Shipowners' vicarious liability under English and Norwegian law*

With an eye to technical failure of autonomous ships

Trond Solvang**

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** Professor, dr juris, Scandinavian Institute of Maritime Law, University of Oslo.

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Sjørettsfondet
University of Oslo
Scandinavian Institute of Maritime Law
P.O. Box 6706 St. Olavs plass 5
N-0130 Oslo
Norway

Phone: 22 85 96 00
E-post: sjorett-adm@jus.uio.no
Internet: www.jus.uio.no/nifs

Editor: Professor dr. juris Trond Solvang –
e-mail: trond.solvang@jus.uio.no

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1 Introduction

1.1 Main questions to be addressed

The topic of a shipowner's vicarious liability for the faults of its servants is fairly well covered under both Norwegian (and Nordic) and English law. The relevant legal sources are however somewhat dated and the practical reality of shipping is under development. This opens for a renewed discussion.

The topic is both practically and legally complex, involving a shipowner's liability in contract and in tort. Simply put: what is the class of persons for whom a shipowner becomes responsible if such person makes a mistake which leads to a defect in the ship's seaworthiness which in turn causes damage to either a cargo owner (in contract) or a third party claimant (in tort)? The question is deliberately put in this way, covering situations of both tort and contract, since the legal background leading up to it is to a large extent parallel under the two systems. In contract there are the Hague-Visby Rules – as incorporated into Norwegian and English law – providing for a duty by the shipowner to exercise due diligence to make the ship seaworthy. The question becomes: where is the line to be drawn for those persons who are deemed to act on the shipowner's behalf in fulfilling this duty? The question is similar under tort law: a shipowner is, as a starting point, made subject to a duty of due care to make the ship seaworthy so as not to be prone to causing damage – raising the question: where is the line to be drawn for those persons who are deemed to act on the shipowner's behalf in fulfilling this duty?

As mentioned above, these questions have been the subject of a fair amount of discussion under both Norwegian and English law, but practical realities make the topic apt for renewed discussion. Technical equipment of ever increasing sophistication is a source of increased relevance to accidents at sea – culminating with today's development of autonomous ships which, somewhat simplified, will rely exclusively on technically sophisticated automation systems in order to navigate and

operate. Since shipowners are generally not made subject to a system of strict liability for damage caused by ships, the question then becomes: would the suppliers of such equipment be deemed servants of the shipowner for the purposes of shipowners' vicarious liability?

This article does not purport to answer such questions in any detailed fashion. Rather, it sets out to provide some main criteria for answering them. Moreover, the article undertakes a comparative review of the position under Norwegian (and partly Nordic) law, and English law. Such a comparison is premised on the fact that English law has an influence on Norwegian law, particularly through the English House of Lords decision, the *Muncaster Castle*. That decision involved the type of question which forms the subject of our inquiry, in the area of contract law and application of the Hague-Visby Rules. However, it also illustrates, by way of its premise and reasoning, central questions pertaining to English tort law, since, for the type of facts in question, the legal sources in English contract and tort law are to some extent overlapping. Moreover, the *Muncaster Castle* decision has been the subject of a fair amount of debate also under Norwegian (and Nordic) law as to whether its result should be adopted – while also under Norwegian (and Nordic) law the decision is helpful for illustrating certain linkages between vicarious liability in contract and in tort.

This comparative review does therefore have multiple ramifications: it aims at illustrating linkages between tort and contract law in English and in Norwegian law, while also aiming at illustrating the potential influence of English law on Norwegian law, primarily in the area of contract law but also – as a matter of illustration – in tort law.

