

State Intervention and Claim for Reimbursement

In the wake of a maritime oil pollution incident

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1 Introduction

1.1 Subjects of the Thesis

The subjects of this thesis are intervention by the Norwegian State in incidents of acute marine oil pollution and public claims for reimbursement subsequent to the governmental intervention.

In this thesis, *state intervention* will mainly be used as a collective term, referring to both the situation where public authorities order a private party to initiate certain measures and the situation where the public authorities implement measures on behalf of a private party themselves. The *reimbursement claim* is the claim set forth by the government for the purpose of covering the expenses incurred after having implemented the measures.

Although the perspective applied is the State's point of view, it is also necessary to give account for the most significant duties and responsibilities that rest with other parties and stakeholders in the occurrence of acute oil pollution. That is, because it provides both the factual and legal backdrop on which the intervention- and reimbursement claim issues are based, and are therefore instrumental in bringing about the issues concerning the State's role. As a consequence, preparedness against acute pollution and the responsible person's duty to take action will also be subject to thorough examination.

This topic has proven highly relevant, both through the recent decades and until present day. By and large, environmental protection has been subject to increased focus over the recent years as a recurring topic in any area of law, as well as in the society as such. Maritime law is no exception, and there have been several initiatives both internationally and domestically aiming to prevent pollution from vessels.¹ In this respect, the centre of atten-

¹ As the thesis concerns vessel-source pollution, oil pollution from ships regarded as *facilities* pursuant to the Petroleum Act §7-1 will not be addressed.

tion has been oil pollution, partly because of the devastating effects evidenced following major disasters such as the accidents concerning the tanker vessels Exxon Valdez-, Erica and the Prestige. Norway has been spared for similar major oil spill incidents, although some significant occurrences have taken place in Norwegian waters.

In accidents involving a risk of oil pollution, it is customary that the government intervenes and, if considered necessary, undertakes the management of the operation and subsequently seeks reimbursement from the liable party. This intervention is, as a starting point, in the interest of all affected parties. The State, on behalf of the society, has a general desire to protect the environment. The party causing the accident is in need of assistance as he or she rarely is able to undertake such advanced and demanding measures, as it would neither be practical nor economically viable. The position of innocent third parties affected by the pollution is also strengthened when the State guarantee to undertake the operation and implement necessary measures. As the State assumes responsibility for and carries out the operation on behalf of the liable party, it is important that the service is performed in a satisfactory manner. Since the costs connected to state intervention – which the polluter eventually becomes responsible for – may be massive, the polluter often has strong opinions regarding which measures and equipment that should be utilised.

In relation to this, several legal issues arise. For one, there are questions concerning the extent of the government's authority, that is, the kind of measures they have competence to impose and carry out, and under which circumstances. Another issue, that has proven equally contentious, is the extent and size of the State's reimbursement claim. In the aftermath of a governmental intervention, disputes tend to arise. There are often disagreements between the affected parties, typically between the Coastal Administration and the Reder, concerning what expenses that can reasonably be included and how the reimbursement claim should be calculated. The current relevance of these issues is evidenced by recent judgments and cases that are scheduled to proceed before Norwegian courts in the near future.

1.2 Legal Sources and Methodology

1.2.1 Introduction

This thesis will apply traditional Norwegian legal method. When discussing the topic of state intervention and claim for reimbursement relating to oil pollution, the point of departure is the ordinary legal sources of maritime, environmental and pollution law. Thus, both legislation, including regulations, preparatory works, case law and legal theory will be of central importance. Additionally, certain sources from foreign jurisdictions may, depending on the circumstances, be relevant sources of law.

1.2.2 Legislation

With respect to pollution law, the main piece of legislation is the “Act relating to protection against pollution and relating to waste of 13. March 1981 no. 6” (henceforth referred to as the Pollution Act or PA). The Pollution Act is very comprehensive and applies in principle to all types of pollution, regardless of source. In this thesis, the relevant provisions are primarily found in chapters 6 and 9, which concerns acute pollution and administrative decisions made pursuant to the act. To some extent, chapter 8 will also be discussed. This chapter concerns compensation for pollution damage, and was included by “act 16. June 1989 no 67”. The thesis will examine the system provided by the Pollution Act and how it applies to marine oil pollution.

Additionally, there are other regulations that concerns maritime oil pollution more specifically, and these rules will to a certain extent overlap and sometimes take priority over the rules set forth in the Pollution Act. In this thesis, the relevant special regulation is the “Norwegian Maritime Code of 24. June 1994 no. 39” (henceforth referred to as the Maritime Code or MC), chapters 9 and 10. The regulations in chapter 10 were implemented in the Maritime Code of 1893 by “act 20. December 1974 no 69”, and maintained in the MC of 1994. Several amendments have subsequently been carried out, primarily by “act 17. March 1995 no 13”, “act 27. February 2004 no 10” and “act 21. December 2007 no 128”. The regulations in chapter 9 have also been subject to amendments, most importantly by

“act 27. May 1983 no 30”, “act 7. January 2000 no 2”, “act 17. June 2005 no 88” and “act 12. June 2009 no 37”.²

While the Pollution Act is the point of departure for most questions concerning state intervention and the claim for reimbursement, the Maritime Code is central for issues concerning reimbursement and limitation of liability.

There is reason to highlight that the relevant provisions in the MC chapter 10 primarily are a result of the implementation of the “International Convention on Civil Liability for Oil Pollution Damage 1992” (henceforth referred to as the Liability Convention) and the “International Convention on Civil Liability for Bunker Oil Pollution Damage 2001” (henceforth referred to as the Bunker Convention). MC chapter 9 is to a large extent founded on the “London Convention 1976 on Limitation of Liability on Maritime Claims”, as amended by the 1996 Protocol. These conventions, and the appurtenant guidelines, will accordingly be influential when interpreting the legislation.

1.2.3 Preparatory works

The *travaux préparatoires* of the respective legislation represent significant legal sources. With respect to the Pollution Act, the most important preparatory works for the purpose of this thesis are NUT 1977:1, NOU 1977:11 and Ot.prp.nr.11 (1979-1980). The Maritime Code has an extensive amount of preparatory works, due to the fact that it has been amended and revised several times. In this thesis, NOU 2002:15 and Ot.prp.nr.77 (2006-2007) are the most utilised documents.

² The many amendments have caused some practical difficulties when determining which set of rules that apply, cf. Rt-2007-246 (Rocknes).

1.2.4 Case law

Seeing that the legislation and its preparatory works to a large extent are of a generic character and do not specifically concern the issues that are raised in this thesis, case law is an important legal source. However, there are not many cases that directly concern the issues that will be raised. There are a few judgments on issues pertaining to reimbursement, which implicitly also demonstrates questions of state intervention. Furthermore, some criminal law cases are illustrating for the duty to take action.

1.2.5 Legal theory

There is limited legal theory with regard to the specific issues of state intervention and claims for reimbursement. However, there are some publications providing a more general approach to pollution- and maritime law. Reference can be made to Bugge (1999) and Falkanger/Bull (2010).

1.2.6 International sources of law

Considering the special nature of the areas of law addressed in this thesis, certain legal sources from foreign jurisdictions might also be of relevance, because the Maritime Code is a product of a legislative collaboration between the Nordic countries.³ Generally, when there has been such a joint legislative process, it will be of considerable interest to examine how the legislation has been practiced by the courts in these jurisdictions.⁴

The collective Nordic effort within the area of maritime law is – and has been – particularly close. Besides the legislation itself, the Scandinavian countries have established a common compilation of case reports titled “Nordiske Domme i Sjøfartsanliggender” (henceforth referred to as ND). The report is published by Nordisk Defence Club and has reported the

³ Falkanger/Bull/Brautaset (2011) p. 26.

⁴ Nygaard (2004) p. 220.

most significant maritime cases decided in Scandinavia since 1900.⁵ Thus, cases from these jurisdictions will be of relevance. They will also be ascribed more legal authority than what is customary, because there has been legislative collaboration and the easy accessibility of other Scandinavian case law.⁶ Additionally, the Scandinavian Maritime Codes are to a large extent based on the same conventions.

For the purpose of this thesis, it is not of interest to examine how issues pertaining to pollution law are regulated in other jurisdictions, and this will therefore not be addressed. The Maritime Code, on the other hand, is similar in many other jurisdictions because of the international conventions on this field, and could therefore be a relevant study.⁷ However, the state of law in other jurisdictions will not be pursued.

1.2.7 Other methodological issues and the term “Reder/Rederi”

Seeing that the vast majority of available legal sources are officially published in Norwegian only, quite a few translations have been necessitated. Certain sources are, however, translated into English by the public authorities, and published on their websites.⁸ There are also sources that are unofficially translated, such as those provided by the Faculty of Law and can be obtained electronically through the University of Oslo Library.⁹ With respect to the Maritime Code specifically, the preferred translation has been the one published in “MarIus” by the Scandinavian Institute of Maritime Law.¹⁰ Accordingly, provided that there are available translated sources, these translated versions will be utilised. The sources that cannot be found in an English translation have been translated by the authors.

⁵ Falkanger/Bull/Brautaset (2011) p. 31.

⁶ Falkanger (2012) I note *.

⁷ Some states are not party to the Conventions, e.g. the US which have chosen a different regulation, see the Oil Pollution Act of 1990.

⁸ See www.government.no

⁹ See <http://www.ub.uio.no/ujur/ulov/english.html>

¹⁰ MarIus 393 (2010).

The Norwegian terms *Reder/Rederi* are difficult to translate into English in a satisfactory manner, as there exists no equivalent English term.¹¹ The term *Reder* is used both in everyday language, as well as in legal terminology, when referring to the person who operates the ship or runs the vessel for his own account.¹² The related term *Rederi*, on the other hand, refers to the company that operates the ship, inter alia a partnership, limited liability company or corporation. However, the term may have different content depending on the circumstances and the applicable regulation.¹³

For practical purposes, the term *Reder* will in this thesis consequently correspond to the term *shipowner*, while the term *Rederi* will be equal to the term *shipowning company*. There are, however, some significant exceptions that should be borne in mind, namely vessels that are on demise or bareboat charter or vessels that have been requisitioned.¹⁴ In these situations, the charterer or the party requisitioning are responsible for manning and equipping the vessel and operates it for their own account.¹⁵ Thus, he will be regarded as the *Reder* and becomes the owner *pro hac vice*.

Although the term usually refers to the owner or owners, it is nevertheless important to be aware of the distinction. Since the terminology is so incorporated in Norwegian terminology and legislation, we have chosen to use the term *Reder* in accordance with the Maritime Code.¹⁶ When it is considered necessary to separate clearly between the terms *Reder* and *shipowner*, such as in MC chapter 10, the distinction will be highlighted.

¹¹ In French and German the corresponding terms are *armateur* and *Reeder* respectively, cf. Falkanger/Bull/Brautaset (2011) p. 145.

¹² Brækhus (1954) p. 33.

¹³ *Rederi* is defined in the Ship Safety and Security Act §4, Ship Labour Act §2-3 and the Maritime Labour Convention art. II no. 1j).

¹⁴ Falkanger/Bull/Brautaset (2011) p. 146.

¹⁵ *Ibid* p. 147.

¹⁶ See MarIus 393 (2010) preface.

1.3 Structure of the Thesis

The thesis will, in section 2, present a general overview of how the State handles maritime oil pollution incidents. State intervention in acute marine pollution incidents is a part of the general system provided by the Pollution Act. Therefore, section 3 discusses the applicability of the Pollution Act, while section 4 and 5 concern the duty of preparedness and the duty to take action against acute pollution. Section 6 addresses state intervention, including the competence to issue orders and immediately implement measures. In section 7 the thesis examines the State's claim for reimbursement, which necessitates a study of overlapping legislation; particularly the Maritime Code. Section 8 accounts for the rules on limitation of liability and some selected issues related hereto. Finally, section 9 summarises some of the findings and provides some concluding remarks.

2 State Services in Cases of Oil Pollution

2.1 Introduction

The subject of the thesis concerns state intervention and claim for reimbursement in cases of marine oil pollution. It is beneficial to first address some questions of a more general character, in order to form the factual backdrop on which the further processing of the topic is based. Thus, this section will give account for the main features of the Norwegian State's maritime services and its aims, with particular emphasis on services provided in relation to oil pollution. The presentation will be illustrated by some examples from incidents that have taken place in Norwegian waters.

2.2 The Norwegian Coastal Administration

The Norwegian Coastal Administration is a national agency for coastal management, maritime safety and acute pollution preparedness. The overarching vision of the agency is to develop the Norwegian coast and maritime zones into the safest and cleanest waters in the world.¹⁷ The Coastal Administration consists of eight operative units, including five regional units, the Shipping Company, the Centre for Emergency Preparedness and the head office, all of which provides an array of different services. One can divide these into three main categories, namely; traditional maritime services, maritime infrastructure and preparedness against acute pollution.

Relevant in this context is the third category, preparedness against acute pollution. The Coastal Administration has prepared extensive contingency plans that can be implemented in the event of acute pollution. The main purpose is to protect life, health, the environment and industry stakeholders. The plans comprise both measures aiming to prevent pollution from occurring and measures aiming to limit the extent of the pollution after an incident has occurred.

¹⁷ *KV Handlingsplan 2014-2023* p. 7.

The Centre for Emergency Preparedness is the unit that is responsible for national preparedness against acute pollution and enjoys nation-wide administrative authority. If an acute pollution incident occurs, it is the responsibility of this department to ensure that the liable polluter and/or local municipality implement the necessary response measures.

2.3 State Management of Oil Pollution Incidents

Oil spill accidents generally cause significant environmental damage. However, the extent of the inflicted damage and its effect on different types of marine environment depends on several external factors. The type and amount of the escaped oil, circumstances regarding the sea, surface and weather – such as waves, tidal movement, temperature, winds and currents – have considerable influence on the magnitude of the accident. Next to living organism, plants and animals such as plankton, fish and seabirds, the shores are especially exposed to the effects of oil spills. If the shoreline is exposed to oil pollution, the flora and fauna on the shore are also inherently vulnerable to the negative effects.

In order to avoid damage to the marine environment and reduce the risk of acute pollution, the government's main focus is to prevent accidents from arising as such. To achieve this goal, the State has adopted preventive marine safety measures. Establishing a functional maritime infrastructure, setting requirements to the vessel, crew and working conditions, and supervising that the requirements are actually being complied with are significant contributors to safety at sea. Considerable attention and legislation regarding maritime environment, health and safety (EHS) is therefore an important part of the Norwegian strategy.

Even though the main focus is to prevent accidents from arising as such, it is unfortunately a well-known fact that accidents will continue to take place. If an accident occurs and oil spill is unavoidable, the focus turns to limiting and minimising the negative consequences of the incident. In order to deal with acute oil spill or a situation which may lead to an oil spill, the State has developed comprehensive emergency systems. These systems encompass preparedness strategies against acute pollution with thorough plans as regards to the organisation, procedures and measures.

2.4 Procedure and Measures utilised in Norwegian Waters

When incidents of acute oil pollution – or the threat of such pollution – are reported to the Coastal Administration, response personnel and equipment are mobilised immediately according to predetermined routines and procedures.¹⁸ As a starting point, the procedure is based on extensive co-operation between governmental authorities, local authorities, private parties and the responsible polluter and the insurer.¹⁹ Practically, it is the respective P&I insurer who often undertakes many of the duties of the polluter.²⁰ As the insurer generally have to bear the expenses in the final round, he will often have a proactive approach to the operation.²¹ Nevertheless, it should be mentioned that the insurance companies often feel side-lined by the Coastal Authorities.²²

The main strategy in the Norwegian emergency system is to combat acute oil pollution with the use of mechanical equipment as close as possible to the source of pollution.²³ This strategy has proven effective where the oil spill originates from a specific point, for instance in a petroleum blowout situation far away from the shoreline. However, experience gained from several international oil pollution accidents involving vessels has revealed that, as a starting point, it is difficult to remove more than 10-15 % of the oil spill close to the source of pollution.²⁴ That is because vessel-sourced oil pollution necessitates more flexibility due to the nature of these accidents, including the types of damage to the vessels, the location, as well as the weather, winds and currents. Therefore, oil spills are first and

¹⁸ St.meld. nr. 14 (2004-2005) p. 59.

¹⁹ Such as the Coast Guard, the Armed Forces, the Maritime Authority and the Directorate for Civil Protection.

²⁰ Gold (2006) p. 599 et seq.

²¹ For an overview of insurance matters in connection with pollution claims, see Williams (2013) p. 265 et seq.

²² According to conversation with representatives from the Swedish Club, Gothenburg 03.04.14.

²³ St.meld. nr. 14 (2004-2005) p. 50.

²⁴ Ibid p. 67.

foremost removed continuously where floating, but considerable quantities also evaporate, get mixed with water or are stranded.

The Coastal Administration has established several different oil spill response depots along the coastline with necessary equipment. Oil booms and skimmers are the most important type of mechanical equipment. Oil skimmers are equipment which collects, cleans and transports oil from the surface to oil storage tanks placed on vessels or ashore.²⁵ Oil booms are used to direct, gather and incarcerate oil that floats uncontrolled at sea.²⁶

The practical utilisation of oil booms and skimmers can be illustrated by the Rocknes- and Full City-accidents.²⁷ The vessels, which were carrying significant amounts of oil, ran aground and caused major oil spills. The Coastal Administration intervened, and undertook the clean-up operations. Booms and skimmers were brought into action, and contributed to the recuperation of several tons of oil. However, substantial quantities were not successfully recollected, thereby contaminating adjacent flora and fauna. The total estimated cost of these major accidents was 133 million and 256 million NOK respectively, the latter constituting the most expensive operation of its kind in Norwegian history.²⁸

Another important part of the preparedness plans is the use of emergency discharging equipment. Draining and discharging bunkers and/or oil carried in bulk, are effective measures which may prevent and limit oil spills. Other useful measures that are utilised are the services provided by tugboats. Tugboats are used to tow and direct the vessel, preventing it from running aground or towing it when already grounded. Emergency discharging and towing are regarded as very efficient measures. Under the specific circumstances, these

²⁵ *Beredskapsrapporten* p. 16.

²⁶ *Ibid* p. 6.

²⁷ See *Rocknesrapporten* and *Havforskningsrapporten* p. 6-10 and 15-25.

²⁸ NOU 2013:8 p. 30.

measures will also quite often represent a relatively cheap method of tackling the oil spill situation.

