lødrup 1999 p.188
101 See Lødrup 1999 page 188-189
case; "(...) citizens can expect - and act accordantly with confidence - that the proper public authority fulfill a defensible professional and administrative standard (…)". ¹⁰²

I have left out the part that it should be considered within the limits of given available resources/funds. In general the principle of lowering the threshold for negligent acts based upon financial circumstances should not be acceptable, neither for public or private institutions. In his commentaries to the Tsesis case from the Swedish lower courts Erling Selvig supports this point of view, ¹⁰³ but this point of view could lead to courts criticizing the budgetary authorities. He further commented on this in the commentaries to the same case after the appeal in the Swedish Supreme Court. "If the courts from the ordinary principles of compensation should require a higher safety level or otherwise demand a more stringent requirement of due care from the public authorities than the available resources allow, the resulting liability for compensation would be criticism of the budgetary authorities." ¹⁰⁴ He's conclusion of this matter is that the Government can avoid its liability for self-imposed duties when not ensuring that sufficient funds create a satisfactory level of safety for the seafarers. Only in case an employee actually commits a negligent act, when taking into consideration the lack of funds, the Government would be held liable. I will not go further on this since this is more a discussion related to the public administrative body, and not the service function.

A supplementary remark is the fact that the services provided by the Government in connection with navigational aids are not free of charge for the users. The required pilot service, as well as charts and port fees are services which the Shipping Industry must pay for, despite that the Governmental institutions is so called "non-profit" serving the public interest the distinction between such payable services and more "profit" related services is vague.

¹⁰² Cf. Rt.1970.1154 page 1156
4.1.2 A common requirement of due care for private and public institutions

To summarize the conception of justice regarding the due care I will start by supporting the general comprehension as stated in section 3.2.1. The tortfeasor must have disregarded rational requirements and expectations in relations to the actual risk for damage on the injured party's interests if his actions are to be considered negligent. A tortfeasor, private or public, should be held liable for his actions if those are increasing the risk beyond what is acceptable when taking into consideration the nature of the operations.

The shipping industry and its seafarers are aware of the risky environment they are operating in, but nevertheless they are depending and relying on certain aids to keep their operations at an acceptable risk level. If public authorities can not maintain this accepted level, despite the limited resources, and organize their operation accordingly the Government should be liable for such neglect. Public authorities provide services, and it is regarding such services the consideration of ignoring rationale requirements and expectations must be viewed. As mentioned above the role or function of the public authorities in reliance to navigational aids will generate certain expectations to their operation. The aim and purpose of these authorities' services is to provide help and aid for safe navigation in Norwegian waters.\textsuperscript{105} Based upon this function what is reasonable for the seafarers to require from the public authorities responsible for navigational aids? To put it the other way around, which requirements and expectations is it excusable for the authorities to ignore? On one hand it is not expected of any institution, private or public, to prevent the inevitable. Certain situations and the nature of the operation must exonerate for liability, but on the other hand also some actions or lack of such should consequently entail liability.

Seafarers should by all reasonability expect that the authorities provide accurate guidance by its navigational aids and that the services are based upon certain professionalism. A premise for such is that the authority has positive knowledge of relevant circumstances, and that there is an alternative action that the government could have initiated to avoid the risk materializing. In case the authorities know that their pilot is not properly skilled to maneuver a tanker in specific waters and despite this they send the pilot on such mission, they have not provided the expected accurate guidance, and

\textsuperscript{105} See for instance the Norwegian Costal Administrations web pages www.kystverket.no for description of their vision and goals.
hence their actions are negligent. Failing to update a chart after a new shallow is detected shows lack of system and professionalism and would be ignorance of both rationale expectations and requirements by the authority. To the contrary, if a vessel runs aground on a shallow not known it is not necessarily reasonable to hold the authorities responsible for consequential damages.\footnote{Rt.1966.351 "Sjøkartdommen" established the Government was not liable for a shoal which was not detected when measuring was conducted in 1913.}

\section*{4.2 Variation in interpretation of the term navigational aids}

Law is not an absolute science but interpretations are made based upon the actual circumstances. As mentioned in section 3.1 "other navigational aids" have been interpreted in various ways, both including and excluding different navigational aids.