The article first looks at the *Muncaster Castle* in order to illustrate the said linkage between tort and contract law. It then proceeds by reviewing another English law case, the *Hopestar*, which illustrates the topic from a reversed side: tort law with linkage to corresponding questions under contract law – while at the same time pointing to methodological aspects of English law, which, from a comparative perspective, are of interest since they lack any real counterpart in Norwegian law. The article then turns to Norwegian law, by first looking at the position of tort law (as regulated

in the Maritime Code) and thereafter at contract law, with particular emphasis on the discussion of the potential influence of the *Muncaster Castle* on Norwegian contract law. The article concludes with a chapter on Norwegian tort law, discussing the relationship between the maritime tort law position concerning vicarious liability, and the corresponding position under general tort law (as regulated in the Torts Act).

On a methodological score the article particularly addresses modes of thinking underlying the legal position under both legal systems, and in both areas of law (tort and contract). For that reason, and for those purposes, the article contains a fair amount of quotes and detailed case summaries, not merely paraphrases of secondary sources (which, in turn, paraphrase primary sources). This pertains in particular to the English law review where there is more case law on point, and where case law constitutes precedents to a greater extent than what follows from the Norwegian (and Nordic) methodological tradition. Under the Norwegian law review the use of primary and secondary sources is more equally apportioned, with some in-depth inquiries into the academic work of Selvig (Det såkalte husbondsansvar, 1968) which goes to the core of the topic of the article.

1.2 Some premises for the discussion

As indicated above, our main area of interest concerns a shipowner's vicarious liability for suppliers of technical equipment to ships, and where such equipment in one way or the other leads to the ship causing damage in the course of the shipowner's operation of it. Some basic premises apply to the discussion.

First, the scenario relates to situations of technical failure of the ship, as opposed to human error by those who operate it.[1] A second premise is that the relevant failure is attributable to negligence by the supplier

[1] See as examples of what naturally could be categorized as technical failure, Solvang (2021) pp. 100–103. See also, Røsæg, Diabolus ex machina: When an autonomous ship does the unexpected, in Autonomous Ships and the Law (Ringbom, Solvang, Røsæg), 2021, p. 125 et seq., and Collin, Unmanned ships and fault as the basis of shipowner's Liability, ibid, p. 85 et seq.

of such equipment. Clearly, a shipowner (through his regular servants) may be negligent in not discovering such fault, or in not prudently ensuring that the ship is maintained in such a state as to avoid such fault from materializing into damage, etc. – but those instances do not involve intricacies of vicarious liability and are therefore left out of the discussion. Moreover, if the relevant technical failure is not attributable to anyone's fault, we are essentially outside of the scope of vicarious liability altogether, although some aspects may arise in relation to anonymous and/or cumulative faults.[2]

A further premise is that the shipowner is primarily not in charge of the development and production of the relevant equipment suffering from technical failure. In other words, we have in mind the traditional situation where a shipowner operates and runs the ship after having acquired it, either as a newbuilding or (although less practical at present with autonomous ships) by second hand purchase.

The premise is therefore that in a situation of newbuilding, the yard procures the relevant equipment as part of the building process, typically by engaging sub-suppliers to deliver it – or in cases of second hand purchase, that the relevant equipment is an integrated part of the ship being purchased. To complement the picture, we could also add the situation where the shipowner retrofits the relevant equipment to an existing ship, or where the shipowner replaces parts of or upgrades an existing technical system from a supplier (e.g. software or sensors to an automated navigational system).

The purpose of these premises is to align our questioning to situations typically being considered under the current state of law. At the same time these premises constitute a reservation to our analyses: if the organizational set-up of a shipowner is different in future development and operation of e.g. autonomous ships than what we here call traditional shipping, then our review and findings may become inappropriate.[3]

[2] Chapter 4.3.2.3.

[3] If a shipowner is closely involved in the technical development of autonomous systems to be incorporated in a new built autonomous ship, and is perhaps also involved in the set-up and running of the company to be entrusted the operation of an autonomous (including remote controlled) ship, our legal analysis might take a different direction.