The accident involving the Icelandic trawler “Gudrun Gisladdottir” provides a good illustration of the use of emergency discharge equipment and towing. The vessel ran aground and sank while it was being towed to a safe harbour. Eventually, it was decided to abandon the ship on the seabed and confine the operation to only draining the vessel of its oil. The damaged vessel is presently still situated on the seabed, but is not considered a threat to the marine environment.

Usually, the accidents require a combination of all the above mentioned measures. The Server-accident may serve as an illustration.²⁹ The vessel ran aground and broke, resulting in considerable oil spill. A range of different measures were implemented; booms, skimmers, discharge and towage, but did not prevent oil pollution over extensive areas. The State initially set forth a claim of almost 200 million NOK, and the legal proceedings are still in progress.

The Fjord Champion-accident is also of interest; the vessel caught on fire and eventually ran aground. The Coastal Administration intervened, initiating comprehensive oil contingency procedures. Subsequently, the State claimed their expenses reimbursed by the Rederi. A peculiar observation is that no oil in fact escaped from the vessel. Nevertheless, a substantial claim was set forth.

Finally, if considered expedient, dispersants may be used in the combat against oil pollution. Dispersants are used to accelerate the natural decomposition of oil. The advantage with dispersed oil is that it rather quickly is diluted and decomposed by microorganisms. The use of chemicals may be used both as a supplement and as an alternative, to mechani-

²⁹ *Havforskningsrapporten* p. 10-14.

cal equipment, but must be applied relatively quickly to prospective.³⁰ The Coastal Administration nevertheless uses dispersants with reluctance since some chemicals may be just as damaging as the oil, especially evidenced after the Torrey Canyon accident, and may also constitute pollution.³¹

Compared to the international disasters involving tanker vessels, the accidents in Norwegian waters appear as quite insignificant with regards to the amount of spilled oil. Nevertheless, as illustrated, the Coastal Administration has been required to initiate comprehensive and demanding operations, which entail substantial resources both in relation to material and personnel. The total costs are often of an enormous magnitude. Thus, considering the extensive costs, the harmful effects and the challenging efforts they require, the accidents and the subsequent clean-up are an interesting study. Not surprisingly, questions relating to cost allocation tend to cause disputes.

³⁰ *Beredskapsrapporten* p. 43.

³¹ FOR-2004-06-01-931 chapter 19.

3 Pollution and the Applicability of the Pollution Act

3.1 Introduction

The present section will give account for the applicability of the Pollution Act, including its purpose, geographical and substantive scope. Furthermore, the general duty to avoid pollution will be addressed, before analysing the concepts acute pollution and risk of acute pollution.

3.2 Generally

The purpose of the Pollution Act is stated explicitly in §1(1) and (2). The overarching objectives can be summarised as, firstly, to work against pollution, including both existing pollution and pollution that might occur in the future. This also comprises a desire of reducing the amount of waste and seeking to promote better waste management. Secondly, it seeks to ensure a satisfactory environmental quality by limiting the damaging effects of pollution.

The Pollution Act exempts pollution from individual means of transport, e.g. ships, from its area of applicability, and refers to the special regulation such as the Ship Safety and Security Act and the Harbour Act, cf. §5(2). As a starting point, pollution deriving from the shipping industry is therefore not regulated by the PA. However, according to §5(3) many of the central provisions are given application nevertheless, namely, §7(2) and (4), chapter 6 and §§74-77. Thus, if a tanker vessel runs aground, the rules on acute pollution will accordingly come into use.

The Pollution Act applies to sources of pollution “within the realm”, cf. §3(2) no. 1. The wording refers to the areas of the Norwegian main-land and the territorial sea.³² Furthermore, it applies to “any threat of pollution within the realm”, cf. §3(2) no. 2. This phrase

³² Territorial Sea Act §§1 and 2.

comprises pollution from vessels located within the territorial sea and vessels threatening to cause pollution in the territorial sea.³³ Additionally, the Act is applicable on pollution from Norwegian vessels insofar as they are located in the Norwegian Economic Zone or located outside and threatening to cause pollution within the Norwegian Economic Zone, cf. §3(2) no. 3.³⁴

It should be noted that the Act does not apply to Svalbard³⁵, and only to Jan Mayen and the Norwegian dependencies to the extent decided by the King. These regulations will not be addressed in the following.

The area of applicability has one important limitation, namely, that the Act is subject to “...any restrictions deriving from international law”, cf. §3. In this respect, the most practical implication is perhaps that foreign ships enjoy the *right of innocent passage* in the territorial sea.³⁶ However, it is questionable whether or not a ship is in innocent passage if it represents a threat of acute pollution. Some guidance is provided in the preparatory works to the Harbour Act:

“To the extent a ship in the territorial sea represents a threat of acute pollution, over which the government can intervene on the basis of the Pollution Act §74, it has to be generally recognised that its passage is not innocent and the principle of innocent passage is consequently not an impediment for intervention.”³⁷

Therefore, it must be presumed that the principle of innocent passage does not limit the applicability of the Pollution Act in relation to acute pollution.

³³ Wang (2005) p. 19.

³⁴ See Maritime Code chapter 1 and the Economic Zone Act §1(2).

³⁵ See the Svalbard Environmental Act.

³⁶ “United Nations Convention on Law of the Sea” (UNCLOS) art. 17 and Territorial Sea Act §2(2).

³⁷ Ot.prp.nr.75 (2007-2008) p. 81.

Moreover, the Pollution Act §74(5) provides a basis for Norwegian governmental intervention on the high seas and the outer territorial waters. Of central importance in this relation is the “International Convention relating to Intervention on the High Seas in Cases of oil Pollution Casualties 1969”, incorporated into Norwegian law by the Intervention Regulation³⁸, cf. §74(5).³⁹

3.3 The Substantive Scope

3.3.1 Pollution as a legal term

The term *pollution* is somewhat ambiguous as it may have various meanings depending on the circumstances. It is thus necessary to define the term in some detail, as the existence of pollution is a condition precedent for intervention and claiming reimbursement. In a legal perspective, the term is utilised in several different acts and regulations.⁴⁰ The most important definition is nevertheless found in the Pollution Act §6, which also influences other parts of the legislation.

The statutory definition of pollution pursuant to the Pollution Act is quite extensive. The provision provides a list with several different factors that might have a negative impact on the environment, cf. §6(1) no. 1-4. As far as maritime oil pollution is concerned, the relevant alternative is §6(1) no. 1 which concerns “the introduction of solids, liquids or gases to air, water or ground” which “cause or may cause damage or nuisance to the environment”.

That one or more of the listed factors must be *introduced* in the environment implies that the introduction to the environment must originate from human activity that comprises deliberate actions, omissions and mishaps. However, borderline cases may arise, especially

³⁸ FOR-1997-09-19-1061.

³⁹ General questions of coastal state jurisdiction pertaining to international law will not be addressed, see rather Aage Thor Falkanger (2010) and Birnie/Boyle/Redgwell (2009) chapter 7.

⁴⁰ E.g. Svalbard Environmental Protection Act §3 a) and Ship Safety and Security Act §31.

when the cause is a combination of both human activity and natural causes.⁴¹ When oil escapes from a ship and leaks out, it is clearly a liquid that is being introduced to the environment originating from human activity.

Furthermore, the introduction of the substance must “cause or may cause damage or nuisance to the environment” to constitute pollution. The phrase expresses a legal standard⁴², and its content is accordingly of a flexible nature.⁴³ Furthermore, the phrase displays that it is the effects of the introduced substance that is decisive in the assessment.⁴⁴ The formulation is extensive, as all damage and nuisance must be taken into consideration, whether it affects people, animals or nature itself, and it does not make any difference whether the damages and nuisances materialise in the urban- or natural environment.⁴⁵ Incidents such as personal injury, damage to property, pure economic loss and damage to nature are included in the term *damage*.⁴⁶ The threshold for constituting *nuisance* is lower, and comprises incidents which inflicts inconvenience, unpleasantness and reduced quality of life, which does not necessarily cause any physical or economic damage.⁴⁷

Consequently, the term pollution is defined broadly and only clearly insignificant damage or nuisance is not comprised by the definition.⁴⁸ This applies *a fortiori* when the effects of the incident are quickly restored by natural processes.⁴⁹ However, this lower threshold will not be actualised in the type of maritime casualties which this thesis focuses on.

⁴¹ Compare Backer (2012) p. 313 and Bugge (1999) p. 215.

⁴² See Knoph (1939).

⁴³ Ot.prp.nr.11 (1979-1980) p. 94.

⁴⁴ Tyrén (1990) p. 36.

⁴⁵ NUT 1977:1 p. 112.

⁴⁶ Wang (2005) p. 25-26.

⁴⁷ Bugge (1999) p. 225.

⁴⁸ NUT 1977:1 p. 112 and Bugge (1999) p. 229-230.

⁴⁹ Backer (2012) p. 314.

Additionally, it should be emphasised that the definition does not require that the *damage or nuisance* have materialised; it is sufficient that it “may cause” damage or nuisance. This wording, along with the statements made in the preparatory works, may be seen as a way of expressing the precautionary principle.⁵⁰

The term “environment” should also be interpreted extensively, as it comprises both the natural environment and man-made surroundings.⁵¹ It is decisive whether “...the environment is influenced so that it cannot be used in the same way as it used to, whether it is humans, animals or plants that is subject to damage, or it concerns damages on objects or resources”.⁵² On this basis, it can be stated with certainty that for all practical purposes, marine oil pollution will be encompassed by the provision.

3.3.2 Waste as a legal term

As the name of the Act and its purpose implies, *waste* and *pollution* are treated as two different subjects. This is reflected in the Act by regulating issues concerning waste separately in chapter 5. Seeing that there are special rules applying to waste, it is of importance to make a distinction between the two terms.

The term “waste” is statutorily defined in §27(1). The point of departure is the first sentence, stating; “...discarded objects of personal property or substances”. The term “substances” is primarily meant to cover solid waste, but waste in a liquid state is to a large extent also included.⁵³ Of particular interest to this thesis is the example of liquid waste provided in the preparatory works, stating that “paint waste and oil waste” is included.⁵⁴ The

⁵⁰ NUT 1977:1 p. 112.

⁵¹ Ibid.

⁵² Ot.prp.nr.11 (1979-1980) p. 95.

⁵³ Ibid p. 132.

⁵⁴ Ibid.

term “discarded” means that the substance must be rejected by the possessor. Accordingly, an oil spill might qualify as both *pollution* and *waste*. The preparatory works does not elaborate upon this issue; guidance must therefore be sought in other sources.

In this respect, the definition of waste pursuant to EU/EEA law is relevant, as it is considered to correspond with the term in Norwegian law.⁵⁵ The starting point pursuant to EU/EEA law is directive 75/442/EØF (henceforth referred to as the Waste Directive), included in the EEA agreement, which defines waste as “...any substance or object [...] which the holder discards or intends or is required to discard”.⁵⁶ The similarity to the Pollution Act §27 is obvious. Since the directive is relevant to the EEA agreement, cases from the Court of Justice of the European Union concerning the interpretation of the article are also important for the meaning pursuant to Norwegian law.

The judgment in Case C-188/07 concerns compensation of damages in the aftermath of the marine casualty of the tanker vessel “Erika”. One question addressed was whether oil spill from a vessel could be regarded as waste pursuant to the Waste Directive.⁵⁷ The Court concluded: “...hydrocarbons accidentally spilled at sea following a shipwreck, mixed with water and sediment and drifting along the coast of a Member State until being washed up on that coast, constitute waste within the meaning of Article 1(a) of Directive 75/442, where they are no longer capable of being exploited or marketed without prior processing”.⁵⁸ As this case is relevant for the Norwegian interpretation of *waste*, the conclusion must be that an oil spill can be regarded as waste also according to the PA, seeing that the spilled oil can rarely be exploited without further processing.

⁵⁵ Bugge (20014) notes 125 and 126.

⁵⁶ Directive 75/442/EØF art. 1(a) and 2008/98/EF art. 3(1). Directive 75/442/EØF was codified and replaced by directive 2006/12/EF which again was replaced by Directive 2008/98/EF.

⁵⁷ Case C-188/07 *Commune de Mesquer v Total France SA and Total International Ltd.*, paragraph 49.

⁵⁸ *Ibid*, paragraph 63.

Summing up, it is evident that an oil spill may be comprised by both the definition of *pollution* pursuant to §6 and the term *waste* pursuant to §27. Consequently, both set of rules might be applicable in an oil spill incident and the chosen definition may have some implications.

A particular issue arising if one applies the rules concerning waste is a potential conflict between the Waste Directive and the Liability Convention; cf. case C-188/07. Both set of rules assume exclusive applicability, but has conflicting regulations of the subjects of liability and limitation of liability. However, such issues will not be pursued.

It is nevertheless clear that administrative practices, case law and other legal customs apply the rules regarding *pollution* in oil spill incidents. The issue has not been problematised, and after all this seems to be the most natural interpretation of the Act. The thesis will therefore address the regulatory framework concerning oil as pollution.

3.4 The General Prohibition against Pollution

Norwegian environmental law is based on a principal distinction between lawful and unlawful pollution.⁵⁹ Accordingly, the Pollution Act §7(1) imposes a general prohibition which states that “no person may possess, do, or initiate anything that may entail a risk of pollution unless this is lawful...”. Hence, both actions and omissions, including passive ownership and rights of disposition, which may entail a risk of pollution are comprised by the general prohibition.⁶⁰ Incidents involving acute oil pollution – or the threat of such pollution – must, with certain reservations, always be regarded as unlawful pollution according to the provision.

The Ship Safety and Security Act §31 also introduces a general prohibition against “pollution of the external environment by the discharge or dumping from ships, or by the incin-

⁵⁹ Bugge (1999) p. 288.

⁶⁰ Bugge (2014) note 29, Wang (2005) p. 28.

eration of harmful substances, or pollution in any other way in connection with the operation of the ship, unless otherwise decided by law or regulation laid down pursuant to law”.⁶¹ The general prohibition and associated exceptions are in line with the “International Convention for the Prevention of Pollution from Ships”.⁶²

In this respect, mention should be made of *continuous pollution*, which derives from the ordinary management and operation of the vessel.⁶³ Typical examples are delivery of waste and cargo remnants and discharge of sewage and noxious substances. Continuous pollution is primarily regulated by the Ship Safety and Security Act, while acute pollution is – contrariwise – first and foremost regulated by the Pollution Act.⁶⁴ As this thesis is focusing on accidents causing or threatening to cause oil spill, the thesis will neither address nor elaborate upon issues concerning continuous pollution.

3.5 Acute Pollution and Risk of Acute Pollution

3.5.1 Introduction

The Pollution Act makes use of two qualified terms concerning pollution, that is; *acute pollution* and *risk of acute pollution*. Seeing that these terms are important criteria in several provisions throughout the PA, they will be reviewed in the following.

3.5.2 Acute pollution

Acute pollution is statutory defined in §38 and subject to special regulation in chapter 6. The drafters considered it adequate to regulate acute pollution separately because of the

⁶¹ See; FOR-2012-05-30-488 and FOR-2004-06-01-931.

⁶² MARPOL.

⁶³ Hernes Pettersen/Bull (2010) p. 517.

⁶⁴ Hernes Pettersen (2013) note (36).

distinct nature of this kind of pollution.⁶⁵ The definition reads; “...significant pollution that occurs suddenly and that is not permitted in accordance with provisions set out in or issued pursuant to this Act.”

The first condition requires that the pollution must be *significant*, and shall be based on a judicial assessment where the frequency of such accidents, its adverse effects and other consequences are important criteria.⁶⁶ However, it is evident that the threshold must be set low, as the wording primarily seeks to exclude incidents of a trivial character.⁶⁷

The second condition prescribes that the pollution must occur *suddenly*, and implies that the incident must be somewhat unexpected and abrupt. The preparatory works mention “...oil spills, e.g. as a result of shipwreck [...] and the release of chemicals and other harmful substances due to an accident” as typical examples.⁶⁸ All though the accident must occur suddenly, the cause of the accident may have developed gradually over time. In relation to a ship accident, possible causes may be ordinary wear and tear of the hull, machinery or other equipment.

In view of the above, it is clear that a maritime accident involving an oil spill from a vessel will entail acute pollution pursuant to §38. Consequently, the rules on preparedness, the duty to take action and the rules on governmental intervention are applicable, cf. the PA chapter 6.

⁶⁵ Ot.prp.nr.11 (1979-1980) p. 150.

⁶⁶ Ibid.

⁶⁷ Ibid.

⁶⁸ Ibid p. 57-58 and 150.

3.5.3 Risk of acute pollution

Many central provisions in the Pollution Act do not require that acute pollution have materialised in order to be applicable; it is sufficient that there is a *risk of acute pollution*. This alternative is highly relevant for marine casualties, as it may be unclear whether oil has in fact escaped the vessel and constituted acute pollution.

The term generally implies that action sometimes must be taken preventatively, which is in line with the precautionary principle.⁶⁹ Contrary to *acute pollution*, the term *risk of* is not statutory defined. However, since the term is utilised throughout the PA, the preparatory works provide some guidance.

The threshold for constituting a *risk* should not be set too high in practice, although totally insignificant risks must be disregarded.⁷⁰ The assessment must be based on the objective probability that pollution will occur and the extent of the damage and nuisance that is feared to be inflicted if the pollution manifests itself.⁷¹ It is sufficient that there are reliable indications that pollution might occur.⁷² In this respect the preparatory works provide an example where a vessel sinks and there is uncertainty relating to the risk of oil escaping the vessel, and expresses that in such situations there will be a “particular suspicion” that pollution might occur.⁷³ Reference can be made to the Fjord Champion-accident; where there was a clear *risk of acute pollution* because the vessel was fairly old, constructed on a single hull and contained considerable amounts of oil, grounded in an environmentally vulnerable area.

⁶⁹ Bugge (2014) note 29.

⁷⁰ Ot.prp.nr.11 (1979-1980) p. 96 and NOU 1977:11 p. 21.

⁷¹ Ot.prp.nr.11 (1979-1980) p. 96.

⁷² Bugge (2014) note 29.

⁷³ Ot.prp.nr.11 (1979-1980) p. 96.

Moreover, it must be clear that the “risk of” criterion is of a dynamic nature, in the sense that the assessment must be performed continuously, considering how the risk presents itself at any given time. In a maritime casualty, the risk may therefore be assessed differently depending on shifting circumstances such as the wind, waves and currents.

4 Preparedness against Acute Pollution

4.1 Introduction

An important feature of the Pollution Act is the duty to maintain preparedness against acute pollution. Although the duty of preparedness relates to the preventive stages of an incident, a presentation is necessary in order to get a complete understanding of state intervention in acute oil pollution incidents.