\subsection*{4.2.1 Navigational charts}

In the Tsesis case the court interpreted charts to be included in the term other navigational aids, but the court was not unanimous in this question. The dissenting judges stated "(...) Even the circumstance that navigational chart (...) is important as an aid when navigating, it is not mentioned in the Convention text or in its preparatory works (...) this supports the assumption that charts is not intended to be considered as "other navigational aids"."\footnote{Cf.ND.1983.1 - page 40} Supplementary they justified their dissent that charts considerably differs from lighthouses and sea marks when it comes to its sort and function.\footnote{Cf.ND.1983.1 - page 34}

Despite the courts dissent, I will support the majority's reasonable arguments that charts is an aid for navigation, and for many seafarers the only available information of depths etc. I would like to point out that the very means of a chart is to help seafarers to navigate safe, based upon information provided by a public authority, in the same way as lighthouses and seamarks. As mentioned when discussing the sources of law the wording of the law should be interpreting objectively.\footnote{See Falkanger & Bull 2004, page 7} If the word has no everyday life meaning, the interpretation should be based upon the general
comprehension of the industry. I am convinced that the general public as well as the industry would agree upon that a chart is actually a navigational aid in the same way as seamarks and lighthouses.

In addition the nature of exempting a ship owner liability for oil pollution damages requires for a situation outside the control of the owner as defined in the paragraphs letters a) to c). It would not be reasonable that charts should be threatened different than a lighthouse; it is out of the control of the ship owner in the same way. At the end of the day the public authority provide such services, and if the seafarers shall be able to navigate safe in Norwegian waters they need accurate information from lighthouses, seamarks as well as navigational charts. The argument that only equipment needing physical maintenance is to be defined as other navigational aids is vague.  

The decisive factor must be the aim of providing safe guidance tools to the seafarers in Norwegian waters. If the navigational chart is not updated the use of other aids such as seamarks and lighthouses are anyway limited, or in worst case misleading. These mentioned aids are closely related, and it would not make much sense if not all of them should be interpreted in the same way. The public authority shall maintain such tools and update them with the latest available information regardless if it is a lighthouse or a chart. I will revert back to in what extent in later on, but for now I will conclude that it is natural to include navigational chart in the term other navigational aids.

4.2.2 The pilot services - a navigational aid?

Having established my point of view regarding the charts I would like to take the predicament of interpreting other navigational aids a step further. In the mentioned case of José Marti it was declined that the pilot was to be considered as other navigational aids. In my opinion this is correct as far as it comes to the fact that the pilot acted based upon available information in the navigational charts. If the pilot run aground a shallow bank not indicated on the chart and he acted according to given procedures, the government should not be responsible for such actions. They could not anyway have provided the pilot information about a shallow bank which at the time being had not yet been detected.

110 See arguments by dissenting judges ND 1983.1, page 34 fl.

111 Cf. ND 1987.64 M/T José Marti
The more principle question in a political juridical sense, rather than prevailing law, if a pilot is a navigational aid equal to lighthouses and charts is more complicated. It is the government's responsibility to ensure that the services provided is sufficient,\textsuperscript{112} and the law also defines the pilot service to be an aid for vessels in connection with navigation and maneuvering.\textsuperscript{113} Pilot services supplement information that navigational charts does not give. Information about local conditions like the tide, currents etc helps the master to maneuver the vessel safer. In practice this is exactly the same function as the other navigational aids have, is there any reason why it should not be treated equally when coming to the law? In other words, should the owner be liable in cases where the services provided in connection with pilotage is considered negligent on behalf of the public authority when not being liable for the same negligence committed when maintaining a lighthouse, or lack of such? The Norwegian courts shall strive to make justifiable and sensible judgments based upon interpretations of the law. I cannot see that in a certain case, where the public authority is negligent for instance in organizing the pilot service; such should be threaten differently from the same kind of negligence when dealing with the organization of maintenance of lighthouses. Some may say that you cannot maintain a pilot in the same sense as a lighthouse, but my discussion below would account for this. Contradictory to these arguments it is claimed that anyhow the ship owner is vicariously liable for the pilot according to NMC.\textsuperscript{114} This is correct if navigational error is committed because of personal fault grounds a vessel. To the contrary if the navigational error was conducted because the pilot was not properly trained this should not be held against the owner. The Government is accountable for ensuring that the pilot is skilled so his advice can help the seafarers navigating safely. Based on these submissions I think it is justifiable to say that a pilot in some cases should be considered equally as other navigational aids.

\textsuperscript{112} Cf. Norwegian Law of 16\textsuperscript{th} June 1989 number 54 section 5
\textsuperscript{113} Norwegian Law of 16\textsuperscript{th} June 1989 number 54 section 3 number 1
\textsuperscript{114} CF NMC Section 151 1\textsuperscript{st} paragraph
4.3 In connection with maintenance

The term in "connection with maintenance" can have various meanings depending on in which context it is used. In the Norwegian law text the word "vedlikehold" is used.\textsuperscript{115} This terminology usually is used in the sense of physical maintenance; hence it would be in connection with the physical maintenance of navigational aids a possible liability for the Government could appear when interpreting it literary. The 1992 Liability convention uses the term "maintenance of lights or other navigational aids in the exercise of that function".\textsuperscript{116} The term "exercise of that function" would justify for a more spacious interpretation in my opinion. The preparatory works does not give any guidance to the meaning of the term maintenance, but the convention is incorporated in the NMC, hence an interpretation based on the underlying source to the legislation would be appropriate.