2 English law – vicarious liability in contract and tort

2.1 Some basic principles related to tort

The following key principles of English law in the area of vicarious liability in tort law (also called *respondeat superior*) are particularly relevant for the present purposes:

First, for a party to be held vicariously responsible for the fault of its assistants (employees, servants or agents), such fault must itself be the commission of a tort, which in the present context means the tort of negligence.[4] This may seem obvious but is still of importance, since the typical risk profile of autonomous or other highly sophisticated ships may entail failure which is not attributable to anyone's negligence.[5]

The second principle is the *prima facie* rule that the assistants for whom a party (principal) is responsible do not include independent contractors retained by the party to carry out work as part of its service or activity.[6] This is important as it highlights basic differences between a party's vicarious liability in tort and in contract. In contract, the basic notion is that an obligor cannot escape liability for breach of contract by delegating contractual performance to someone else, irrespective of whether or not the delegate is an independent contractor. In tort, different notions apply; here the question essentially revolves around the scope of a party's duty of care, and such a duty may well be considered duly *performed* through proper delegation of tasks to an independent contractor.

This distinction is central to key aspects of the present inquiry, which to a large extent deal with liability in tort. It is also central because tech-

4 Witting, Street of torts, 2018, p. 588; Cooke, Law of tort, 2017, p. 513.

5 Solvang (2021) pp. 100–104.

6 Witting (2018) p. 589 also notes the exception for non-delegable duties, an exception which seems not applicable to our topic, see also pp. 607–608. See, moreover, the extensive discussion relating to the maritime sector in the *Hopestar*, [1952] 2 Lloyd's Rep. 105 (128–130).

nical failure of autonomous or other highly sophisticated ships would typically be attributable to independent contractors in their capacity as suppliers of technical equipment. There are however exceptions to this *prima facie* rule of non-liability for faults of independent contractors in tort. We shall see that such exceptions may be of relevance to the present topic.

A final distinction is mentioned which serves also as introduction to the discussion below of the *Muncaster Castle*[7] and the *Hopestar,* namely the relationship between torts at common law and duties imposed on a principal (shipowner) by statutes, involving torts at statutory law. In the *Muncaster* this concerned the intricate relationship between the basic principles of tort law at common law as combined with considerations of construction of the statutory instrument implementing the Hague Rules. The *Hopestar* contains corresponding intricacies between basic principles of tort law and statutory rules imposing ship safety requirements on the shipowner, to the protection of the ship's crew.

2.2 The *Muncaster Castle* – primarily contract but also tort

2.2.1 Background of the case

The case concerned cargo damage (of ox tongues) caused by sea water ingress through what turned out to be defective inspection covers on the ship's storm valves. This defect was in turn caused by faulty tightening up of nuts on the storm valves by an employee of a reputable repair yard retained by the shipowner a few months earlier in connection with regular classification survey and maintenance work on the ship. It was undisputed that the shipowner through its regular servants (technical managers and marine superintendent) was not to blame for not having discovered this faulty tightening up of the nuts in connection with taking over the ship from the repair yard, or in connection with inspection during the repairs.

[7] [1961] Lloyd's Rep 1 p. 57 HL and [1959] Lloyd's Rep 2 p. 553 CA.

It was therefore a question of the extent of the shipowner's due diligence obligation to make the ship seaworthy under the Hague Rules: did that obligation extend to negligence by an independent contractor retained by the shipowner, as in the present case?

Both the first and second instance held for the shipowner: the Commercial Court held it to be decisive that the shipowner's surveyor was not negligent in failing to detect the bad workmanship of the yard, and that the shipowner had discharged its burden of proving that it, through its regular servants, had exercised due diligence in making the ship seaworthy.[8]

The Court of Appeal held likewise: having regard to the technical nature of the work, the shipowner had fulfilled its obligation by entrusting the vessel to a competent firm of ship repairers. As part of the reasoning it was held that the act of retaining a reputable yard was in performance of, and not in delegation of, the shipowner's obligation to exercise due diligence to make the ship seaworthy.