The preparedness is primarily premeditated systems that provide control mechanisms, plans for how the concrete pollution should be handled and guidelines regarding notification when acute situations occur.⁷⁴ More precisely, the plans describe and put forward necessary tasks, distribute responsibility between different parties and key players, give an account of the equipment which should be available on short notice, including how the equipment ought to be used and provide information and access to personnel with requisite knowledge and training.⁷⁵

The Norwegian emergency system and preparedness against acute marine pollution involves several participants, both public and private. In general, the emergency preparedness is organised in three levels; private-, municipal- and governmental preparedness. The different parties are delegated different duties and responsibilities, primarily based on the extent and seriousness of the situation.

4.2 Private Preparedness

The point of departure in Norwegian environmental law is that any person engaged in an activity that may result in acute pollution shall provide a necessary emergency response system to prevent, detect, stop, remove and limit the impact of the pollution, cf. the Pollu-

⁷⁴ Bugge (1999) p. 358.

⁷⁵ Ibid.

tion Act §40(1) first sentence. The duty of preparedness against acute pollution is a specification and concretisation of the general prohibition against pollution in §7(1).⁷⁶

The Ship Safety and Security Act imposes a general duty on each vessel to maintain a “necessary emergency response system, including an emergency preparedness plan, in order to prevent, or [...] limit the effects of pollution of the external environment from the ship”, cf. §34. The main difference between this provision and the Pollution Act §40, is that the latter specifically addresses acute pollution.⁷⁷

The private preparedness shall be in a reasonable proportion to the probability of acute pollution and the extent of the damage and nuisance that may arise, cf. §40(1) second sentence. One must concretely estimate the probability of an accident – together with the extent of potential damages – against the total costs of preparedness.⁷⁸

The pollution control authority may require that contingency plans shall be submitted for approval for any activity that may result in acute pollution, cf. §41. The content depends on the concrete enterprise.⁷⁹ In the shipping industry, contingency plans are drawn up both for each individual vessel and the Rederi in general.

Even though the general rules regarding private preparedness pursuant to the Pollution Act are indisputably applicable to the shipping industry, the nature of the industry makes them difficult to completely maintain and enforce. Incidents involving oil pollution are often very difficult to predict, especially when it comes to analysing the development and the damages that might arise. Demanding shipowners and vessels to possess equipment and personnel that can handle massive accidents is unpractical and not economically sustaina-

⁷⁶ Bugge (2014) note 174.

⁷⁷ Hernes Pettersen (2013) note 36.

⁷⁸ Bugge (1999) p. 359.

⁷⁹ Wang (2005) p. 90.

ble. The complexity of acute oil pollution situations implies that co-operation⁸⁰ and assistance by the Coastal Administration are absolutely necessary in practice.⁸¹

4.3 Public Preparedness

4.3.1 Municipal Preparedness

Local governments and municipalities shall provide for necessary emergency response systems to deal with “minor incidents of acute pollution” that may occur or cause damage within the municipality, cf. the Pollution Act §43(1).

The regulations are first and foremost designed to handle pollution onshore or near the coastline. Municipalities have neither the necessary equipment nor the expertise to handle more significant cases of acute oil pollution at sea. Municipal preparedness is therefore in practice limited to handle small oil spills within the port area.⁸²

4.3.2 Governmental Preparedness

The State shall provide the necessary emergency response system to deal with “major incidents of acute pollution” that are not covered by the municipal emergency response systems or by the private emergency response system, cf. the PA §43(2). The Coastal Administration is delegated the main duty and responsibility to carry out, operate and organise a

⁸⁰ The Norwegian Shipowners’ Association assists all Norwegian shipowners, inter alia through the Contingency Planning Secretariat.

⁸¹ The Coastal Administration is delegated authority to order private parties and persons engaged in activities that may result in acute pollution to co-operate on the preparedness against pollution, cf. the Pollution Act §42(1). Such co-operation saves costs for the parties and provides a more efficient emergency response system; cf. Ot.prp.nr.11 (1979-1980) p. 153.

⁸² Wang (2005) p. 91.

high functioning preparedness at the governmental level.⁸³ In practice, this necessitates cooperation with several other public authorities and agencies.

Governmental preparedness at sea is first and foremost aiming to manage significant marine casualties and emissions on the continental shelf.⁸⁴ Nevertheless, seeing that oil spills originating from vessels often are equally complex and difficult to handle for the parties involved, the Coastal Administration is the key player in this respect also.

⁸³ FOR-2002-12-20-1912.

⁸⁴ Ot.prp.nr.11 (1979-1980) p. 154.

5 The Duty to Take Action against Acute Oil Pollution

5.1 Introduction

While the duty of preparedness is related to the preventive stages of combating oil pollution, the duty to take action relates to the concrete situation where acute pollution has occurred or threatens to occur. Although fundamentally different, the two duties are closely connected.

This section covers the duty to take action, including the substantive scope of the duty and the question of which subjects the duty rest upon. Although this thesis primarily concerns the State's right to intervene and claim reimbursement, it is necessary to examine these issues. That is, because these questions are interrelated and display the context in which the issues concerning intervention arise.

5.2 The Responsible Person's Duty to Take Action against Pollution

5.2.1 Generally

The Pollution Act §46(1) prescribes; “[i]n the event of acute pollution or a risk of acute pollution, the person responsible shall in accordance with section 7 initiate measures to avoid or limit damage and nuisance”. To understand the content of this duty, it is necessary to assess the criteria provided by the provision in further detail. The terms *acute pollution and risk of acute pollution* refer to the moment in time at which the duty to take action arises. The terms are accounted for above and do not necessitate any further elaboration. However, the term *person responsible* will be thoroughly examined. Thereafter, it will be assessed what further criteria that are prescribed by §7.

The Ship Safety and Security Act implies, to a large extent, a corresponding duty to take action against pollution. According to §37(1) a), the “master” of the ship shall ensure “that reasonable measures are taken in order to prevent such pollution or limit the effects of it”. Illustrative

measures are the initiation of emergency response systems and operating available equipment and personnel in order to avoid or reduce the extent of pollution.⁸⁵

5.2.2 The person responsible

Pursuant to §46(1), the phrase “the person responsible” refers to the entity, legal person or individual who is the subject on whom the duty to take action rests. The term in §46 should be interpreted in the same way as in §7.⁸⁶

The person responsible is, as a starting point, the person from whom the pollution originates. That is, the person who possess, does, or initiates activities that may cause pollution.⁸⁷ This will usually be the owner of the object from which the pollution derives, but also persons having disposal of the object or other holders of legal rights in the object might be regarded as the person responsible under the circumstances.⁸⁸ There is no requirement that the person responsible has demonstrated culpable conduct, the occurrence may simply be a result of an unfortunate mishap.⁸⁹ Additionally, it will be of significance to examine which person has the economic interest in the activity that is posing the pollutive threat.⁹⁰ Which person that will benefit from an eventual clean-up operation will also be of significance, as this person presumably has a close connection to the activity.⁹¹

Even though it is possible to adopt certain guiding criteria for the assessment of which party represents the person responsible, it is nevertheless evident that the term remains somewhat ambiguous. Applied to maritime affairs, the term may refer to e.g. the Reder, owner,

⁸⁵ Hernes Pettersen/Bull (2010) p. 566-567, Ot.prp.nr.87 (2005-2006) p. 123.

⁸⁶ Ot.prp.nr.11 (1979-1980) p. 157.

⁸⁷ Cf. Rt-2012-944 paragraph (57).

⁸⁸ Ot.prp.nr.11 (1979-1980) p. 97.

⁸⁹ NOU 1977:11 p. 23.

⁹⁰ Bugge (2014) note 30.

⁹¹ Cf. Rt-2012-944.

charterer, carrier, cargo owner or master. Even so, the interpretation of the term implies that in most cases it is the Reder who will be regarded as the person responsible.⁹² The Reder is usually the owner of the ship, and the person from whom the pollution originates. The legal owner of the ship will ordinarily be identified through the ship registry of the flag state⁹³ and the IMO identification number.⁹⁴ However, the Reder and the owner may not always be the same legal entity. The capacity as Reder may be transferred to other parties, e.g. by way of enforcement or through a contract of affreightment.

Most noticeable in this respect are the so-called *demise* or *bareboat* charter parties. In such contracts, it is the charterer that for all practical purposes controls the vessel and has the economic interest in the specific activity. The bareboat charterer equips, crews and trades the vessel for his own account, and thereby essentially is the Reder.⁹⁵ Therefore, the charterer is considered to be the person responsible in these circumstances.

Moreover, it is possible that the *person responsible* will vary depending on the measure in question and there may be several responsible persons depending on the situation. The preparatory works provides an example; if the driver of a vehicle carrying dangerous cargo suffers an accident, he will be the person who in the first instance has a duty to take action.⁹⁶

If this approach is applied to a maritime situation, the consequence is that the master often will be the person responsible for initiating measures immediately as the accident occurs. Typical measures that will be required are requisitioning assistance from tugboats or other

⁹² For a presentation of the traditional Reder term, see Brækhus (1954) p. 33 et seq.

⁹³ In Norway, the ship registers are the Norwegian Ordinary Register (NOR) and Norwegian International Register (NIS), cf. the Maritime Code and the NIS-Act.

⁹⁴ FOR-2002-06-27-754 §6.

⁹⁵ Falkanger/Bull/Brautaset (2011) p. 263.

⁹⁶ Ot.prp.nr.11 (1979-1980) p. 97.

vessels and initiating repairs. Case law has proven that in such situations, the master may be considered the person responsible.⁹⁷ Additionally, a duty is imposed on the master pursuant to the Maritime Code §135, which gives him or her an independent duty to provide for necessary measures in situations of distress. Finally, it should be mentioned that if the master does not fulfil the duty to take action, the consequence may be that he is subject to penal sanctions, and the company may be subject to criminal proceedings and incur a corporate penalty.⁹⁸

The Reder will typically be responsible for acquiring further assistance for more comprehensive measures. Although it happens that the Reder is an individual owning a vessel directly as a sole proprietor, it is more customary to organise the shipping enterprise as a partnership⁹⁹, limited partnership¹⁰⁰, limited liability company or corporation¹⁰¹. If the choice of organisational structure is that of a company or corporation, the main rule is that the entity is an independent legal person. Consequently, it is the company, and not the owners, i.e. private shareholders or a parent company, which is the subject of responsibility. This principle rule does, however, seemingly have an important exception recently established in the Hempel-case.¹⁰² The case involved the subject of responsibility pursuant to the Pollution Act §51; whether a parent company could be held responsible when its subsidiary was in possession of something that could cause pollution. It should nevertheless be considered as guiding also in relation to §7, as the Supreme Court stated that the preparatory works of §7 has “particular interest” when interpreting §51.¹⁰³ The Supreme Court’s conclusion was that the parent company could be regarded as the subject of responsibility.

⁹⁷ See Rt-1992-1578 (Arisan).

⁹⁸ Cf. Pollution Act §78 and the Criminal Code §§48a and 48b.

⁹⁹ See the Maritime Code chapter 5.

¹⁰⁰ The Partnerships Act §1-2(1) e).

¹⁰¹ Limited Liability Companies Act and Public Limited Liability Companies Act.

¹⁰² Rt-2010-306.

¹⁰³ Ibid, paragraph (53).

This decision implies that a parental company can be considered the person responsible also pursuant to §7. Further details of this issue will not be elaborated; the present thesis is confined to highlighting the matter.¹⁰⁴ Regardless, it will depend on a concrete assessment, where the parental company's degree of control and economic interest in the subsidiary, as well as efficiency considerations, will be the guiding criteria.

Another interesting question is if other parties with a connection to the vessel can be considered the person responsible. A practical issue is when a ship runs aground, becomes a total loss and it is not possible to direct a claim against the Reder. Is it possible that a hull insurer, P&I insurer or mortgagee can be regarded as the person responsible? As a starting point this must be answered in the negative. For the hull insurer, these issues are regulated in the "Nordic Marine Insurance Plan 2013" (NMIP). When paying compensation for damage or total loss, the insurer is subrogated to the assured's rights and gets title to the wreck, cf. §5-19(1) and (2). The insurer may, however, waive these rights and thereby be protected against the burdens that may be associated with owning the wreck.¹⁰⁵ Furthermore, if the insurer takes possession of the wreck, and subsequently becomes liable for the costs of its removal, the assured shall reimburse him, cf. §5-20(1). This liability will finally be incumbent on the P&I insurer.¹⁰⁶ However, the hull insurer cannot claim reimbursement for liability incurred by a *new casualty* occurring after the ownership has been transferred to him. Thus, in such a situation the hull insurer may be considered the person responsible, and should therefore consider obtaining a P&I insurance for this risk.

The John R-accident displays a similar situation. After the vessel grounded, a company bought the wreck. Thereafter, the State intervened and claimed reimbursement from both the original Rederi and the new owner, while the Reder submitted that only the new owner

¹⁰⁴ The significance of the Hempel case has been a subject to some discussion, see Falkanger (2012) II and Innjord/Pihlstrøm (2012).

¹⁰⁵ Wilhelmsen/Bull (2007) p. 328.

¹⁰⁶ Brækhus/Rein (1993) p. 604-605.

was liable. The question was not tested since the parties reached a settlement, but the case is nevertheless illustrative.

5.2.3 The substantive scope of the duty

The next issue that will be addressed is the content of the duty, and the question is therefore what measures have to be initiated to limit damage and nuisance “in accordance with section 7”, cf. §46(1). The reference to §7 primarily aims at the second paragraph.

The provision in §7(2) expresses the purpose of the measures that the person responsible is obliged to implement. The person responsible shall “ensure” that measures are taken in order to “prevent” pollution from occurring. For instance, if a ship suffers technical malfunctions it will be necessary to provide for repairs to ensure that pollution is prevented. Other incidents where preventive measures must be implemented are in cases of grounding and collision, which represents the most common causes of acute pollution from vessels, as well as fault in navigation or machinery.¹⁰⁷

According to the second sentence, the person responsible shall take steps to “stop or remove the pollution or limit its effects”. Thus, the provision concerns measures that should be carried out if pollution has already occurred. All unwanted effects of pollution are encompassed; both direct physical and consequential effects on nature itself, as well as material and economic effects on human health or welfare.¹⁰⁸

With respect to case law, the question of whether the person responsible has performed his duty to implement measures arises most frequently in connection with criminal proceedings.¹⁰⁹ The Full City-case is illustrative; the master of a vessel was convicted of breaching

¹⁰⁷ St.meld. nr. 14 (2004-2005) section 3.11.

¹⁰⁸ Ot.prp.nr.11 (1979-1980) p. 97 and Bugge (1999) p. 321-322.

¹⁰⁹ Backer (2012) p. 319.

the duty to notify the authorities.¹¹⁰ The result seems somewhat peculiar, considering that the authorities were already aware of the fact that the vessel was in distress. Reference can also be made to the Arisan-case, where the master rejected an offer regarding assistance from tugboats, despite the fact that such assistance was necessary as the ship wrecked and caused a considerable oil spill.¹¹¹

The duty to immediately notify authorities in the event of acute pollution – or the threat of such pollution – is a concrete manifestation of the duty to take action, cf. the Pollution Act §39 and the Ship Safety and Security Act §37.¹¹² The notification shall contain information of the incident and give an account of what measures which are or will be initiated in order to prevent or minimise the effects.¹¹³

Seemingly, the Pollution Act §7(2) separates between measures to *prevent* pollution from occurring, cf. first sentence, and measures implemented to *stop, remove or limit the effects* after pollution has occurred, cf. second sentence. In this context the Fjord Champion-case is of considerable interest; a vessel grounded and extensive measures was implemented, even though no oil escaped the vessel.¹¹⁴ The Rederi submitted that the provision implies such a distinction, stating that the duty to implement measures to *stop, remove or limit the effects* of pollution did not arise before pollution had actually taken place, even when the threat of pollution was acute. The Interlocutory Appeals Committee of the Supreme Court agreed with the Court of Appeal and reiterated that the duty to take action pursuant to §7(2) has to be read in conjunction with the general prohibition in §7(1) against *possessing* something that may cause pollution. Owning a wrecked ship that risked spilling oil was consid-

¹¹⁰ RG-2011-680.

¹¹¹ Rt-1992-1578.

¹¹² FOR-1992-07-09-1269 and FOR-2008-06-27-744.

¹¹³ Hernes Pettersen/Bull (2010) p. 566.

¹¹⁴ The case went through three judicial authorities; the Bergen District Court, the Court of Appeal (Gulating) and the Interlocutory Appeals Committee of the Supreme Court, referenced TBERG -2011-105297, LG-2012-115462 and HR-2014-208-U respectively.

ered in defiance with the Act, and the Reder was therefore obliged to implement measures. The Committee furthermore reiterated that the submitted interpretation would result in an artificial distinction that would be contrary to the purpose of the Act .

The third sentence in §7(2) prescribes that the person responsible must take steps to “mitigate”¹¹⁵ any damage or nuisance resulting from the pollution or from measures to counteract it.¹¹⁶ The aim is primarily to encompass reasonable measures to restore the natural environment, or other damage or nuisance, such as re-introducing affected animals or fish and refilling of sand on beaches which has been contaminated by oil.¹¹⁷ Another practical measure that has been carried out following several oil accidents is cleaning of sea birds.¹¹⁸ However, the duty to *mitigate* also includes damage and nuisance, which do not relate strictly to the natural environment, for instance quay structures and buildings.¹¹⁹

The fourth sentence of §7(2) provides that the duty to take action against pollution applies to measures that are in “reasonable proportion” to the damage and nuisance to be avoided. The requirement of a *reasonable proportionality* between the measures and the damage and nuisance was adopted to limit the independent duty to take action.¹²⁰ Consequently, the higher probability of damage or nuisance, the more extensive measures must be implemented. Additionally, only measures that appear as necessary after a concrete assessment at

¹¹⁵ For further regulations see FOR-2004-06-01-931 chapter 40 and Appendix II, cf. the Environmental Liability Directives (2004/35/EF, 2006/21/EF and 2009/31/EF).

¹¹⁶ Backer (2012) p. 160 seems to be of the opinion that when pollution has caused changes in the environmental conditions, the breach itself provides a basis for mitigation and restoration of the environment to its prior condition. An express authority in law is therefore not necessary, but without a statutory basis there may be certain limits concerning the extent of the duty to mitigate.

¹¹⁷ Ot.prp.nr.11 (1979-1980) p. 97-98.