4.3.1 In the exercise of the function and service provided

If only the physical maintenance should be the basis for liability, the effect would be that only negligent acts on behalf of the person actually performing this would be relevant. This would be in contrast to the acknowledged principles established in the Torts Act,\textsuperscript{117} were the employers liability actually is a liability for the operation as a whole, not only for subordinate staffs actions. Erling Selvig's comments to the Governments responsibility in matters concerning traffic at sea further develop this. "The central juridical political question is which responsibilities that should be attached to the different Governmental activities. A proper answer to this will probably not be found by a thoroughly investigation of the individual civil servant".\textsuperscript{118} In other words the Government has a responsibility for the totality of its operations, and this should be the basis for the assessment of whether they are fulfilling their duties or not. Chasing subordinate personnel trying to find a scapegoat would not be the proper way of establishing if the Government has fulfilled their duties of proper maintaining the navigational aids.

\textsuperscript{115} Cf. Lov om Sjøfarten av 24. juni 1994 nummer 39, med endring sist ved lov 5.april 2002 nr.8 section 192 letter c)

\textsuperscript{116} Cf. 1992 Liability Convention article III number 2) letter c)

\textsuperscript{117} Cf. Norwegian Law 1969 of 13th June number 26

\textsuperscript{118} Cf. Nordiske domme i sjøfartsanliggende Årgang 1983 - Comments; page VII
Considering the fact of the actual function the public authority has when it comes to navigational aids, I would say it consist of more than just physical maintenance - they are a service institution providing help and guidance in navigation matters. When also considering that the reasonable requirements the user of such services has changes in accordance with new available technology, it would be sound to say that maintenance also could be establishing new aids and improving existing aids. This would expand the basis of liability to also include the organizational and administrative oversights or faults, in contrast to just physical maintenance. For instance it is a part of the service to provide properly skilled pilots. If the training of pilots is insufficient not fulfilling the required standards, this should be considered a negligent act if it contributes to an accident with a vessel. Consequently the Government should be held liable for the damages arising of such. The contrast to this is where the pilot makes a personal fault, for instance when navigating the vessel. Consequential damages of such will the government not be liable for, since the pilot is considered to be in the service of the vessel.\textsuperscript{119} This is also in contrast to the Torts Act regulating the employer's liability, but the NMC is to be considered "Lex superior" regarding this relation.\textsuperscript{120}

Another situation which can be of an organizational nature is the communication between the two public authorities Norwegian Costal Administration and Statens Kartverk. As mentioned they are together responsible for all the navigational aids in Norwegian waters. What would be the consequence that lack of communication between these institutions creates risks or even worse accidents? A present example were this question possibly will be raised is the Rocknes case were the costal administration was not informed about a possible dangerous shoal detected by Statens Kartverk. The pilot services (costal administration) rely on such information when pilots update their navigational manuals, and since the vessel grounded on this specific shoal the Governments responsibility for maintenance of navigational aids would probably be debated. I will not go further in detail on this, but again emphasise the above statement from Erling Selvig; "The central juridical political question is which

\textsuperscript{119} Cf NMC section 151 1st paragraph.

\textsuperscript{120} See also Nygaard 2000 page 226-227 and his references to Rt.1963.622 which established the principle of the Government not being liable for personal faults committed by the pilot in service of a vessel.
responsibilities that should be attached to the different Governmental activities (…)"). The Government is wholly responsible for the services in connection with the navigational aids, hence omissions in organizing the communication between the authorities delegated the responsibility could also be a basis for liability.

4.4 Possible effect of a spacious interpretation

The judgment rendered in the Tsesis case, hence also my point of view has been criticized by a variety of people.\textsuperscript{121} Primarily it has been based upon the fact that the owner is strict liable for oil pollution damages. Owners are obliged to maintain approved insurance for possible damages caused by oil contamination from his vessel. The idea for such is to indemnify the injured parties, and the critics claim that this requires a stringent interpretation of the exemptions. The consequence of the opposite could undermine the aim of the 1992 Liability and Fund convention, thus also the NMC chapter 10, and also the indemnification of innocent injured parties as well as their legal capacity.