Upon further appeal, the House of Lords reversed the decision, not on the basis that English common law tort principles of vicarious liability had been wrongly applied by the lower courts, but upon a different approach to the construction of the Hague Rules.

The reasoning of the Court of Appeal and the House of Lords merit further attention, not least because the common law position as set out by the Court of Appeal bears a striking resemblance to the legal position as expressed under Norwegian law.

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[8] It may be noted that the Court did not resort to any of the 'legal techniques' discussed in Solvang (2021) p. 103–104 of shifting the burden of proof or adopting the doctrine of *res ipsa loquitor* to reach the result of holding the shipowner liable without any concrete finding of fault. The only case of which the author is aware where the doctrine of *res ipsa loquitur* was tentatively applied to situations of unseaworthiness, is the *Eurasian Dream*, [2002] Lloyd's Rep p. 719, where the Commercial Court made statements to the effect that unseaworthiness is in itself an indication of someone having acted negligently (p. 744). However, that view seems not to have been adopted by the higher courts, and it seems to run counter to the fact that a defect of the ship may well be latent in the true sense (as further elaborated below). Moreover, it dodges the very question up for decision in the *Muncaster Castle*, namely for whose faults a shipowner would be vicariously liable.

2.2.2 The decision of the Court of Appeal[9]

The position of the Court was put succinctly by Wilmer L.J. who stated:

> "Where the work to be done is of a specialized nature, outside the course of a carrier's ordinary business, it seems to me quite unreal to say that the carrier is delegating his duty to exercise due diligence; on the contrary, the very fact of employing a skilled and competent contractor may amount of itself to a performance of that duty. The question must be one of fact, depending on the nature of the work to be performed."[10]

On the facts of this case the repair work was found to be of sufficiently specialized nature to justify a finding that the shipowner was not liable.[11] Fairly strong words are used in support of the correctness of this approach, and the decision was unanimous with concurrent reasoning in the speeches by the respective Justices.

As part of its reasoning the Court tested out the consequences of a different position; that a shipowner be liable for whatever fault made by anyone in the course of the ship's lifetime: "To hold the contrary would, as it seems to me, lead to absurd results which cannot have been in the contemplation of those who framed the Rules. The carrier, even though he may only be a purchaser at second hand, would have to be held liable for any defective workmanship in the original building of the ship, or in any repairs carried out at any time in the ship's history, and equally for any defective equipment or spare parts supplied at any time in the ship's history, notwithstanding that the defects might be latent to anybody but the original builder, repairer or supplier, and notwithstanding that such person might be far removed from the carrier by a chain of contractors and sub-contractors. It would in my judgment be absurd to construe the Rules in such way as to render it thus virtually impossible for a shipowner ever to discharge his obligation."[12]

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9 [1959] Lloyd's Rep 2 p. 553.

10 P. 585.

11 In the House of Lords, however, this was subject to discussion: the removal and tightening of storm valves was not in itself of a specialized nature. This particular task could be performed by anyone, as it was actually performed by the ship's crew following the event of cargo damage – p. 80 of the House's decision.

12 P. 581.

This position was also supported by precedent, in the form of the *Angliss* case from 1927,[13] where the Commercial Court (Justice Wright) had held that a shipowner was not liable for faults by the building yard, and with *obiter* remarks that the same would ensue if faults of a certain nature were made by a repair yard which had been retained, as an independent contractor, by the shipowner. This result was held to be in line with common law tort principles taken also from cases outside the realm of shipping, e.g. in road accidents caused by defective motor vehicles.