¹¹⁸ The beneficial effects of this measure are a recurring topic of discussion. Both the degree of successful outcome and the extent of suffering undergone by the birds have been under scrutiny.

¹¹⁹ NOU 1977:11 p. 24.

¹²⁰ Ot.prp.nr.11 (1979-1980) p. 97 and NOU 1977:11 p. 22.

the time are comprised by the duty.¹²¹ The assessment must as a starting point be based on objective criteria, but also certain subjective criteria, such as the economic impact on the person responsible may under the circumstances be relevant.¹²²

Summing up, it is evident that the responsible person's duty to take action pursuant to §7(2) is quite extensive. However, the system provided by the Pollution Act does not always seem to fit with the reality of the shipping industry. If oil pollution has materialised, the shipping companies will rarely have sufficient available resources to tackle the situation. It is not practically feasible that every ship is equipped with such comprehensive gear. In many situations, it is the respective insurance companies that may be able to procure the necessary clean-up services. But even the insurers will frequently fall short, as the Coastal Administration often is the only party that possess the available resources. The practical reality is that the Reder may only be able to fulfil his duty in the phase where it is a risk of pollution. When oil has escaped from the vessel, the system does not appear adequate to regulate oil spill incidents.

5.3 The Public Duty to Take Action against Acute Oil Pollution

The public duty to take action against acute oil pollution is subsidiary and a supplement to the responsible person's duty to take action.¹²³ However, as the person responsible often is unable to handle acute oil pollution alone, the public duty to take action is highly practical.

The public duty to take action against acute pollution involves both local and central authorities. The starting point is that the local municipalities have an unconditional duty to take action in cases of acute pollution within the municipality, while the government – if considered necessary – has the competence to take over, co-ordinate and run the operations.

¹²¹ Ot.prp.nr.11 (1979-1980) p. 97.

¹²² Bugge (1999) p. 325-328.

¹²³ Ot.prp.nr.11 (1979-1980) p. 62.

If the person responsible “does not take adequate measures”, the “municipality concerned” shall “take steps to deal with the accident”, cf. the Pollution Act §46(2) first sentence. The municipal duty to take action applies to every event of acute pollution irrespective of size or if the situation is comprised by the municipal preparedness pursuant to §43. The underlying reason for why the person responsible has not taken adequate measures is irrelevant. Furthermore, an important part of the duty is to notify the Coastal Administration, so the State can assess whether it wants to assume command of the operation.

The duty to take action against acute pollution is imposed on the *municipality concerned*. In situations where oil pollution crosses municipal borders, both the municipality where the incident takes place and the municipality where the effects are manifested are regarded as the “municipality concerned”.¹²⁴ Reference can be made to the Server-accident where oil was discovered in eight different municipalities.

In the event of “major incidents” involving acute pollution or a risk of acute pollution, the Coastal Administration “may” wholly or partly “assume command of efforts” to deal with the accident, cf. §46(3). In contrast to the municipal duty to take action, the government may *choose* to assume command over the operation.¹²⁵ Whether or not an event is regarded as a *major incident* must be determined concretely. The Coastal Administration is, according to regulations, given the authority to evaluate situations and declare governmental intervention pursuant to §46.¹²⁶

¹²⁴ Ot.prp.nr.11 (1979-1980) p. 157, Wang (2005) p. 94.

¹²⁵ Wang (2005) p. 94.

¹²⁶ FOR-2002-12-20-1912.

6 State Intervention

6.1 Introduction

If a ship has been involved in an accident that *has caused* or *threatens to cause* oil pollution, the government may, as displayed in subsection 5.3, choose to intervene in the following operation. The next issue that arises is how this competence can be utilised. Hence, the topic of the present section is the legal basis for the State's ability to intervene and to what extent intervention is lawful.

The existence of an applicable legal basis is a condition precedent for state intervention according to the principle of legality.¹²⁷ How strict the requirement of authority in law should be interpreted must be assessed concretely in each situation, taking all interpretative factors into consideration.¹²⁸ Environmental law is an area where the motives behind the public regulations are generally considered to be particularly weighty.¹²⁹ Additionally, the Constitution §110b provides an incentive not to adopt a strict interpretation on this area of law. Thus, there is no strict requirement to obtain an especially clear basis for intervention in the area of environmental law.¹³⁰

State intervention in cases of acute oil pollution mainly manifests itself through the Coastal Administration's competence to issue orders, which will be addressed in subsection 6.2 and the Coastal Administration's competence to immediately implement measures, which will be processed in subsection 6.3. The presence of a legal basis for such intervention is not a point of controversy. The further qualitative conditions and how far this competence extends are, however, not as clear-cut. This has given rise to disputes in practice, where the responsible person often questions whether the intervention is too intrusive. Clarification of

¹²⁷ Graver (2007) p. 71, cf. Eckhoff/Smith (2006) p. 327.

¹²⁸ Rt-1995-530 (Fjordlaks) p. 537.

¹²⁹ Graver (2007) p. 77.

¹³⁰ Backer (2012) p. 139.

these issues is important, as the intervention forms the framework that is determining for the reimbursement claim.

State intervention in cases of oil pollution raises several questions pertaining to general administrative law.¹³¹ Issued orders and measures implemented by the Coastal Administration are, as a starting point, individual administrative decisions and consequently subject to various requirements set forth in the Public Administration Act, cf. the Pollution Act §85.¹³² However, such issues will not be pursued.

6.2 Public Authorities Competence to Order the Responsible Party to Implement Measures

6.2.1 Introduction

The Pollution Act sets forth a general prohibition against pollution, as well as a duty for the responsible person to take action to prevent pollution from occurring or minimise pollution that has already occurred, cf. §7(1) and (2). However, these provisions alone do not form a satisfactory guarantee that sufficient procedures are implemented when an accident takes place. Occasionally, the responsible party does indeed not provide for necessary measures, either because he is unwilling or unable. This is the rationale behind the rule in §7(4), which gives the public authorities the competence to order the responsible person to implement definite measures. It is important to bear in mind that the Reder is still responsible for the clean-up operation, even though the public authorities interfere.

¹³¹ See LG-2012-115462 (Fjord Champion).

¹³² Ot.prp.nr.11 (1979-1980) p. 98 and 69.

6.2.2 The content of the competence

It is stated in §7(4) that “[t]he pollution control authority may order the person responsible to implement measures pursuant to the second paragraph, first to third sentences, within a specified time limit”.

The pollution control authority is defined in §81(1) and gives direction as to which public agency is delegated authority within the State hierarchy. The governmental body that enjoys competence varies depending on the subject of regulation.¹³³ With respect to acute pollution, the authority has been delegated to the Coastal Administration, which consequently is entitled to issue orders concerning implementation of measures pursuant to §§7(4), cf. 81(2).¹³⁴

The main issue is what kind of measures the Coastal Administration can order the responsible person to implement. The provision refers to the measures listed in the second paragraph first to third sentences; hence, it refers to the responsible person’s duty to take action. This implies that the measures that can be imposed are limited to those that can “prevent” pollution from occurring, and if pollution has already occurred the measures must aim to “stop”, “remove” or “limit” the effects of pollution, cf. first and second sentence. Additionally, the authorities can order the responsible party to take “steps to mitigate any damage or nuisance”, cf. third sentence. Insofar as the measures ordered by the Government is adequate with respect to reaching one or more of these listed purposes, the responsible person will be obliged to comply with the order.

6.2.3 Test of reasonableness – a substantive limitation?

According to §7(2) fourth sentence, the duty to take action is limited to measures that are in a “...reasonable proportion to the damage and nuisance to be avoided”. At first glance it

¹³³ Bugge (2014) notes 36 and 303.

¹³⁴ FOR-2002-12-20-1912 and FOR-2012-04-27-369.

therefore seems as though only the measures that are regarded as *reasonable* can be ordered implemented by the Coastal Administration. However, the competence to issue orders pursuant to §7(4) only refer to the first three sentences. Consequently, the standard of reasonableness provided by the fourth sentence does not apply according to the wording. As a result, the Coastal Administration enjoys considerably wide authority and discretion when deciding which measures to impose under the specific circumstances.

That the State's competence to give orders is not limited by the criterion *reasonable* may be surprising. It is nevertheless manifestly a fact that the exclusion of this limitation was deliberate by the drafters;¹³⁵

“If the pollution control authority gives an order pursuant to the last paragraph, it is the discretion of the pollution control authority that is decisive when considering which measures that should be implemented, and this discretion can, as a starting point, not be reviewed by the judiciary. In order to clarify this, §7 fourth paragraph only refer to sentences two to three in the second paragraph, and accordingly not to the fourth sentence.”¹³⁶

Therefore, there are seemingly few limitations on the Coastal Administration competence to order the responsible person to carry out measures. This is especially noticeable when considering that the courts are predominantly prevented from reviewing the discretion exerted; so-called “free administrative discretion”.¹³⁷ However, the consequences of excluding the criterion relating to reasonableness from §7(4) are not immediately clear. That is,

¹³⁵ Ot.prp.nr.11 (1979-1980) p. 97.

¹³⁶ It seems to be misprint in the provided citation when it states; ”sentences two to three in the second paragraph”, as the Act refers to sentences one to three. This does not, however, affect substantive meaning of the quotation.

¹³⁷ For presentations of judicial review, see Eckhoff/Smith (2010) p. 539 et seq, Innjord (1996) and Nisja/Reusch (2009).

because the preparatory works provide some additional statements which makes it questionable whether the limitation was meant to apply nevertheless. Reference can be made to the proposition, which states that:

“The responsible person can only be ordered to implement measures that are reasonable according to the concrete circumstances. In the assessment of reasonableness one may consider to what extent the person responsible is to blame for the pollution or the threat of pollution.” (Our underlining).¹³⁸

An additional argument from the preparatory works in support of applying a substantive limitation of reasonableness may be put forward. That is, the statement saying that the changes made to §7(2)-(4) in the recommendations submitted in NOU 1977:11 were of a “minor” character.¹³⁹ This might imply that the intention was not to make any substantive amendments when leaving out the reference to the reasonable criterion. The changes were therefore presumably of an editorial nature, and the criterion may consequently still apply.

Thus, if read in conjunction, the preparatory works could be interpreted as expressing that the orders issued pursuant to §7(4) should be subject to a concrete assessment of reasonableness.

On the other hand, it could obviously be argued that the provision itself does not adopt the limitation of reasonableness in its wording and that this was intended by the drafters. This view is supported in the literature. Wang states that a direct order is “...presumed to reach a bit further than the independent duty to take action”.¹⁴⁰ Bugge is apparently of the same opinion, as he states that the provision does “...not contain any material boundaries for the

¹³⁸ Ot.prp.nr.11 (1979-1980) p. 98.

¹³⁹ Ibid, p. 96.

¹⁴⁰ Wang (2005) p. 29.

administrative decisions”.¹⁴¹ Additionally, Falkanger emphasises that the pollution control authority can order the person responsible to take measures “...without being bound by the [...] limitation”.¹⁴² He nevertheless states in continuation that; “...it is reason to believe that the pollution control authority will use the competence pursuant to fourth paragraph with caution, so that the limitation of reasonableness will apply in practice”.

Hence, the general perception in legal theory seems to be that there is no substantive limitation of reasonableness, and that the statements in the preparatory works, which immediately might indicate otherwise, should be interpreted as referring to the doctrine of abuse of discretionary power pursuant to administrative law.¹⁴³ This view is furthermore supported by the Legislation Department, which in a Statement of Interpretation adhere to the arguments set forth by Bugge.¹⁴⁴

With respect to case law, there are, to our knowledge, not any Norwegian cases providing any further clarification of this matter.¹⁴⁵ There are, however, two Swedish judgments that address the legality of the orders given by the pollution control authorities.¹⁴⁶ Both of the cases concern oil pollution and provide comparative illustration, but are not directly comparable with Norwegian law. In the cases of *Feederchief* and *Opus*, the authorities ordered compulsory salvage of a grounded and a sunken vessel, to which the shipowners objected.¹⁴⁷ The central question was whether the orders were “warranted and reasonable”. After a concrete assessment, the Court of Appeal decided in favour of the Authorities in the first case and against in the latter.

¹⁴¹ Bugge (1999) p. 329.

¹⁴² Falkanger (1991) p. 166.

¹⁴³ Bugge (1999) p. 329.

¹⁴⁴ Statement of Interpretation (2007) section 5.

¹⁴⁵ In the case LE-2011-53445 (Court of Appeal), there are some statements which may be interpreted in favour of a material criterion of reasonableness. The issue was, however, not addressed in the subsequent Supreme Court judgment; Rt-2012-944.

¹⁴⁶ The cases are briefly commented in Selvig (1991), Selvig (1999) and NOU 2002:15 p. 23.

¹⁴⁷ ND-1988-27 and ND-1997-53.

It should be mentioned that Bugge recently seems to have nuanced his point of view to some extent, as he states that the practical differences will not be significant and that the issued orders primarily may *concretise* and *clarify* the duty to take action, not extend it.¹⁴⁸ This approach is in line with Backer, who states that the duty pursuant to §7(2) can be “...concretised by decisions from the pollution control authority in accordance with §7 fourth paragraph”.¹⁴⁹

Summing up, it is nevertheless evident that statements in the preparatory works, in the legal literature and in the Interpretation Statement from the Legal Department provide a basis for assuming that there is no substantive criterion prescribing that the competence of the Coastal Administration is limited to ordering measures that are *reasonable*. Consequently, it seems the limits on the competence to impose orders pursuant to §7(4) go further than the responsible person’s independent duty to take action pursuant to §7(2). The outer border, within which the Coastal Administration must operate, is represented by the doctrine of abuse of discretionary power. In practice, there is therefore reason to believe that the consequences of the absence of a substantive criterion are not that significant. In other words, it is because the doctrine of abuse of discretionary power prescribes that administrative decisions must not be *grossly unreasonable*. This involves a concrete assessment. Intervention that is *unnecessary* or *too extensive and comprehensive* is, as a starting point, grossly unreasonable.¹⁵⁰ Clearly, the Coastal Administration enjoys quite substantial authority when ordering which measures the person responsible has to implement. It will nearly only be arbitrary and clearly irrelevant measures that will not be comprised by the competence; the authorities may not order the polluter to initiate measures that are not connected to the pollution whatsoever.

¹⁴⁸ Bugge (2014) note 37.

¹⁴⁹ Backer (2012) p. 319, see also Backer (1991) note 16.

¹⁵⁰ Bugge (1999) p. 333-336.

6.3 Immediate Implementation of Measures by Public Authorities

6.3.1 Introduction

The Pollution Act §74 provides a legal basis for the Coastal Administration to arrange and implement measures immediately in cases of acute oil pollution. The provision is applicable in three different situations; (i) if the person responsible does not carry out orders issued by the authorities, (ii) if issuing orders may cause a risk of delay and (iii) if it is uncertain who the person responsible is. The provision is scarce when addressing the scope and defining the limits of lawful implementation of measures. The three different situations must, as a starting point, be interpreted and treated separately.¹⁵¹

The Pollution Act §74 does not put any restrictions on authorities' competence to take action against pollution pursuant to other legal bases.¹⁵² *Negotiorum gestio*, the principle of necessity and the right of self-defence provide such legal alternatives. The Coastal Administration is pursuant to the Harbour Act delegated authority to intervene in various situations, but §38(7) and the principle of *lex specialis* imply that the PA takes precedence in cases of *acute pollution*.¹⁵³

The following subsection will present the Coastal Administration's competence to immediately implement measures in cases of acute oil pollution.

6.3.2 Issued orders are not carried out by the person responsible

If the Coastal Administration has "issued orders" pursuant to §7(4) and these are "not carried out by the person responsible", the Coastal Administration "may arrange for the measures to be implemented" in cases of oil pollution, cf. §74(1).¹⁵⁴

¹⁵¹ Bugge (1999) p. 363 et seq.

¹⁵² Ot.prp.nr.11 (1979-1980) p. 165.

¹⁵³ Østgård (2010) p. 167.

¹⁵⁴ It is presumed that §74(1) also applies to orders issued pursuant to other provisions in PA, cf. Bugge (2014) note 272.

Whether or not the *issued orders are carried out by the person responsible* depends on a concrete interpretation of the issued orders held up against the actions taken by the person responsible. The provision does not make a distinction between situations where the person responsible attempts, but fails to carry out the orders and situations where the person responsible does not take any actions whatsoever. Subjective circumstances concerning the reason why the person responsible failed to follow the orders are of no interest. The Fjord Champion-case, in which the Coastal Administration intervened, partly because the person responsible failed to carry out the issued orders is illustrative.

The Pollution Act §74(1) does not require the Coastal Administration to perform and carry out measures themselves. The wording “may arrange for the measures to be implemented” is used in order to allow the State to engage and hire private parties to implement measures if that is the most appropriate.¹⁵⁵ However, the provision does not provide statutory authority for public authorities to impose orders on private parties other than the person responsible.¹⁵⁶ It is therefore not possible for the Coastal Administration to demand a master on a nearby vessel – which has nothing to do with the incident – to take action pursuant to §74(1).¹⁵⁷

6.3.3 Issuing orders may result in a delay

The Coastal Administration may arrange for measures to be implemented immediately in cases of oil pollution if “issuing orders may result in a risk of delay”, cf. §74(2).

The provision provides the authorities with the competence to initiate measures that are needed with great urgency without issuing any orders in advance. The objective is to be

¹⁵⁵ Ot.prp.nr.11 (1979-1980) p. 165.

¹⁵⁶ Ibid.

¹⁵⁷ The Pollution Act §47 does, on the other hand, impose a duty to provide assistance during public operations in certain situations.

able to take action against pollution as early as possible. Whether or not there is *a risk of delay* must be assessed concretely in each individual situation. *Why* there is a risk of delay is irrelevant.

RG-2012-1495 provides some guidance on how the provision should be interpreted.¹⁵⁸ It was evaluated concretely whether imposing traditional orders would cause an intolerable risk of delay, which in turn would worsen the situation. The decision indicates that situations must be evaluated continuously. Even if there is a *risk of delay* in the initial phase of an operation, which necessitates immediate implementation of measures, this does not automatically imply that there is a *risk of delay* during the entire operation.

In cases of acute oil pollution at sea, immediate implementation because issuing orders may result in a risk of delay is of great practical importance. Rapid implementation is often especially important seeing that hesitation and postponement may dramatically worsen the situation. For example, if a vessel is in danger of running aground, the Coastal Administration may immediately intervene with the assistance of tugboats.¹⁵⁹ Furthermore, imposing orders through the traditional procedure is often unnecessary because it is obvious to all involved parties that the person responsible does not have the necessary expertise or equipment to implement the necessary measures.