To a certain extent I agree with parts of this critique at least when it comes to indemnifying innocent injured parties. An innocent third party should never be forced to carry the burden of damages caused by a tortfeasor. Interpreting "navigational aids" such as charts spacious would not necessarily mean that the injured party would be less compensated. If the owner is not liable for the damages caused by a negligent act on behalf of the Government, the Government would in principle have to compensate the damages in whole. This follows by the ordinary principle applied in the Norwegian legal order, that "persons" causing damages by negligent acts should compensate the injured party's loss caused by such acts. To the contrary if the interpretation is applied restrictively and the owner is liable for the damage, he can limit his liability according to NMC\textsuperscript{122}. In such case and if the damages is higher than the limitation amount the injured parties would not be indemnified, but they would have to bear some of the loss them self.

\textsuperscript{121} See for instance Wetterstein 2004 page 79 fl. and the argumentation from the dissenting judges in ND.1983.1 - page 38

\textsuperscript{122} Cf. NMC section 194 for oil pollution damage covered by the 1992 Liability Convention, and section 208 cf. section 175 for other oil pollution damage not covered
If the oil pollution damage is covered by the 1992 Liability Convention, the ship owner is obliged to have insurance coverage for his liability for oil pollution damage. The insurance company is though entitled to limit their liability in the same extent as the owner. When the damages exceed the amount that the owner/insurer can limit its liability to, the International fund for compensation for oil pollution damage will compensate the surplus, though also limited to a certain amount. In extreme situations the injured parties would then not be fully compensated for the damages.

Arguing that when practicing a spacious interpretation of the term "other navigational aids" would undermine the aim of the 1992 Liability and Fund convention is therefore in my opinion not relevant when considering the principle of indemnifying third parties. As exemplified the consequence could improve the possibility for the injured parties of obtaining full compensation. The bottom line is that the injured parties will not be harmed economical if interpreting the term "other navigational aids" spacious, to the contrary they could be better off.

As long as the exemption is expressed by the term other navigational aids, I think it is justifiable and sensible that all navigational aids is treated equally, whether they are physical installations, information sources for navigation or a person's competence. Since they are the responsibility of the Government, and if the Government is not able to fulfill its duties in regards of maintaining them, the owner must be excused for such faults, hence the Government should compensate the damages arising because of their negligence.

5 Conclusive remarks
The requirement of due care is as already mentioned a rather relative term, and several considerations must be made when assessing it. With regard to the safety of the seafarers and their need for aids when navigating in the complex waters of Norway the Government has a great responsibility. When using such aids the seafarers must in a reasonable extent rely on them, and act accordingly. Some of the court cases which I have referred to addresses this and the judges have brought up issues like available aids.

123 Cf. NMC sections 197, 200
124 Cf. 1992 Fund Convention article 4 number 4)
resources, what by reasonable could be expected and so on. The shipping industry has tried to improve the safety at sea for several years, including measures to protect the environment and human life. New technology has made it possible to construct vessels that are more solid and with better navigation abilities. This technology has also made it possible to give better aids, and make maintenance of these more efficient and accurate. The Norwegian Government has started to improve its navigational services by for instance new accurate readings of the waters and entering the information into digitalized charts. Although these initiatives the central governments must continue to provide sufficient funds so the proper authorities can maintain this process, new technology on the vessels require new technology from the ones providing navigational aids. The requirements the seafarers should demand within reasonable levels is actually increased by this technology.

Also the focus on environmental issues world wide should be an incentive for increasing the accuracy, efficiency and reliability for the Government. By providing services that increases the safety, the risk for pollution decreases - the cost of a pollution disaster would be enormous, the proactive measures which the Government can take is nothing in comparison. Norway has a commitment towards its own national seafarers as well as the international maritime sector.

The legal system should be dynamic and adjust to changes in society. I am not saying that this is not the case in general, but prevailing law in certain fields does not reflect this. Above in the section regarding prevailing law, and followed by the conception of justice I addressed certain elements that are mature for changes. The justification that lack of funds should lower the requirements of due care for public authorities, and the practice of only negligent acts committed by subordinate leading to Governmental liability must be altered. When imposing an obligation upon themselves the Government as well as private institutions must fulfill such. Failing to do so because of any negligent act, administrative as well as operative, should cause consequences.

I have faith in our legal system and I am absolutely sure that the "prevailing law" as described above will change. The courts will, as I do, see that lack of funds are not an acceptable excuse for not fulfilling obligations, especially taking into consideration the effect of such. Safety at sea, and environmental issues should not be compromised or neglected because of lack of finances; the courts must set forth an example and give the Government a clear message about this.
The aim of my thesis was as stated in the introduction to determine the extent of the Norwegian Governments possible liability for oil pollution damages. An absolute exact boundary has not been possible to establish, since the situations vary from case to case. Regardless of this I think my assessment of the prevailing law, through the conception of justice, has at least highlighted the possibility of an altered application and interpretation of the governing laws.
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