The case *Philips v. Britannia*[14] was referred to. Here a wheel came off a lorry and caused an accident. The car owner had sent the lorry to its manufacturers to have a defective axel repaired. The car owner was not held liable for the negligence by the manufacturer's employee. There was a duty, not to make the car reasonably fit for the road,[15] but to take reasonable care to have it fit for the road, and in that respect "the duty is discharged by the owner of the vehicle who puts it into the hands of a competent repairer with instructions to do what is necessary to put it in a fit state to use the road."[16]

Furthermore, when reviewing such common law cases from other areas than maritime law, the Court pointed to a general distinction to be made between what could be characterized as specialized work lying outside a shipowner's (or other defendant's) area of expertise, thus justifying retention of independent contractors for whose fault the defendant would

13 [1927] 28 Lloyd's Rep. 202.

14 [1923] 1 K.B. 539.

15 Which would have entailed strict liability, similar to the common law strict liability for seaworthiness imposed on common carriers, before this liability was replaced by the Hague/Hague-Visby Rules, providing for a duty to exercise due diligence to make the ship seaworthy.

16 P. 556. That case is of date (from 1923) but under English law, traditional fault based rules (combined with compulsory insurance) are still retained in respect of car accidents. Witting (2018), p. 605, illustrates how claimants may depend on concepts of agency to recover under the insurance of the car owner when the car is lent to another driver who causes the damage through negligence. From a Norwegian perspective this seems obsolete as damage caused by motor cars has for decades been governed by strict liability combined with compulsory insurance, see Car Liability Act, 1961, s. 4.

not be liable – and work lying within the defendant's area of expertise, leading to vicarious liability for an independent contractor's fault.[17]

Into the first category falls the *Haseldine v. C. A. Daw & Son*[18] where a landlord retained a competent firm of engineers to periodically inspect, adjust and report on the lift in the building. A worker of the firm negligently failed to adjust it, which caused personal injury to a third party visitor. The claim against the landlord failed: "The invitor [landlord] is bound to take that kind of care which a reasonably prudent man in his place would take – neither more or less."[19] Another example of this category concerns bailment: in *Searl v. Laverick*[20] a carriage was destroyed during storage in a building which collapsed due to an independent contractor, engaged by the bailee, having been negligent in erecting it.[21] The bailee was held not to be liable for the fault of the contractor. An example of the second category is the case *Woodward v Mayor of Hastings*:[22] Cleaning of snow from a schoolyard was left to an independent contractor who acted negligently, leading to personal injury to a third party visitor. There was no "esoteric quality" needed for performing snow cleaning work, hence the owner of the building (a municipality) was held liable.

These non-shipping common law cases were not binding precedents but carried persuasive value only. However, the Court believed that the test of due care should not in itself differ between those cases and the duty to exercise due diligence to make a ship seaworthy under the Hague Rules.

According to the Court: "[The cases] were referred to by way of analogy only, but, so far as they go, they weigh heavily in favour of the argument for the shipowners. So long as we remember that we are proceeding only by way of analogy I think that it is useful to briefly examine the principles on which the Court has acted in cases where it has been sought to fix liability upon a person under a duty to exercise reasonable care for the faults of an independent contractor. As already stated, I can

17 Earlier authorities show that difficult lines had to be drawn, for example in the *Paterson Steamships, Ltd. v. Robin Hood Mills, Ltd.,* (1937) 58 Ll.Rep. 33, Privy Councel, where an independent contractor adjusting the ship's compass was deemed to be the shipowner's servant due to the nature of the work – see the discussion by the House of Lords in the *Muncaster,* p. 70–71.

18 [1941] 2 K.B. 343.

19 As quoted from the *Haseldine* – at p. 571 of the *Muncaster.*

20 [1873] L.R. 9 Q.B. 122 – at p. 584.

21 P. 584.

22 [1945] K.B. 174.

see no distinction in principle between an obligation to exercise due diligence, such as Art. III, Rule 1, of the Hague Rules imposes on a carrier, and an obligation to exercise reasonable care, such as the law imposes, for instance, upon a bailee in favuor of a bailor; upon a master in favour of his servant;[23] or upon an invitor in favour of an invitee."[24]

Moreover, the Court emphasized that it would have reached its result in favour of the shipowner even without such supportive views from other areas of common law and from the maritime law authority of the *Angliss*, due to the specialized nature of the work undertaken by the repair yard in the *Muncaster Castle*.