6.3.4 Uncertainty regarding who is the person responsible

The Coastal Administration may arrange for measures to be implemented immediately in cases of oil pollution if “it is uncertain who is responsible”, cf. §74(2).

The most obvious situation comprised by the provision is where oil pollution is unexpectedly discovered with no indications of where it originates from and, consequently, impos-

¹⁵⁸ The judgment is legally enforceable, cf. HR-2013-82-U.

¹⁵⁹ See Rt-1992-1578 (Arisan), where the master refused to accept assistance from tugboats.

sible to establish the identity of the person responsible.¹⁶⁰ Additionally, it occasionally occurs that the person responsible refuses responsibility for a detected oil spill. Reference can be made to a criminal decision by the Supreme Court where an oil tanker unsuccessfully claimed that the oil pollution originated from another tanker.¹⁶¹

Observations of oil slicks of unknown origin occur quite often along the Norwegian coast. In 75 % of the registered oil spills concerning vessels between 1987-1998, the person responsible was unknown.¹⁶² Given that many oil spills are not registered, the percentage is presumably higher. However, such incidents are often less serious and does not require intervention by the Coastal Administration.

Shipping is an industry with complex organisations of ownership, which often involve several different establishments and partnerships. Advanced company structures may make it difficult to identify which company should be regarded as the person responsible in the aftermath of a maritime casualty. In such indistinct situations, the Coastal Administration may decide to implement necessary measures pursuant to the provision.¹⁶³ Furthermore, situations where several parties are suspected of being the person responsible are comprised by the provision if it is impossible to point out the person responsible.¹⁶⁴

6.3.5 The extent of lawful immediate implementation of measures

6.3.5.1 Introduction

A key issue in relation to state intervention in cases of oil pollution is what kind of latitude the Coastal Administration is provided with when implementing immediate measures. The

¹⁶⁰ Ot.prp.nr.11 (1979-1980) p. 165.

¹⁶¹ Rt-1983-965.

¹⁶² *DNV-Rapporten* p. 44.

¹⁶³ Bugge (2014) note 273.

¹⁶⁴ Ot.prp.nr.11 (1979-1980) p. 165.

Act does not address the substantive scope and extent of intervention pursuant to §74.¹⁶⁵ The issue may, perhaps more precisely, be formulated as a question of which restrictions the right to immediately implement measures is subject to.

The Coastal Administration is entitled to “make use of and if necessary cause damage to the property of the person responsible” when implementing immediate measures, cf. §74(3). The term “property” includes moving property, e.g. vessels.¹⁶⁶ Utilisation and damaging of property can only take place if it is required and the benefits exceed the disadvantages.¹⁶⁷ Inflicted damage or loss must be covered by the person responsible insofar as the intervention was regarded necessary.¹⁶⁸

The main issue regarding the extent of intervention is whether or not immediate implementation of measures are subject to a substantive test of reasonableness, thereby limiting the authority.

6.3.5.2 Reasonableness as a limitation pursuant to the Pollution Act §74?

According to the wording, the Pollution Act §74 does not directly prescribe a test of reasonableness.¹⁶⁹ However, one might ask if such a limitation should be interpreted into the provision, because of statements in the preparatory works.

The preparatory works point out that §74 is based on a proposal that originally contained a slightly different formulation.¹⁷⁰ The present provision corresponds, with some minor differences, to §63(2) and (3) presented in NOU 1977:11. In contrast to the final provision,

¹⁶⁵ Neither in regulations, even though such authority is explicitly provided in §74(4), cf. Wang (2005) p. 126.

¹⁶⁶ Wang (2005) p. 125.

¹⁶⁷ Ot.prp.nr.11 (1979-1980) p. 165.

¹⁶⁸ Bugge (1999) p. 365.

¹⁶⁹ Apparently, the corresponding provision in the Svalbard Environmental Act §97 contains a test of reasonableness, due to the wording “necessary”.

¹⁷⁰ Ot.prp.nr.11 (1979-1980) p. 165.

the proposal in §63(2) included the wording “...arrange for reasonable measures...” (our underlining).¹⁷¹ The rephrasing and elimination of the wording “reasonable” is not explained in the preparatory works, but can hardly be considered as an inadvertence. The Pollution Act uses the term *reasonable* in several provisions and the omission of such a wording in §74 cannot be ignored. Hence, the competence pursuant to §74 is only limited by the doctrine of abuse of discretionary power.¹⁷²

6.3.5.3 Reasonableness as a limitation pursuant to the Pollution Act §7?

The preparatory works and legal theory indicate that §74 must be interpreted in conjunction with §7 because the State’s competence to implement measures does not reach any further than what the person responsible is obliged to do pursuant to §7.¹⁷³ The general reference to §7 creates confusion, as the duty to take action pursuant to §7(2) is limited to reasonable measures, while the competence to impose orders pursuant to §7(4) excludes such a test of reasonableness. The question is therefore whether it is §7(2) or §7(4) that sets the framework for lawful implementation of measures pursuant to §74. The three different situations must be interpreted and treated separately.

Immediate implementation of measures if orders are not carried out by the person responsible clearly refers to §7(4). The PA §74(1) states that if orders are “issued pursuant to §7(4)” and “these are not carried out”, the authorities may arrange for “the measures” to be implemented. Consequently, the competence to immediately implement measures in these situations is not subject to a substantive limitation of reasonableness.

¹⁷¹ NOU 1977:11 p. 38.

¹⁷² Bugge (1999) p. 329, 363-364.

¹⁷³ Ot.prp.nr.11 (1979-1980) p. 69, Bugge (1999) p. 363-364, Wang (2005) p. 125.

Immediate implementation of measures if issuing orders may result in a delay or if it is uncertain who is responsible, is apparently subject to the same framework.¹⁷⁴ The main difference between §74(1) and §74(2) is that §74(1) involves a previously issued order while §74(2) does not involve any issued orders. Immediate implementation without any previously issued orders lacks all the classic characteristics of an administrative decision. Such implementation must nevertheless be equated with administrative decisions from a legal point of view and is consequently subject to the limits provided in §7(4).¹⁷⁵ Imposing the same restrictions in all three situations secures flexibility and avoids an unnecessary complex system. Additionally, it would be strange and unfavourable to restrict the leeway in situations involving pressure of time.

Summing up, the extent of lawful measures pursuant to §74 is not subject to a substantive test of reasonableness.¹⁷⁶ The only restrictions imposed on the Coastal Administration's right to immediately implement measures are limitations pursuant to general administrative law and the doctrine of abuse of discretionary power.¹⁷⁷

¹⁷⁴ Bugge (1999) p. 363-366.

¹⁷⁵ Ibid p. 363-364.

¹⁷⁶ Seemingly opposite Wang (2005) p. 129.

¹⁷⁷ Bugge (1999) p. 363-364.

7 Claim for Reimbursement

7.1 Introduction

Norwegian pollution- and environmental law are based on the internationally recognised polluter-pays principle.¹⁷⁸ Accordingly, when the person responsible refuses to implement satisfactory measures to tackle the pollution, either on his own or when ordered to, a natural consequence is that he becomes responsible for covering the expenses incurred from measures implemented by other parties.

The statutory basis for this reimbursement claim is the Pollution Act §76. The first paragraph concerns reimbursement of the expenses incurred by public authorities, and reads:

“The costs, damage or losses pursuant to section 74 incurred by the public authorities may be claimed from the person responsible for the pollution or waste problems [...] If the person responsible cannot pay or it is not known who is responsible, the costs may also be claimed from the injured party or the person whose interests were served by the measures.”

The specific issues that will be addressed in this section are primarily related to the substantive scope of the right to reimbursement. Therefore, the presentation will firstly give account for the material content of §76. However, acute marine oil pollution is also subject to regulation by the Maritime Code. Consequently, it is necessary to examine how these different set of rules are interrelated.

The present section presupposes that an accident which entails acute pollution or the threat of acute pollution has occurred, and that the Norwegian Coastal Administration has initiated measures aiming to “prevent” pollution, “stop”, “remove” or “limit” the effects of pollu-

¹⁷⁸ Bugge (1999) p. 176. See Birnie/Boyle/Redgwell (2009) p. 432-434 on the principle in the context of international marine pollution law.

tion or to “mitigate any damage or nuisance” resulting from pollution. The question has now turned to the allocation of the economic responsibility for the implemented measures.

7.2 The Substantive Scope of the Right to Reimbursement Pursuant to the Pollution Act §76

7.2.1 The addressee of the claim

The addressee of the claim for reimbursement is the “person responsible”, cf. first sentence. The wording refers to the same individual, entity or legal person as the corresponding term in §§7 and 46. To reiterate briefly, the Reder will generally be considered the person responsible.

7.2.2 Alternative addressee of the claim

According to §76 third sentence, the costs may also be claimed from the “injured party” or “the person whose interests were served by the measures”, provided that the person responsible “cannot pay” or if it is “not known who is responsible”. This provision has a subsidiary character as against the duty of the person responsible to reimburse.¹⁷⁹ This is evident from §77(1), which entitles the private person that has to pay for the costs to claim recourse from the person responsible.

The rationale behind the rule is that when the public authorities implement measures to protect private interests, it is more reasonable that the private party bears the expenses incurred in his interest rather than the State.¹⁸⁰

As mentioned above, it happens quite frequently that oil slicks of unknown origin are detected. Occasionally, the responsible Reder does not have the economic means to settle the

¹⁷⁹ Ot.prp.nr.11 (1979-1980) p. 168 and NOU 1977:11 p. 35.

¹⁸⁰ Ot.prp.nr.11 (1979-1980) p. 168.

reimbursement claim or the Rederi may be dissolved and therefore unable to provide for payment. In such scenarios, the person who has benefited from the measures, for instance by cleansing of his private beach, may have to bear the costs. It must nevertheless be emphasised that this represents the exception rather than the rule.

7.2.3 Costs, damage or losses

According to §76 first paragraph, the Coastal Administration can claim the “costs, damage or losses” which the State has incurred pursuant to §74. As accounted for in subsection 6.3 above, there are three types of situations in which the State may immediately implement measures. The extent of the right to reimbursement must be assessed separately for each of these situations.¹⁸¹ Thus, it is reimbursement of the hereto related costs that can be claimed.

The fact that §76 prescribes that it is the losses “pursuant to section 74” that can be claimed implies a requirement of a causal link between the reimbursement claim and the aim of the measures undertaken.¹⁸² Consequently, as far as the costs are related to measures aiming to *prevent* pollution, *stop*, *remove* or *limit* the effects of pollution or to *mitigate any damage or nuisance* resulting from pollution, cf. §7(4) cf. §7(2), the Coastal Administration can claim reimbursement. Furthermore, these measures must be considered adequate based on a professional appraisal at the time of implementation.

Since the doctrine of abuse of discretionary power represents the lower threshold when determining which measures should be reimbursed, the Coastal Administration’s access to reimbursement is extensive. Costs related to measures that the Coastal Administration could foresee would be ineffective or other measures which goes beyond mitigating the damages are outside the scope of the provision.

¹⁸¹ Bugge (1999) p. 363.

¹⁸² Correspondingly; CMI-guidelines section 10 e).

Concerning the practical settlement of the claim, it is assumed that the public authorities may partially recover their claim by selling any potential assets which they acquire through the operation, based on §76 combined with non-statutory law.¹⁸³ In a maritime oil pollution situation, one can imagine that oil collected through the use of booms and skimmers still will be of value. Likewise, the wrecked ship might still have a value, i.e. as scrap metal. When the Authorities sell these items, parts of the claims will be set off.

7.3 The Relationship to the Rules on Compensation for Pollution Damage pursuant to the Pollution Act Chapter 8

Although the reimbursement claim has many similarities to an ordinary doctrine of strict liability for damages, the two concepts must be set apart. That is, because the Pollution Act adopts a dual-tracked system where liability for damages is regulated separately in chapter 8. The scope of the rules on liability is listed in §57 letters a-e. Of particular interest is the provision in letter b), which states that the liability for damages includes “compensation for damage, losses, nuisance or expenses” that are incurred as a result of taking “reasonable measures to prevent, limit, remove or mitigate” pollution damage.¹⁸⁴

The resemblance between the expenses that can be claimed pursuant to the liability rules and the expenses that may be claimed reimbursed is striking, and evidences that the different sets of rules overlap each other to a considerable extent. Additionally, the basis for liability is predominantly the same for each alternative; as a strict liability is adopted either the claim is set forth as a compensation claim or a reimbursement claim.¹⁸⁵ Nevertheless, the preparatory works explicitly states that the rules on reimbursement and liability for damages shall coexist, and that the latter shall function as a supplement to §76.¹⁸⁶ Conse-

¹⁸³ Statement of Interpretation (2000) section 2 and Wang (2005) p. 128.

¹⁸⁴ It can also be mentioned that §§57d) cf. 58 additionally includes “compensation for damage, nuisance or losses in regard to other exercising of rights of common”.

¹⁸⁵ Bugge (1999) p. 416.

¹⁸⁶ NOU 1982:19 p. 60 and Ot.prp.nr.33 (1988-1989) p. 87.

quently, in certain circumstances the Coastal Administration will have the possibility to choose which of the two alternative tracks they will follow when pursuing their claim.¹⁸⁷ As a result, the Coastal Administration may base its claim on the rules on liability for damages pursuant to §57 if a claim for reimbursement pursuant to §76 cannot be set forth, for instance because the order imposed pursuant to §7(4) was invalid.

It is stated in §53(1) that the chapter applies to the duty to pay compensation for pollution damage “insofar as the question of liability is not separately regulated by other legislation or a contract”. An example of such special regulation is found in the Maritime Code, which will be accounted for. However, the provisions in the Pollution Act chapter 8 are not completely disregarded, as it will supplement the special regulation.¹⁸⁸

7.4 The Relationship to the Maritime Code

7.4.1 Introduction

Besides the Pollution Act, marine oil pollution is additionally subject to regulation by the Maritime Code. Seeing that the regulations pursuant to these acts are not identical, the relationship between them must be examined further. Firstly, the scope of the Maritime Code will be accounted for, and then it will be assessed how the two sets of rules can be harmonised.

The relevant provisions in the Maritime Code are found in chapter 10, parts I and II respectively. The legislative background of the rules is the implementation of international conventions, namely, the Liability Convention and the Bunker Convention.

¹⁸⁷ Which person that represents the subject of responsibility may not always coincide according to the two set of rules, as the subject of liability for damages is defined differently than in §§76, cf. 55.

¹⁸⁸ Ot.prp.nr.33 (1988-1989) p. 99 and Falkanger (1991) section 6.

7.4.2 Scope of the Maritime Code §§183 and 191

The Maritime Code §183 represents the point of departure for liability for bunker oil pollution, and prescribes strict liability for “pollution damage [...] caused by fuel oil” on the “shipowner”, cf. first paragraph. *Fuel oil* is statutorily defined in the fourth paragraph as “all oils containing hydrocarbon fluid, including grease, intended for operating the ship or its propulsion, as well as remnants of such oil”.¹⁸⁹

Pollution damage caused by fuel oil is defined in detail in the second paragraph a) and b). According to letter a), the term comprises “damage or loss” occurring “of the ship” that is caused by pollution from fuel oil that is “escaping or drained from the ship”. When the pollution has led to diminishment of the environment, the recoverable expenses are limited to those that relate to “reasonable” measures. According to letter b), also “expenses, damage or loss” due to “reasonable measures” that are implemented after an accident that “causes or entails immediate and considerable danger for damage” as mentioned in letter a) and that “aim to prevent or limit such damage” are included. There is one important limitation in the tenth paragraph, that is, that part I of the chapter does not apply to pollution damage covered by §191(2).

The Maritime Code §191, which implements the Liability Convention, has a similar content, as this provision served as a model for the design of §183. Thus, the provision adopts a strict liability for “the owner of a ship” for “oil pollution damage”, cf. first paragraph. Likewise, the second paragraph, letters a) and b) define oil pollution damage in a quite similar manner.

There are, however, some fundamental differences between the two regulations, the most significant being the type of ship that is subject to regulation. While a “ship” in chapter 10

¹⁸⁹ In the translation of the Maritime Code published in MarIus (2010) no. 393, it seems as the last half of the quoted phrase has been left out by an inadvertence. This latter half of the paragraph has therefore been translated by the authors.

part I refers to “any seagoing vessel or other floating device on the sea”, cf. §183(3), it refers only to floating constructions “designed to carry oil in bulk” that in fact is “carrying oil as cargo in bulk and during subsequent voyages” in part II of the chapter, cf. §191(3). Which category the vessel falls within entails several consequences, first and foremost which limitation of liability scheme applies.

The substantive content of each criterion will not be subject to further elaboration, except from where they need to be in order to clarify the relationship to the Pollution Act. For the purpose of this thesis, it is at this point sufficient to demonstrate that the two provisions cover different situations, but they will both to a considerable extent coincide and overlap with the provisions in the Pollution Act.

The regulation of oil pollution liability provided by the MC has several implications. Of major importance is that incidents that fall within the scope of these rules are subjected to limitation of liability. As a consequence, the party liable for polluting will in many cases not be required to pay full compensation, as he may be entitled to limit his liability. As the system provided by the PA is based on the polluter-pays principle and that the person responsible has an unlimited responsibility for compensation and reimbursement, a fundamental divergence is established between the two set of rules. The following presentation aims to account for how the two sets of regulations can be applied and harmonised.

7.4.3 Applicability of the Maritime Code on the reimbursement claim

The Maritime Code §185(1) declares that “[c]laims for indemnification against the shipowner for pollution damage caused by fuel oil may only be asserted by the rules under Sections 183 to 190”. Correspondingly, §193(1) states that “[c]laims for compensation for oil pollution damage can only be made against the owner of a ship according to the provisions of the Chapter”. Clearly, the provisions assert exclusive application on the area of oil pollution damage. This is in line with the articles in the Conventions which the provisions seek

to adopt, with the homologous wording; “[n]o claim for compensation for pollution damage shall be made against the shipowner otherwise than in accordance with this Convention”.¹⁹⁰ Consequently, if the Coastal Administration’s claim is not covered by these convention-based rules, they cannot pursue the shipowner under a different basis of liability.¹⁹¹

As demonstrated, claims for reimbursement pursuant to the PA overlap with the rules in the MC chapter 10. It is therefore of considerable interest to determine to what extent the reimbursement claim is subjected to regulation also by the MC, as the reimbursement claim in that case would be comprised by the rules on limitation of liability. It might additionally affect the evaluation of which measures that the Coastal Authorities may claim reimbursed. In order to clarify this issue, the first question that must be addressed is whether the wording “[c]laims for indemnification” and “[c]laims for compensation” in the Maritime Code §§185 and 193 comprises the reimbursement claim pursuant to the Pollution Act §76.¹⁹²

The answer to this issue does not immediately stand out as clear. On one hand, there is the strictly linguistic argument. While §76 speaks about payment of the costs of measures to deal with pollution, namely, reimbursement, the provisions in the MC refers to claims for compensation for oil pollution damage. Thus, there is a semantic difference. This may be interpreted as an argument that there is also a substantive difference between the phrases and that the reimbursement claim is not comprised by the Maritime Code.

¹⁹⁰ See the Liability Convention article 3 no. 4 and the Bunker Convention article 3 no. 5.

¹⁹¹ Falkanger/Bull/Brautaset (2011) p. 211 and 218.

¹⁹² Although the wording *claims for indemnification* and *claims for compensation* are not identical, the content must be presumed to be the same. That is, because the authentic Norwegian text uses the word “erstatningskrav” in both relations. Why the translation published in MarIus (2010) no. 393 makes a distinction is not immediately clear. Especially when considering that both the Convention texts speak of *claim for compensation* in the authentic English versions.

The linguistic argument is furthermore strengthened by the fact that the Pollution Act, as displayed above, has a separate system for compensation for pollution damage in chapter 8, which applies independently from the rules regarding the reimbursement claim. Additionally, such a distinction is not adopted in the Maritime Code, which might imply that the Code solely aims to regulate claims for compensation and not claims for reimbursement.

Finally, it might be taken into consideration that the Pollution Act §53(1) states that chapter 8 applies to “the duty to pay compensation for pollution damage insofar as the question of liability is not separately regulated by other legislation or a contract”. According to the preparatory works, this provision primarily concerns situations of pollution damage where the question of liability, including the basis and subjects of liability, is regulated in the special legislation.¹⁹³ A similar reservation is not expressed in the statute as far as the reimbursement claim is concerned, which might imply that the two claims are substantively different.

On the other hand, the substantive differences between the two types of claims are not great, and should not be exaggerated. As evidenced, the claims encompass each other to a large extent. This is especially noticeable for the reimbursement claim and compensation claim pursuant to the Pollution Act, which will often both be applicable. That the nuances between the two type of claims are of such minor character is a fact that weighs against regarding the reimbursement claim as not being comprised by the claim for compensation pursuant to the Maritime Code.

Furthermore, too much emphasis should not be put on the circumstance that the different acts utilise different wording. After all, the relevant provisions in the MC primarily aim to implement the Bunker Convention and the Liability Convention. Seeing that the Conventions make use of the phrase “claim for compensation”, it is only natural that the statutes utilise the same terminology. The Pollution Act has therefore neither been the template, nor

¹⁹³ Ot.prp.nr.33 (1988-1989) p. 104.

the most influential factor when modelling the provisions and it may accordingly be held that the difference in wording should not be given too much attribution.

In continuation, the preparatory works also comment on the issue:

“According to the regulations concerning liability for oil pollution from ships, the strict liability is limited. The rules on limitation of liability take precedent over the duty to pay for measures pursuant to § 66”.¹⁹⁴

The citation displays the only comments that are provided, and the issue is not elaborated upon. Nevertheless, the statements are clear and undoubtedly rest on the assumption that the reimbursement claim is comprised by the provisions in the Maritime Code.

Regardless, it would not be a desirable situation if the Coastal Administration could circumvent the limitation rules in the MC simply by categorising the claim as a reimbursement claim rather than a claim for compensation. Not only would such a situation arrange for a state of law that would be utterly unpredictable for the affected parties, but it would also bring the State of Norway in breach of its international obligations pursuant to the Conventions.

Moreover, that the Maritime Code is applicable on the reimbursement claim is supported in legal theory. Bugge does not examine the issue in detail, but nonetheless states clearly enough that “where a claim for reimbursement is set forth pursuant to the Pollution Act §76 in an clean-up operation subsequent to a maritime casualty comprised by the Maritime Code chapter 10, the rules in the Maritime Code will [...] take precedent”.¹⁹⁵

¹⁹⁴ Ot.prp.nr.11 (1979-1980) p. 169. The reference to §66 corresponds to §76 in the present Act.

¹⁹⁵ Bugge (2014) note 286.

Therefore, it must be concluded that the reimbursement claim pursuant to the Pollution Act §76 should be interpreted as being comprised by §§185 and 193 in the Maritime Code. The question also seems to be answered in the affirmative in practice, as the State's reimbursement claim has been subject to limitation in several occasions.¹⁹⁶ Reference can, inter alia, be made to the accidents concerning "Green Ålesund" and "Rocknes".¹⁹⁷ It is thus a *claim for compensation* in the terminology of the Maritime Code chapter 10, hence, the hereto accompanying regulations of chapter 10 apply. As a result, the reimbursement claim must be assessed against the regulations provided by the Maritime Code. This entails several significant legal effects, the most conspicuous is perhaps that the reimbursement claim becomes subject to the limitation rules.

However, some additional assessments must be made. That is, because even though the provisions in the MC are similar to those in the PA, they are not identical. On some key areas it is therefore necessary to examine the provisions in the Maritime Code in some detail, to display how they interfere with – and must be harmonised with – the Pollution Act. Two issues will be addressed; firstly the addressee of the claims and secondly the kind of measures that can be included in the reimbursement claim.

7.5 Applying the Rules in the Maritime Code on the Reimbursement Claim

7.5.1 The addressee of the claims

The *person responsible* is, as previously established, the addressee of the reimbursement claim pursuant to the Pollution Act. The person responsible cannot be predefined, but will vary according to the circumstances. Most often, however, the responsibility will be incumbent on the Reder. The Maritime Code, on the other hand, places the responsibility on the *ship owner*. As evidenced, the Reder is not always the owner of the ship. Additionally,

¹⁹⁶ NOU 2002:15 p. 51 et seq and Ot.prp.nr.77 (2006-2007) p. 5-6.

¹⁹⁷ Falkanger/Bull/Brautaset (2011) p. 215.

the term ship owner may itself have a different meaning depending on the circumstances. The closer content of the term *shipowner* pursuant to the Maritime Code will therefore necessarily be elucidated. Since the MC claims exclusive application in this relation, the subjects of liability in the context of the reimbursement claim must be interpreted in line with the rules in the MC.

The subjects of liability in the Maritime code are the “shipowner” and “the owner of a ship” respectively, cf. §§183(1) and 191(1). Although the wording is similar, they are statutory defined in different ways. With respect to the term in §183, the definition provided in the fifth paragraph proclaims that “shipowner” shall be interpreted as “the owner, including the registered owner, the Reder, the bareboat charterer, the manager or others responsible for central functions relevant to the running of the ship”.¹⁹⁸ Consequently, the term *shipowner* is quite broad, and may refer to several different persons or companies, and there is nothing preventing that multiple entities have owner status simultaneously.¹⁹⁹ This is especially evident because of the generic phrase “...others responsible for central functions relevant to the running of the ship”, which makes it less important to lay down the specific content of the other listed persons.

The Maritime Code §191(5), on the other hand, defines the term “owner of a ship” as “the person registered as owner in the Ship Register”, and as “the person who owns the ship” if the ship is not registered in the Ship Registry. Clearly, the definition is more narrow, as it leaves out many of the persons that are included in the definition in §183. Most noticeable is perhaps the exclusion of the bareboat charterer and the Reder. What is more, these parties are among the subjects who are comprised by the rules on channelling of liability pursuant to §193, cf. particularly (2)c). Consequently, the liability is directed towards the owner of the ship. The main rationale behind channelling liability is that the injured party is

¹⁹⁸ Cf. the Bunker Convention article 3 no. 1; “[s]hipowner” means the owner, including the registered owner, bareboat charterer, manager and operator of the ship”.

¹⁹⁹ Falkanger/Bull/Brautaset (2011) p. 217.

considered to be sufficiently protected by the strict liability imposed on the shipowner and that exposing other parties to liability would lead to uncertainty, especially in relation to insurance matters.²⁰⁰

The registered owner of a ship has a statutory duty to obtain satisfactory insurance, in relation to both Conventions, cf. the Maritime Code §§186 and 197. If this obligation is breached, the ship may be subject to sanctions, cf. §§187 and 199. Practically, claims are often brought directly before the insurance company, typically the P&I insurer, cf. §§188 and 200. It is especially when the insurance proves insufficient to cover the losses that a claimant, e.g. the State, will have the benefit of pursuing other parties that may fall within the *owner* terms. An example may be if the shipowner's liability exceeds the insurance limits of the Bunker Convention.²⁰¹

As a final observation, it can be concluded that the definition of *shipowner* pursuant to §183(5) to a large extent coincides with the content of the term *person responsible* pursuant to the Pollution Act. However, the definition of *owner* in §191(5) differs quite considerably from the definition in the Pollution Act, as it points out a far more limited circle of persons. Nevertheless, in the event of acute marine oil pollution the PA must be interpreted in line with the statutory definitions in MC chapter 10. For instance, if a vessel that is fixed on a bareboat charter suffers a maritime casualty comprised by MC §191, the registered owner would be the subject of liability. As opposed to in the PA, where it would probably be the bareboat charterer, Reder, as owner *pro hac vice*. As the example illustrates, the practical implications may be considerable since the addressee of the reimbursement claim could differ.

7.5.2 Recoverable costs

Attention is now turned towards the measures for which the Coastal Administration can claim reimbursement. Seeing that the Maritime Code assumes exclusive applicability for

²⁰⁰ Falkanger/Bull/Brautaset (2011) p. 211.

²⁰¹ Ibid p. 218.

this specific type of marine pollution, cf. §§185 and 193, it is necessary to examine the regulation in the MC on this point a bit further. A central issue is therefore whether these rules provide a right to claim reimbursement which differs from the Pollution Act §76.

The point of departure pursuant to the MC is the definitions of “pollution damage caused by fuel oil” and “oil pollution damage” in §§183(2) a) and b) and 191(2) a) and b). The content of the two provisions will primarily be addressed jointly as a whole, for the reason that they are virtually identical.²⁰²

According to the letters a) first sentences, the term essentially comprises “damage or loss” resulting from oil “escaping” or being “drained” from the ship. This includes “loss of profits”, but when the damage has caused “impairment of the environment” only expenses for “reasonable measures” that have been or will be undertaken are covered, cf. second sentence.

With respect to letters b), they expand the term pollution damage to cover “expenses, damage or loss” due to “reasonable measures” incurred after an incident that “causes or entails immediate and considerable risk of damage as mentioned in letter a”, and the purpose of which is to “prevent or limit such damage”.²⁰³ Furthermore, that the loss must be “due to” reasonable measures implies a requirement of a *causal link* between the claim and the aim of the measures.²⁰⁴

A particular issue relating to the criterion of a *causal link* is costs deriving from various consultants’ fees. One can particularly raise questions concerning expenses that the State incur when hir-

²⁰² Ot.prp.nr.77 (2006-2007) p. 19.

²⁰³ It was formerly a question whether it was a condition precedent for liability that oil must *de facto* have been discharged, pursuant to the Liability Convention 1969. In ND-1988-117 the Helsingfors City Court answered the question in the affirmative. The judgment was rightfully criticised by Selvig (1991).

²⁰⁴ Correspondingly; CMI-guidelines section 10e).

ing media advisors. Even though taking such measures may be desirable, one may ask if these costs are sufficiently connected to preventing and limiting pollution damage.

While both letters a) concern the situation where an oil spill has already occurred, it is sufficient that such a situation threatens to occur according to letters b).²⁰⁵ The preparatory works does not provide much guidance with regard to the specific content of the criteria. Only a few concrete examples are given, such as, that *loss of profit* will include the losses incurred by a fish farm or a tourist facility because of the oil pollution, and measures to restore the environment comprises cleaning of oil from the sea and shore, cf. letters a).²⁰⁶ Furthermore, measures to prevent and limit the damage will typically be emergency discharge of the oil from a wrecked ship.

As there seems to be limited amounts of legal sources available that can provide clarification of which specific costs can be claimed reimbursed, it may be relevant to consider if there are any internationally established guidelines or standards that can shed light on the issue. One such document is the EU States Claims Management Guidelines which is a product of the European Maritime Safety Agency (henceforth referred to as the EMSA-guidelines). These guidelines have been used as a point of reference in Norwegian court cases. In the judgment of Bergen City Court in the Fjord Champion-case, the judge stated that the Guidelines had no formal authority, but would nevertheless provide guidance because it was assumed to express opinions of best practice on the area.²⁰⁷ The grounds of the judgment certainly evidences that the Guidelines was ascribed significant weight. The Court of Appeal and the Interlocutory Appeals Committee of the Supreme Court did not utilise the EMSA-guidelines, as questions concerning recoverable costs were not a subject-matter. In the Server-case, the solutions prescribed by the guidelines have also been argued, but are clearly ascribed less weight than in the Fjord Champion-case.²⁰⁸

²⁰⁵ It is presumed that the provisions correspond to the content of the Pollution Act §§57 cf. 58, so that the rules in the Conventions, the Maritime Code and the Pollution Act are coterminous on this point, cf. Bråfelt (2012) note 365.

²⁰⁶ Ot.prp.nr.77 (2006-2007) p. 9.

²⁰⁷ Case no. 11-105297TVI-BBYR/01 p. 16.

²⁰⁸ *Serverrapporten* section 6.7.

Even though the EMSA-guidelines can be relevant source to look at, it should be emphasised that its authority as a legal source must be limited. That is, because the parties that developed the document was primarily public bodies from the EU and EEA States – and not other private stakeholders – which consequently give the guidelines a somewhat distorted view. This is illustrated by the purpose of the Guidelines which is, inter alia, to assist the States in achieving successful recovery of costs.²⁰⁹ It must therefore be used with some scepticism.

Evidently, the scope of the measures that can be claimed pursuant to §§183 and 191 are to a large extent congruent with the provisions in the Pollution Act. At least, all the elements that are set forth in these two provisions are covered by the PA §§76 cf. 74 and 7. The question is, however, whether the provisions in the Maritime Code are more restricted in terms of what measures that are included, seeing that these provisions explicitly limit the liability to “reasonable measures”.

7.5.2.1 Reasonable measures

Considering that the conclusion above was that the Pollution Act does not adopt a substantive limitation of reasonableness with regards to what measures that can be claimed performed and alternatively reimbursed by the liable party, the provisions seemingly differ on this point. Thus, it is necessary to examine the content of the limitation to “reasonable measures” pursuant to the Maritime Code §§183(2) and 191(2) letters a) and b) in further detail.

It should be mentioned that the premises for the assessment are slightly different pursuant to the two sets of rules. With respect to the PA, the assessment concerned what measures the person responsible had an obligation to implement and could be ordered to implement, while the assessment pursuant to the MC is related to the economic liability for which the shipowner is responsible. Regardless, the starting point in both cases must be an evaluation

²⁰⁹ EMSA-Guidelines section 1.3.

of proportionality; a more serious occurrence of pollution requires more comprehensive measures.

The content of the phrase *reasonable measures* is neither elaborated upon in the preparatory works, nor has it been subject to examination by Norwegian Courts. Guidance must therefore be sought in alternative sources. In this respect, it is of relevance that there are some international documents that lay down how certain international bodies interpret the term. As the provisions are based on international conventions, such documents are also of relevance pursuant to Norwegian law.

For one, the criterion is commented in the so-called CMI-guidelines.²¹⁰ With respect to preventive measures, clean-up and restoration, the Guidelines state that the measures must be “likely [...] to be effective in avoiding or minimising pollution damage” based on an “objective technical appraisal at the time any relevant decisions were taken”.²¹¹ It is emphasised that compensation cannot be refused solely on the grounds that the measures proved ineffective or that mobilised equipment proves not to be required. However, according to the Guidelines a claim should be refused if the measures that were implemented “could not be justified on an objective technical appraisal in the circumstances existing at the relevant time, of the likelihood of the measures succeeding, or of mobilised equipment being required”.

²¹⁰ Comité Maritime International (CMI) “Guidelines on Oil Pollution Damage (1994)”. The guidelines are not legally binding, but are of relevance as they aim to clarify to which extent costs are recoverable under the law as applied in the majority of countries that are party to the Convention and promote a consistent approach.

²¹¹ CMI-guidelines article 10b).

The interpretation in the CMI-guidelines conforms on several points with the interpretations provided in the so-called IOPC-guidelines.²¹² These guidelines similarly state that the assessment must be made “on the basis of objective criteria” and according to “the facts available at the time of the decision to take the measures”.²¹³ Furthermore, that costs are not accepted “when it could have been foreseen that the measures taken would be ineffective”, but if measures prove to be ineffective, it is not in itself a reason for rejecting a claim.²¹⁴

With respect to mitigation and restoration of the environment, both guides make it clear that not only measures relating specifically to the clean-up operation are included, but also that measures promoting the restoration of the damaged environment and assisting its natural recovery are as a starting point *reasonable*.²¹⁵

Recurrent themes throughout both sets of guidelines are proportionality and objectivity. The measures for which the expenses can be claimed recovered must be proportionate compared with the damage that has or threatens to occur. Thus, it is to a certain extent necessary to carry out a cost-benefit analysis. Moreover, this assessment must be based on objective, technical criteria. If these conditions are present at the time of implementation, it is apparent that even costs relating to measures that are in fact useless are recoverable. Such an interpretation is, besides, in accordance with the precautionary principle.²¹⁶

²¹² The International Oil Pollution Compensation Funds (IOPC Funds) has published a “Claims Manual (2013)”, which in section 3 sets forth guidelines on the submission of different types of claim to the fund. The manual is clearly of relevance, but it should be noted that it does not address legal issues in detail and should not be seen as an authoritative interpretation, cf. p. 6

²¹³ IOPC-guidelines section 3.1.5. See also Falkanger/Bul/Brautaset (2011) p. 211.

²¹⁴ IOPC-guidelines section 3.1.6.

²¹⁵ See the CMI-guidelines section 12 and the IOPC-guidelines section 3.6, which specifically address the scope of compensation for environmental damage.

²¹⁶ See Birnie/Boyle/Redgwell (2009) p. 152-164 regarding the principle in the context of international law.