Again, according to the Court: "If the matter were *res integra*, therefore, and uncomplicated by authority, I should find it impossible to accede to the argument on behalf of the cargo-owners, or to hold, as a matter of construction of the Rules, that whenever some contractor's workman puts in bad workmanship in carrying out work on the ship, that is necessarily conclusive to show a want of due diligence on the part of the shipowner. Do the authorities compel me to hold otherwise? In my judgment they do not; on the contrary, they appear to me to lead to the same result."[25]

Finally, the Court also reviewed case law from other relevant Hague/Hague Visby jurisdictions but found no sufficient support for a consistent tendency in favour of the cargo owners, capable of disturbing what the Court found to be the governing English common law position.[26]

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[23] See *Davie v. New Merton Board Mills* [1959] 2 W.L.R. 331: An employer is under a duty to take reasonable care to provide a reasonably safe tool for use by his employee. However, the employer is not liable for personal injury to the employee in circumstance where the tool had been purchased from a reputable supplier who had obtained it from a reputable manufacturer and with the defect being of such nature that it could not be discovered by anyone but the original manufacturer – as discussed by the Court at p. 566 and p. 582 of the *Muncaster* – and as illustrated in more detail in the *Hopestar*, below.

[24] P. 583.

[25] P. 581.

[26] P. 569–570.

2.2.3 The decision of the House of Lords

The House of Lords reversed, not only on the result but essentially on every aspect of the reasoning adopted by the Court of Appeal.

This concerned, first, the significance given to foreign law decisions shedding light on the likely intent of the draftsmen of the Hague Rules, back in 1924. The House went much deeper into an analysis of such cases, dealing with pre-Hague Rules legislation in the U.S., Canada and Australia,[27] and found that since these cases primarily went in the cargo owners' favour on similar facts to those in the *Muncaster*, considerations of international harmonization of the understanding of the Hague Rules pointed towards a finding in the cargo owner's favour also in the present case. This at the same time meant that the influence given by the Court of Appeal to English common law decisions was toned down.

Lord Simonds quoted from the earlier case, the *Huorani v. T. and J.*:[28] "I think it is very important in commercial interests that there should be uniformity of construction adopted by the Courts in dealing with the words in statutes dealing with the same subject-matter, and it is a matter of great satisfaction to me to find that the decisions of these Courts seem to correspond to the decisions given by the Courts of the highest authority in the United States."[29]

Second, and as a consequence of the above, the House stressed the importance of a distinction being made between common law tort rules relating to vicarious liability and the ensuing duty of care, and the present case dealing with statutory tort rules incorporating the concept of duty of care, i.e. due diligence by the shipowner to make the ship seaworthy.

Lord Keith of Avonholm stated: "There is nothing novel in a statutory obligation being held to be incapable of delegation so as to free the person bound of liability for breach of the obligation and the reasons for this become, I think, more

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27 The American Harter Act, 1893, the Canadian Water Carriage of Goods Act, 1910, the Australian Sea-Carriage of Goods Act, 1904 – referred to at p. 67.

28 (1927) 28 Ll.L.Rep. 120, p. 125.

29 Lord Simonds at p. 70. See also Lord Merriman at p. 74; Lord Radcliffe at p. 83; Lord Keith of Avonholm at p. 86; Lord Hodson at p. 89.

compelling where the obligation is made part of a contract between parties. We are not faced with a question in the realm of tort, or negligence. [...] *The question, as I see it, is not one of vicarious responsibility at all. It is a question of statutory obligation*. Perform it as you please. The performance is the carrier's performance."[30] (author's emphasis)

Despite this principled distinction between common law tort rules and statutory obligations, the House realized that the nature of a duty of care may be closely interlinked in the two.[31] Since that was so, it became critical to determine the scope of servants for whom the principal (shipowner) would be responsible within the two sets of rules. In that respect the House criticized the legal test adopted by the lower courts in deciding – in a ship repair situation – when a shipowner would become liable for a repairman's fault. The House found the criterion of what belongs to a shipowner's 'ordinary course of business' (or similar) unworkable as a matter of legal efficacy.