In conclusion, it seems to be significant similarity between the rules in the Pollution Act and the Maritime Code on this point, despite the existence of the *reasonable* criterion in the latter. Evidently, the criterion is interpreted quite broadly, and the lower threshold appears to be that measures that are knowingly ineffective at the time of implementation are not reasonable. Consequently, the Coastal Administration will also enjoy considerable authority pursuant to the rules in the MC. The shipowner, or Reder, will therefore in many situation risk liability for the costs of measures that has no effect or in another way proves unsuccessful. As Selvig expresses, it must be accepted that the oil pollution liability pursuant to the MC also gives the pollution control authority significant discretion when determining what orders or actions that can be imposed to avoid environmental damage, and that the Courts can only intervene if “disproportionate expensive measures” are imposed.²¹⁷

The lower threshold therefore seems to be similar to the threshold pursuant to the PA, i.e. the doctrine of abuse of discretionary power, which provides that the measures cannot be *grossly unreasonable*. That the provisions should be interpreted in the same way is additionally supported by the fact that the potential borderline has not been actualised in case law. Even though it cannot be completely ruled out that the assessment can be slightly different in a concrete situation, this does not alter this main conclusion.

7.5.3 Calculation of the claim

While the Pollution Act §76 prescribes that “costs, damage or losses” may be claimed reimbursed, the Maritime Code §§183b) and 191b) uses the phrase “expenses, damage or loss”.²¹⁸ The point of departure pursuant to both set of rules is consequently that the Coastal Administration must incur an economic loss. This is a fundamental precondition in any area related to the law of damages, and is seldom difficult to ascertain. However, the provisions do not give any indication as to the calculation of the subsequent claim. Since

²¹⁷ Selvig (1999).

²¹⁸ The authentic Norwegian text uses the phrase “[u]tgifter, skade eller tap” in both relations.

the chosen method for calculating the claim potentially has great influence on the size of the claimable amount, this issue needs to be examined closer.

7.5.3.1 Net loss

The first question is naturally which method of calculation applies, since several different schemes for the assessment of damages exist. It is obvious that the provisions in the MC are ordinary claims for damages, and consequently the ordinary principles of tort law are applicable. As demonstrated, the reimbursement claim pursuant to §76 is of a slightly different nature. Nevertheless, the preparatory works state that the principles of tort law also apply to this set of rules.²¹⁹

As a result, the starting point is that the claimant should be put in the same economic position as he was before the accident took place.²²⁰ This implies not only that compensation must be sufficient to cover the losses, but also that some benefits gained by the claimant may be entered as deductible, cf. the doctrine of *compensatio lucri cum damno*.²²¹

Support for such a method of calculation can be found in the CMI-guidelines section 10f), which states; “[w]here equipment or material is reasonably purchased for the purpose of preventive or clean-up measures, compensation is payable for the cost of acquisition, but is always subject to a deduction for the residual value of such equipment or material after completion of the measures”. Likewise, the IOPC-guidelines section 3.1.11 express that the “cost of equipment purchased for a particular spill” should be subject to “deductions [...] to take into account the remaining value of the equipment”.

²¹⁹ Ot.prp.nr.11 (1979-1980) p. 168 and NOU 1977:11 p. 19.

²²⁰ Lødrup (2009) p. 447.

²²¹ Lødrup (2009) p. 448 and Hagstrøm (2001) p. 159.

The Guidelines outline a situation that is not unpractical. Reference can be made to the Server-accident, where the State had to purchase some equipment specifically for that operation. Such equipment will represent an asset which also can be utilised in subsequent operations. The remaining value must therefore be deducted, i.e. written off according to the expected economic lifespan of the respective equipment. Moreover, in practice, it also seems to be assumed that it is the net loss that can be claimed.²²²

The conclusion is therefore that the reimbursement claim must be calculated on the basis of a net loss method.

7.5.3.2 Full cost or excess costs

A matter that has been subject to some discussion and uncertainty is whether or not the Coastal administration can claim the full costs reimbursed, including both fixed costs and excess costs, or only the excess costs.

The question arises as the Coastal Administration maintains a level of permanent preparedness and has some vessels, personnel and equipment in place regardless of whether an accident has occurred. Consequently, the fixed costs of having these resources available will accrue in any event.

On one hand it may therefore be claimed that these expenses should be excluded from the reimbursement claim, and that only the excess costs is recoverable. Such costs will typically be extra bunker expenses, overtime payment of existing personnel, expenses of hiring extra personnel, additional wear and tear and cleaning of vessels and equipment. Such an interpretation may immediately seem reasonable. After all, this is the solution that is the most natural consequence of applying the net loss method; the Coastal Administration should be put in the same position as they would be in if the incident had not occurred.

²²² *Serverrapporten* section 6.1.5.

Thus, fixed costs are not a loss incurred because of the incident, as they would accrue regardless, and on this basis not subject to reimbursement.

In continuation, it may be held that if the fixed costs were also included, the Coastal Administration would receive an unwarranted benefit. That is, because these fixed costs are included in the budgets and, accordingly, finances are already allocated by the State.

On the other hand, one may argue that if only the excess costs were recoverable, the shipowner would in certain circumstances benefit from a state intervention because it would be less expensive than hiring a private contractor. This would result in a non-desirable situation.

There is seemingly no Norwegian case law concerning the issue.²²³ There are, however, some cases from other Scandinavian jurisdictions that are of relevance. Reference can be made to the Tsesis-case.²²⁴ A vessel ran aground, resulting in considerable oil pollution damage. The Court of Appeal decided that expenses related to the permanent preparedness of the Swedish Coast Guard were recoverable, such as crew wages and certain other expenses incurred by the engaged vessels.²²⁵

This interpretation is in accordance with the opinion of the Maritime Law Commission, which states that it is natural that expenses for permanent preparedness are comprised by the compensation claim insofar as the equipment has been used or its value has decreased when preventing or limiting damage in a concrete incident.²²⁶

²²³ It should be noted that in case 11-105297TVI-BBYR/01 (Fjord Champion), the District Court calculated the claim on the basis of a full cost method, see p. 16-17.

²²⁴ ND-1981-1.

²²⁵ This question was not a subject-matter in the subsequent Supreme Court case.

²²⁶ Selvig (1983) p. IX.

This interpretation is maintained in two Danish cases of grounding entailing a risk of pollution; “Brage Pacific” and “Minerva”, which both concerned the Danish Maritime Code §191.²²⁷ In “Brage Pacific”, the Court admitted that expenses were recoverable for regular wages to the crew on the vessels from the Defence Command which was engaged in the State’s operation, despite the Reder’s argument that these would be incurred regardless of the accident.²²⁸ Similarly, in “Minerva”, the Court found that the State could recover crew wages, use of resources, maintenance and administration of the engaged vessels, based on a calculation of accrued time.²²⁹ Hence, case law opts for including the fixed costs.

Furthermore, the opinion in legal theory appears to adhere to the interpretation laid down by these cases. Falkanger/Bull/Brautaset state that “[e]ven expenses relating to permanent preparedness, which would have been incurred in any event, will be covered”.²³⁰ Likewise, Selvig states that the “costs related to resources that form a part of the government’s oil pollution preparedness may also be claimed covered”.²³¹

Moreover, the IOPC-guidelines support this view, cf. section 3.1.11 and 3.1.14. The latter proclaims that; compensation is also paid for a “reasonable proportion of so-called fixed costs” that are incurred by public- and quasi-public bodies, namely, “costs that would have arisen for the authorities or bodies even if the incident had not occurred, such as normal salaries for permanently employed personnel”.

Considering all the presented legal sources, the conclusion must be that fixed costs also are subject to reimbursement. Thus, an exception is made from the principle that only the strict loss should be compensated and that the claimant should be put in the same position as he

²²⁷ The provision corresponds to the Norwegian §191.

²²⁸ ND-2005-524.

²²⁹ ND-2005-532.

²³⁰ Falkanger/Bull/Brautaset (2011) p. 211.

²³¹ Selvig (2012), see also Selvig (1983) p. IX.

would be in if the incident had not occurred. Policy considerations support this solution. That is, because it is reasonable that the polluter pays the costs of oil preparedness, seeing that this system is implemented as a result of the activity he/she represents.

7.6 The Requirement of Implementation with Due Diligence

When the Coastal Administration intervenes pursuant to the Pollution Act §74 they are under an obligation to act with due diligence, even though this is not explicitly stated in the statutory text.²³² This duty must not be confused with the question of the Coastal Administration's discretion as to what measures that *should* be implemented in the specific case. As established above, this is an assessment of appropriateness, an assessment over which the Coastal Administration has exclusive authority. The requirement of due diligence, on the other hand, concerns the very performance of the individual measure that is chosen, and is probably an issue that the Courts can review.

Although this duty is not laid down by written law, it should be considered valid as it is solidly supported by considerations of fairness and loyalty. Additionally, it may be seen as a general expression of the right to mitigate losses, by ensuring that the responsible person does not suffer from a failure in the performance of a measure over which he cannot exercise control.

It is, nevertheless, undoubtedly so that there must be a certain margin for errors, seeing that a situation of acute maritime pollution entails significant uncertainty and necessitates difficult deliberations, often combined with time pressure. Consequently, within reasonable limits the person responsible must recognise that he is liable for some expenses that appear as less sensible, when reviewed in retrospect. The assessment of whether or not the duty of

²³² Bugge (1999) p. 364.

due diligence is breached must be based on the knowledge possessed by the decision-makers and performing parties at the point in time when the implementation takes place.²³³

However, it is not only measures that prove less sensible may be subject to scrutiny when assessing if the duty is complied with. A particular issue that has proven to be somewhat disputed in practice is whether or not the Coastal Administration could have carried out the measure at a lower cost, e.g. when acquiring services from independent contractors. Reference can be made to Server-case, where this has been an issue. Subsequent to the accident a limitation fund was established, since it was clear that the reimbursement claim would exceed the Reder's limited liability pursuant to the Maritime Code §§172a cf. 175a.²³⁴ The representatives of the Reder submitted to the fund administrator²³⁵ that the Coastal Administration had breached its duty of implementation with due diligence, because they did not act in accordance with the "Act relating to public procurement 16 July 1999 no. 69". The fund administrator found that the Coastal Administration had breached the regulations in the Act, and that there was a foreseeable causal link between the breach and the alleged increased costs.²³⁶ Parts of the claim set forth by the Coastal Administration were therefore reduced on a discretionary basis. There is, however, reason to believe that the threshold will be set quite high for reducing such claims, as consideration must be made to the stressful character of an acute situation, as well as proving the causal link between the breach and the increased costs; it will presumably be difficult to document.

The breach of the duty to act with due diligence may furthermore entail more severe consequences, provided that it is sufficiently serious. For instance, the State may incur liability for damages itself. If the Coastal Administration acts negligently, by e.g. causing clearly

²³³ Ibid p. 364.

²³⁴ Norsk Lysningsblad 04/07/12.

²³⁵ Cf. MC §236.

²³⁶ *Serrapporten* section 6.5.3.8.

unnecessary damage on the vessel during the operation, the State may become liable on the basis of “Act relating to compensation in certain circumstances 13 June 1969 no. 26” §2-1.

7.7 Briefly on Alternative Legal Bases for Reimbursement

Although the legal basis for reimbursement is primarily regulated by the provisions in the Pollution Act and the Maritime Code, it might also, depending on the circumstances, be possible to base such a claim on other sets of rules. The principle of *negotiorum gestio*, the principle of necessity and the rules on salvage represents such alternative legal bases.

7.7.1 The principle of negotiorum gestio and the principle of necessity

As far as the principles of negotiorum gestio and necessity are concerned, the PA §76 represents an example of codification of these rules.²³⁷ In continuation, an issue that naturally arises is whether or not §76 regulates these rules exhaustively, or if it can be supplied with these legal doctrines on a non-statutory basis. The preparatory works answer this question in the affirmative.²³⁸ Consequently, it can be relied on that §76 is a non-exhaustive rule, and there may be claims of reimbursement of costs based on other legal grounds.

7.7.2 Salvage

The rules concerning salvage deserve some additional comments, as they are a distinct characteristic of maritime law and do not have a counterpoint in any other area of law.²³⁹ In essence, these rules imply that a person who salvages the property of another – where such property is exposed to loss or serious damage – is entitled to claim a generous reward.²⁴⁰ The entitlement to a reward is primarily based on the outcome being successful, often re-

²³⁷ Bugge (1999) p. 256.

²³⁸ Ot.prp. nr. 11 (1979-1980) p. 169.

²³⁹ Cf. Thorbjørnsen (1951) p. 20.

²⁴⁰ Falkanger/Bull/Brautaset (2011) p. 472.

ferred to as *no cure - no pay*, with certain exceptions in cases entailing a risk of pollution damage, cf. §§445(1) and (3) cf. 449. The salvage institute will not be accounted for in detail.²⁴¹ It is, however, of relevance to highlight a few interesting matters.

Salvage is subject to regulation in the Maritime Code chapter 16.²⁴² It is explicitly stated in §442(2) second sentence that the provisions of the chapter “apply if the ship which performed the salvage is owned by a State”.²⁴³ Furthermore, the apportionment of the salvage award when the salvage is performed by the State is regulated especially in §451(2) no 3. If the Coastal Administration undertakes the salvage operation of a ship, by implementing measures such as towage, the salvage rules may represent an alternative legal basis on which they can found their claim for remuneration.

Under certain circumstances the use of the salvage rules may be preferable, predominantly because the salvage award is not subject to limitation pursuant to the MC, cf. §173 compared to §§171, 172 and 172a. Additionally, the claim is secured by a maritime lien in the ship and cargo and is a maritime claim which entitles arrest in a ship, cf. §51(1) no. 5, §61 no. 1 and §92(2) c). Consequently, even if there are other claims submitted towards the Reder, the State’s claim will be well protected.

It is, however, important to be aware of the right of the Reder to refuse the salvaging of the vessel.²⁴⁴ If such a refusal is “reasonable” and the salvor nonetheless salvages the vessel, the

²⁴¹ For a more general presentation of the institute, see Brækhus (1967) and Falkanger/Bull (2010) p. 442-460.

²⁴² Based on the Convention on Salvage 1989, which was drafted as a result of the Amaco Cadiz -accident, and replaced Salvage Convention 1910.

²⁴³ Previously, state operated vessels did not have a claim for salvage award. This changed in ND-1958-247 (Astoria).

²⁴⁴ Usually, salvage will be based on an agreement, e.g. “LOF” or “Skandinavisk bjergningskontrakt”.

salvor is not entitled to a salvage award, cf. §450(2).²⁴⁵ Whether or not this condition is fulfilled has given rise to many disputes.²⁴⁶ It would be too comprehensive to go into the further details in this thesis, but it should be highlighted that the risk of environmental damage is a circumstance that may give the salvor a right to salvage the vessel against the wishes of the Reder, because it would not be *reasonable* to refuse, cf. the Tsesis-case.²⁴⁷

As for the relationship between the salvage rules and other relevant legislation, it is stated in §442(3) that the provisions of chapter 16 have “no limiting effect on rules which otherwise apply to salvage operations carried out by or under the supervision of public authorities”.²⁴⁸ This statement is supposed to express that if there is a conflict between the salvage rules and rules that give the public authorities competence to give orders or intervene in such cases, the salvage rules must yield.²⁴⁹ The Pollution Act and the Harbour Act are listed as concrete examples.

²⁴⁵ The authentic Norwegian text uses the word “berettiget” which replaced the corresponding wording “beføyet forbud”. For a thorough review of the criterion, see Brækhus (1966) p. 491-557.

²⁴⁶ Selvig (2012).

²⁴⁷ ND-1983-1. For a review, see Selvig (1983) p. viii-xi and Selvig (1985) p. ix-x.

²⁴⁸ Cf. the Convention on Salvage art 5 no 1.

²⁴⁹ NOU 1994:23 remarks to §442.

8 Limitation of Liability

8.1 Introduction

Even though the Pollution Act is based on the principle idea that the polluter shall pay full compensation to the State for the incurred costs, the Reder/shipowner is entitled to limit his liability pursuant to the rules in the Maritime Code. Such limitation of liability has occurred several times in practice, inter alia in the cases concerning “Mercantil Marica”, “Green Ålesund”, “Gudrun Gisladdottir” and “Rocknes”, and might be in the ongoing Server-case.²⁵⁰

In the present section, a brief introduction to the limitation rules will be given, and then two selected issues will be addressed; limitation of the duty to take action and conduct barring limitation. These issues have been chosen as they have proven particularly relevant in the ongoing Server-case, and are especially unclear as they have not yet been conclusively decided upon by the courts.

8.2 The System of Limitation of Liability

8.2.1 Generally

That the Reder/shipowner may limit his liability implies that he is entitled to invoke a limitation amount as a limit for his economic liability. There are different schemes of limitation rules. Oil pollution from tanker vessels comprised by the definition in MC §191(3) are subject to regulation by the MC chapter 10 part II, while oil pollution from other vessels are regulated by the MC chapter 10 part I, cf. §183(3), which renders the global limitation rules in chapter 9 applicable, cf. §185 (2).

²⁵⁰ The claims in the settled cases would not be limited pursuant to the present rules, because of considerably higher limitation amounts, cf. Ot.prp.nr.77 (2006-2007) p. 9.

The limitation amounts are laid down according to the ships gross tonnage, and calculated in SDR, cf. §§194, 175 and 175a.²⁵¹ The access to invoke the limitation rules for tanker vessels is dependent on the establishment of a limitation fund according to MC chapter 12, cf. §195(1), while this is not a requirement for other vessels. If the total claim that is submitted exceeds the limitation amount, the claimants must settle for a dividend; a proportional distribution of the fund will take place. Thus, the State may have to compete with other claimants when seeking reimbursement.

8.2.2 Claims subject to limitation and parties entitled to limitation

For tanker vessels, liability may be limited according to §194 for claims that fall within the definition of oil pollution damage in §191 a)-b). This definition has been accounted for previously. For bunker oil pollution, on the other hand, the claims subject to limitation are listed in §§172 and 172a. In practice, the higher limitation amounts in §175a will usually apply.²⁵² Emergency discharging of bunkers, removing wrecks and cleaning of the sea and shoreline are typical measures comprised, cf. §175a no 1.²⁵³

The right to limitation only concerns claims arising out of the same *event*. What constitutes the same event is defined differently for bunker pollution and pollution from tanker vessels, compare §§175 no 4 cf. 175a(2) and 194(3).²⁵⁴ When claiming reimbursement for costs related to a clean-up operation, the accident itself will usually represent the relevant *event*. However, incidents that constitute new *events* may occur during the clean-up operation, e.g. while towing or discharging. Reference can be made to the Server-accident, where a new oil spill occurred while discharging oil from the wrecked ship, because the oil pump

²⁵¹ Special Drawing Right, cf. MC §505.

²⁵² Falkanger/Bull/Bautaset (2010) p. 218.

²⁵³ Ot.prp.nr.77 (2006-2007) p. 9.

²⁵⁴ The definition in §175 no 4 is interpreted in Rt-1984-1190 (Tønsnes), Rt-1987-1369 (Ny Dolsøy) and ND-1987-274 (arbitration-case).

was not stopped in time. Since the spill took place one month after the grounding and was not a direct result of the grounding, but an operational error, the incident constituted a new event.²⁵⁵

Questions regarding who is entitled to submit claims to the limitation fund have been somewhat disputed.²⁵⁶ For bunker oil pollution the Reder/shipowner cannot submit the incurred costs that are comprised by §172 no 4²⁵⁷, but is entitled to submit the costs comprised by §§175a, cf. 179. Likewise, for tanker vessels the Reder/shipowner may submit costs for measures that are “voluntarily” undertaken, cf. §195(3). Whether measures are undertaken *voluntarily* when orders are imposed by the Coastal Administration pursuant to §7(4) is not immediately clear. A categorical answer cannot be given; presumably it depends on the concrete circumstances, e.g. considering the nature of the order and the possibility of the Reder/shipowner to initiate measures before orders are given. Regard should also be given to the desire to promote the motivation of the Reder/shipowner to implement measures himself. As the Reder/shipowner can submit claims to the fund, the State’s reimbursement claim may have to compete with these claims.

8.3 Limitation of the Duty to Take Action

A particular issue that arises in connection with the right to limit liability is whether the Reder/shipowner is entitled to limit his duty to take action, cf. the PA §§7(2), (4) and 37. In other words, if the limitation amount restricts the orders imposed by the Coastal Administration, and thereby constitutes an upper limit for the duty to take action.

In accidents of a certain magnitude, the Coastal Administration will usually undertake the clean-up operation and claim reimbursement from the Reder/shipowner. This reimburse-

²⁵⁵ *Serverrapporten* section 5.3.2.2.

²⁵⁶ Also in English law, cf. (1971) Lloyd’s Rep. 341 H.

²⁵⁷ NOU 2002:15 p. 15 and NOU 1980:55 p. 18.

ment claim is subject to limitation. Thus, if the claim exceeds the limitation amount, the Reder/shipowner will not be burdened with the excess costs. However, if the Coastal Administration orders the Reder/shipowner to undertake the measures cf. the PA §7(4), he must bear the associated expenses and may submit a claim to the limitation fund to partially recover the costs, cf. MC §§172a and 175a. Hence, if the Reder/shipowner could limit the duty to take action, this would represent a more economically advantageous option because the Reder/shipowner could refuse to take any further action and disregard the order.

On one hand, one may claim that such limitation is possible, due to the wording in §172a(1) which entitles limitation “regardless of the basis of the liability”. This phrase might imply that liability based on an issued order pursuant to the Pollution Act is also included. Furthermore, it may be held that not allowing limitation of the duty to take action would circumvent the limitation rules, as the Coastal Administration can inflict more extensive liability on the Reder/shipowner through issuing orders than it can through implementing the measures themselves and claiming reimbursement. This follows from the fact that the State’s additional claim may be limited, while the Reder’s/shipowner’s expenses would be submittable to the fund and settled by a dividend from the limitation amount. It is not desirable that the economic liability of the person responsible is dependent on the Coastal Administration’s choice of procedure. Consequently, refusing limitation of the duty might lead to arbitrariness and unpredictability from the Reder’s/shipowner’s point of view.

On the other hand, it may be argued that the wording of §§172 and 172a favours a different interpretation. The provisions use the term “claim”, which refers to the Reder’s/shipowner’s economic responsibility, more specifically, to *monetary claims*. This must be clear, seeing that the provisions concern costs and economic losses. The preparatory works support such an interpretation of the wording.²⁵⁸ Hence, the wording “regardless

²⁵⁸ The historical development evidences that the wording concerns *monetary claims*, see inter alia Ot.prp.nr.13 (1929) p. 10 and 56 which concerned the implementation of the Brussels Convention

of the basis of the liability”, refers to the basis of this monetary claim. That the basis for the monetary claim is an imposed order should therefore not imply that the issued order is subject to limitation.

Furthermore, the legislative history indicates that limitation of the duty to take action should not be admitted. Of special interest are the statements given in relation to the enactment of “act 17.June 2005 no 88”, which concerns limitation amounts relating to clean-up efforts. NOU 2002:15 contained a proposal for implementing a new provision 182e, regulating conduct barring limitation, with the purpose of clarifying the relationship between the right to limitation of liability and the responsibility for performing duties based in statute or in issued orders.²⁵⁹ The proposal was dismissed, *inter alia* because of objections from the Ministry of Environment, which asserted that it would lead to a disregarding of the duty to take action pursuant to the Pollution Act on behalf of the limitation rules in the Maritime Code.²⁶⁰ The NOU is also of interest when commenting on §179, which introduces the Reder’s right to submit the costs of his own measures to the limitation fund. When read in conjunction, the NOU’s presentation of the state of law seems to presuppose that the duty to take action is not limited by the limitation amount.²⁶¹

Moreover, the preparatory works of “act 12. June 2009 no 37”, which concerned increasing of the limitation amounts, provides additional guidance of the issue. The Ministry of Justice and Public Security emphasises in the proposition that the “...duty to take action according to the Pollution Act applies in full, regardless of whether the costs of the measures is higher than the limitation amount pursuant to the Maritime Code”.²⁶² Additionally, it states that;

1924, and Ot.prp.nr.13 (1963-1964) p. 9, which concerned the Brussels Convention 1957. See also NOU 1980:55 p. 15-16, concerning the implementation of the London Convention 1976.

²⁵⁹ NOU 2002:15 p. 40 and 46.

²⁶⁰ Ot.prp.nr.79 (2004-2005) p. 33.

²⁶¹ NOU 2002:15 p. 15-16 and 26-27.

²⁶² Ot.prp.nr.16 (2008-2009) p. 8.

“[t]he limitation amount in the Maritime Code has [...] no effect on the extent of the duty of the person responsible to implement measures pursuant to the Pollution Act”.²⁶³ These statements were endorsed unanimously by the Standing Committee on Justice.²⁶⁴

It is also of relevance that policy considerations adhere to the solution that the Reder/shipowner is not entitled to limit the duty to take action. That is, because it may cause practical difficulties to determine at which point in time the limitation amount is reached, and thus when the right to limit the duty arises. During a complicated operation, the existence of such a right would lead to uncertainty, seeing that the Reder's/shipowner's initial duty to take action would suddenly cease to apply.

An additional circumstance that one should be aware of is that if a right to limitation of the duty is admitted, this would also have consequences for the possibility to incur criminal liability, cf. the PA §§78(1) b) cf. 7. Considerations regarding coherence in the legislation therefore indicate that such limitation should not be allowed. Furthermore, the rationale behind many of the rules is that the Reder/shipowner shall be motivated to undertake measures himself.²⁶⁵ This rationale will, however, be directly contradicted if a right to limitation of the duty to take action is permitted.

The conclusion is therefore that the duty to take action is not subject to limitation, and the limitation rules will thus not restrict the orders issued by Coastal Administration. Consequently, the duties pursuant to the PA are still functioning, even though the limitation rules in the MC are applicable. The fact that this solution will entail a difference in the responsible party's economic liability depending on which procedure the Authorities chooses is unfortunate, but does not alter the conclusion.

²⁶³ Ibid.

²⁶⁴ Innst.O.nr.59 (2008-2009) p. 2.

²⁶⁵ See e.g. NOU 2002:15 p. 46 and Ot.prp.nr.79 (2004-2005) p. 29.

8.4 Conduct Barring Limitation

Limitation of liability is regarded as a distinct feature of maritime law. However, allowing such limitation may seem unreasonable if the liable party has caused the damages by reprehensible conduct.

Therefore, limitation of liability is not permitted if it is proved that the party entitled to limitation caused the damages “deliberately” or “through gross negligence and with knowledge that such damage would probably result”, cf. MC §§174 and 194(3). The provisions are interpreted in accordance with general principles of tort law, which implies that both actions and omissions are included.²⁶⁶

The first alternative, that the error must have been committed *deliberately*, means that the wrongful act must be intentional. In such situations the liability is clearly unlimited.²⁶⁷ The second alternative firstly prescribes that the error must be committed with *gross negligence*. According to case law, this implies that the action/omission represents “a clear deviation from ordinary reasonable behaviour” and that this behaviour is “particularly blameworthy” where the person is “significantly more to blame than where there is a question of ordinary negligence”.²⁶⁸ Thus, the main question is whether the deviation from ordinary conduct is sufficiently clear and blameworthy to lose the right to limitation.²⁶⁹ However, gross negligence is not enough, as the person additionally must have had the *knowledge that the loss would probably result*. Hence, the standard is set to *conscious* gross negligence.²⁷⁰ Consequently, the provision requires both that there must be a causal connection

²⁶⁶ NOU 2002:15 p. 24, Falkanger/Bull/Brautaset (2010) p. 194 and p. 212.

²⁶⁷ See ND-1979-27 (Despina).

²⁶⁸ Rt-1989-1318 p. 1322.

²⁶⁹ NOU 2002:15 p. 24.

²⁷⁰ Ibid p. 25.

between the actions/omissions and the loss, and that the actual loss appeared as a likely result of the reprehensible actions/omissions.²⁷¹

Seeing that the person who acted wrongfully must have acted intentionally or with gross negligence *and* with knowledge – at the present time – that damage would probably result, the threshold is set very high. Furthermore, it is not the right to limitation as such that is lost if the criteria are met, it is only the right to limit the losses deriving from the specific wrongful act/omission.²⁷² Accordingly, while the right to limitation will be barred for these losses, the right to limitation may be intact for other losses arising out of the accident. There must thus be a causal link between the loss and the act of privity.²⁷³

As a consequence it is necessary to separate between losses deriving from wrongful acts/omissions relating to the maritime casualty, and losses which occurs as a result of the subsequent risk that the maritime casualty entails.²⁷⁴ If a ship accidentally runs aground, the losses related thereto will be subject to limitation. However, if the person responsible does not take any additional steps to prevent or mitigate further damage, one might ask if the losses resulting from this omission are comprised by §§174 and 194(3), and therefore exempted from limitation.

In this respect, the independent duty to take action and the duty to carry out orders imposed by the Coastal Administration are naturally of interest. As a starting point, one must assess whether the failure to act in accordance with these duties are *deliberate* or *consciously*

²⁷¹ Ibid p. 22. As an illustration, see ND-1993-57 (Merikuljetustekniikka); the right to limitation applied because the liable party – which clearly had acted grossly negligent – did not understand that the actual loss would result.

²⁷² The requirement of a proximate cause is stricter under the present regime than in the previous convention, cf. Bredholdt/Martens/Mathiasen/Philip (2012) p. 263-264 and p. 317-319.

²⁷³ NOU 2002:15 p. 24.

²⁷⁴ Ibid p. 26-27.

grossly negligent, and that there is a causal link between the failure and the occurred loss. According to the preparatory works, there will “normally be a deliberate or grossly negligent breach of the duty to take action from the Reder” when the duty follows “directly from the legislation or is concretised by a specific order”.²⁷⁵ In these situations it is therefore a presumption that the Reder/shipowner had the necessary knowledge, and neglecting the duty represents a deliberate omission. The subjective criteria for losing the right to limitation are therefore fulfilled.

It should be emphasised that the subject of liability pursuant to §§174 and 194(3) is the “liable party”, which means that the error must be committed by a person with a right to limit liability. Generally, questions concerning who should be regarded as the liable party may cause some difficulties, as the Rederi usually is organised through some form of a company or corporation. This is essentially a question of identification; which company bodies and employees should be equated with the Reder/shipowner. The assessment is concrete, with the presumption that errors committed by management personnel with a fairly significant level of responsibility will result in identification.²⁷⁶ Thus, this will normally not cause any problems when an order is issued, as the board or persons at a senior management level would be the addressee of the order. However, in acute situations it is conceivable that other personnel, such as the master, may have a duty to take action, based on an order or in statute. The master’s failure to follow an order can as a starting point not be equated with the Reder/shipowner²⁷⁷, even when the Reder/shipowner serves as the master himself and acts in this capacity.²⁷⁸ The consequence of not identifying the acts/omissions of the master with the Reder/shipowner is that the limitation right will be intact for the Rederi, while the master will lose his right to limitation.

²⁷⁵ NOU 2002:15 p. 26.

²⁷⁶ Falkanger/Bull/Brautaset (2011) p. 194.

²⁷⁷ Lund (1966) p. 314.

²⁷⁸ ND-1958-122 (Polly).

Although the Reder/shipowner normally will lose the right to limitation when issued orders are not complied with, some reservations must be made. Firstly, the order must obviously be lawful and definitive.²⁷⁹ Secondly, if carrying out the requested measures is impossible for the person responsible, he will not lose right to limitation.²⁸⁰ This is in line with the long-established principle *impossibilium nulla obligatio est*.²⁸¹ Such impossibility might occur if the weather does not render it possible to initiate the imposed orders. That the weather can cause significant operational difficulties was experienced inter alia in the Godafoss- and Petrozavodsk-accidents. Thirdly, if it is certain that the ordered measures would not be suitable for the purpose, the omission is not comprised by §§174 and 194(3).²⁸² After all, in such a situation it is clear that carrying out the order would not have had any effect and it would accordingly not be reasonable to deprive the Reder/shipowner of his right to limitation.

²⁷⁹ NOU 2002:15 p. 27.

²⁸⁰ Ot.prp.nr.79 (2004-2005) p. 33.

²⁸¹ Hagstrøm (2011) p. 384.

²⁸² Ot.prp.nr.79 (2004-2005) p. 33.

9 Concluding Observations

Through the study conducted in this thesis, it is possible to provide some final remarks about the regulation of state intervention and claim for reimbursement in the wake of a marine oil spill incident.

For one, it is clear that maritime oil pollution is subject to regulation in several parallel and partly overlapping sets of rules, especially within the Pollution Act and the Maritime Code. As a consequence, the regulations are not easily accessible and stand out as complex and somewhat fragmented. With respect to the MC, the leeway of the authorities is limited as the regulations are based on conventions and must be practiced in accordance with the obligations it entails. Thus, amending the rules is not feasible. The authorities are, on the other hand, provided with more flexibility in relation to the Pollution Act. It would certainly be possible to amend the statute, so that the relationship between the rules concerning claim for reimbursement and claim for compensation gets elucidated. That the interrelation between these two central sets of rules is somewhat unresolved is surprising. A clarification would be natural either when the rules on compensation were incorporated in the act or subsequently.

Moreover, it is evident that the public authorities enjoy wide discretionary competence when intervening in marine oil pollution incidents. From the perspective of society as such, this is solely positive. The environment is so essential that it should be highly prioritised. However, from a Reder's (and the insurers) point of view, it may be argued that the judiciary should have a greater competence to review the discretion exerted, since it entails such dramatic consequences.

The Reder's legal protection is first and foremost secured by the right to limitation of liability. This principle is a distinct characteristic of maritime law, and in general contrary to the society's conceptions of reasonableness and righteousness. Only when the Reder has acted with a sufficient degree of culpability will he lose the right to limitation, and the polluter-pays principle is carried out in full also in marine oil pollution incidents.

A final observation is that the regulatory framework provided in the Pollution Act does not always seem to fit the reality of the shipping industry. The principal duties which are incumbent on the Reder pursuant to the PA are not practical when a maritime oil spill occurs. However, it must be borne in mind that the PA aims to be the general act concerning pollution in Norway, and it is therefore difficult to make a statute of such a generic character suit specifically for all types of pollution. After all, maritime oil pollution is just a small part of what the PA is intended to cover.

10 Table of References

Legislation

Statutes

Norway

The Public Administration Act	Act relating to procedure in cases concerning the public administration of 10. February 1967.
The Economic Zone Act	Act relating to the economic zone of Norway of 17. December 1976 no. 91.
The Pollution Act	Act relating to protection against pollution and relating to waste of 13. March 1981 no. 6.
The Partnerships Act	Act concerning unlimited liability partnerships and limited partnerships of 21. June 1985 no 83.
The NIS Act	Act relating to a Norwegian International Ship Register (NIS) of 12. June 1987 no. 48.
The Maritime Code	Norwegian Maritime Code of 24. June 1994 no. 39.
The Petroleum Act	Act relating to petroleum activities of 29. November 1996 no. 72.
Limited Liability Companies Act	Act relating to limited liability companies of 13. June 1997 no. 44.
Public Limited Liability Companies Act	Act relating to Norwegian public limited liability companies of 13. June 1997 no. 45.

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The Territorial Sea Act	Act relating to the territorial sea and the contiguous zone of 27 of June 2003 no. 57.
The Ship Safety and Security Act	Act relating to ship safety and security of 16. February 2007 no. 9.
The Harbour Act	Act relating to harbours and fairways of 17. April 2009 no. 19.
The Ship Labour Act	Act relating to employment protection etc. for employees on board ships of 21. June 2013 no. 102.
<i>European Union</i>	
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Directive 2004/35/EF	Directive 2004/35/EC of the European Parliament and of the Council of 21 April 2004 on environmental liability with regard to the prevention and remedying of environmental damage.
Directive 2006/12/EF	Directive 2006/12/EC of the European Parliament and of the Council of 5 April 2006 on waste.
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FOR-2008-06-27-744	Forskrift om melde- og rapporteringsplikt ved sjøulykker og andre hendelser til sjøs.
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FOR-2012-05-30-488	Forskrift om miljømessig sikkerhet for skip og flyttbare innretninger.
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Brussels Convention 1957	1957 International Convention relating to the Limitation of the Liability of Owners of Sea-going Ships and Protocol of Signature.
Bunker Convention	International Convention on Civil Liability for Bunker Oil Pollution Damage 2001.
Convention on Salvage	The International Convention On Salvage, IMO 1989.
Liability Convention	International Convention on Civil Liability for Oil Pollution Damage 1992.
London Convention	London Convention 1976 on Limitation of Liability on Maritime Claims.

Maritime Labour Convention	Maritime Labour Convention, signed in Geneva 23 February 2006, entered into force 20 August 2013.
MARPOL	International Convention for the Prevention of Pollution from Ships 1973.
Salvage Convention	1910 International Convention for the Unification of Certain Rules of Law related to Assistance and Salvage at Sea and Protocol of Signature.

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