Lord Simonds stated: "Having [set out the facts], I must say at once that I find it impossible to distinguish between one independent contractor and another, or between one kind of repair and another. I have no love for the argumentative question 'Where is the line to be drawn?', but it would be an impossible task for the Court to examine into the facts of each case and determine whether the negligence of the independent contractor should be imputed to the shipowner. I do not know what criterion or criteria should be used nor were any suggested. Take the case of repair: Is there to be one result if the necessary repair is slight, another if it is extensive? Is it relevant that the shipowner might have done the work by its own servants but preferred to have it done by a reputable shipyard? These and many other questions that will occur to your Lordships show that no other solution is possible than to say that the shipowners´ obligation of due diligence demands due diligence in the work of repair by whomsoever it may be done."[32]

Despite such criticism, the House left open what criterion should or might instead be adopted at common law. The House's decision was confined

30 P. 87. To the same effect, see e.g Lord Radcliffe at p. 82.

31 See e.g. Lord Keith of Avonholm at p. 86–87.

32 P. 71 – see the corresponding discussion, or dilemma, under Norwegian and Nordic law, chapter 3.2 below.

to determining the position under the Hague Rules. At the same time, the House indicated that some of the earlier cases at common law may be open to reconsideration.

Commenting on the earlier authorities, Lord Merriman stated: "No one, I think, doubts that, in some circumstances, a defendant can escape liability for the negligence of an independent contractor; nor could he doubt that in other circumstances he cannot so escape, for he would be faced by such authority as [ref]. I do not think it necessary to try to reconcile all the cases on this subject. It is surely sufficient to say that in the context of the Hague Rules it is patent that the obligation of the shipowner is in the latter category."[33]

Similarly Lord Hodson: "It may be, however, that the distinction between the last two cases based on specialized work being necessary in case of the repair of a lift and being unnecessary in case of the cleaning of a school may have to be reconsidered.[34] Whether this is so or not I do not find such cases of assistance in reaching a conclusion in the matter which the House has now to decide."[35]

More importantly, for present purposes relating to autonomous ships, is that the House of Lords considered that although a carrier is responsible under the Hague Rules for faults made by independent contractors retained for ship repair purposes, a carrier would *not* be responsible for faults made before the ship came into its possession or 'orbit' – involving e.g. faults made by the yard during the course of building of the ship, or faults made to the ship during a previous owner's time of ownership. The reasoning was essentially threefold: partly an adoption of the reasoning in the *Angliss*,[36] partly more free standing policy considerations concerning a shipowner's lack of control over such pre-possession events,[37] and partly more semantic arguments: a shipowner cannot be responsible for not making a ship seaworthy until he has a ship to make seaworthy.[38]

33 P. 72.

34 The two cases are referenced under the discussion of the Court of Appeal, above.

35 P. 91.

36 See the discussion of the Court of Appeal, above.

37 Lord Radcliffe at p. 85.

38 Lord Keith of Avonholm at p. 87.

This finding that a shipowner will not be held vicariously responsible for faults made to the ship before it comes into his 'orbit' or possession, is made without reservation by the House, and was even conceded to by the cargo side in the *Muncaster*.

According to the case report Counsel for the claimant stated: "The responsibility under the Hague rules did not attach to a shipowner where a ship under construction, or while in previous ownership, had been rendered unseaworthy in a respect which was not discoverable by the shipowner on reasonable examination either at the time of takeover or subsequently. That presented a sensible construction and a fair result. It protected so far as possible the interests of those who entrusted their goods to carriage in ships, but did not impose any impossible or over-strict burden upon a shipowner who had bought a ship or had one built. Counsel conceded that there were obvious difficulties where there was a new building, as in the *Angliss* case or a purchase. It would obviously be unjust and unfair to seek to make a shipowner responsible for something done by somebody else, when the ship was in previous ownership or in course of being built, which he (the shipowner) had no opportunity even of ascertaining. Looking at the matter in that light there was a consistency of approach with the view that the Hague Rules protected the shipowner against latent defects."[39]

Such a finding, which to a large extent was taken from the reasoning of the *Angliss*, is seemingly applicable to a shipowner's duty to take reasonable care to make a ship seaworthy also at common law – as this is further illustrated at common law in the *Hopestar* (below) where cross-reference is made to the *Angliss*.[40]

Lord Merriman based his view on what he considered to be the *ratio* of the *Angliss*, and the other Justices concurred: "The *ratio decidendi* can be found in the passage that follows. He [Mr. Justice Wright in the *Angliss*] pointed out that the carrier might not be the owner of the ship but merely the charterer; he might not have contracted for the building of the ship, as in the *Angliss*, but merely have purchased her, possibly years after she had been built, and added: '[…] In the two latter cases the builders and their men cannot possibly be deemed to have been the agents or servants of the carrier and it is illogical that there should be such difference in the

[39] P. 63.

[40] See also Atiyah, Vicarious Liability in the Law of Torts, 1967, p. 341.

carrier's obligations merely because he has bought the ship by the method of contracting with the builders to build it for him. In addition, if the carrier were to be held liable for the bad workmanship of the builders´ men, he might equally be held liable for bad workmanship by the men employed by the various sub-contractors who supply material for the builders, such as steel-workers in furnaces and rolling mills, or who supply special articles such as castings, pumps and proprietary machines, which would involve an almost unlimited retrogression.'"[41]

This was, according to Lord Merriman, the *ratio* of the *Angliss*, and he submitted that such problems of 'unlimited retrogression' would not occur in situations of repairs: "[T]here is, in my opinion, no question of undue retrogression in attaching to the shipowner responsibility for a person in the employ of those to whom he has entrusted the repair of his own ship."[42]

Lord Radcliffe pointed out that the fact that a shipowner would not be responsible for faults made to the ship before it came into his 'orbit', was not transferable to situations of ship repairs, which were within the shipowner's 'orbit': "It is, I think, impossible to transfer these considerations which are apposite to the building of ships to the case of the survey and repair of a ship which is already in the service of a carrier. There the duty to have the necessary work done is directly upon the carrier from whatever moment of time is chosen as the date when the duty attaches and whatever is done is necessarily done by agents on his behalf."[43]

Although the House held that a carrier's vicarious liability extended to faults made by a repair yard, it is nonetheless confined to faults made by workmen of the yard. The House made express reservation for instances of failure in sub-supplies, e.g. in respect of defects in stock parts used by the repair yard as part of its work. A shipowner's liability for such events would lead to an "almost unlimited retrogression" of liability.[44] The cargo side conceded to such an understanding.

The case report states: "Answering Lord Merriman, Counsel agreed that if a repairer, on his own, engaged a sub-contractor to do something or provide something, the shipowner would not be responsible for some latent defect in the article provided by the subcontractor. That was not the present case, however."[45]

41 P. 77.

42 P. 77.

43 P. 85.

44 See the description given in the above quote from the *Angliss*.

45 P. 63.

This, in turn, brought about the concept of latent defects leading to unseaworthiness of the ship. Cargo damage caused by latent defects is expressly exempted from the carrier's liability under Hague/Hague-Visby Rules Art. IV litra (p), which we shall later see is brought up for discussion also under Nordic law. Somewhat simplified: If a shipowner were to be held responsible for any person making a mistake leading to defects in the ship – throughout its history, including its building stage – this would render the liability exception for latent defects virtually void of meaning.

The House made in this respect a distinction between latent defects in the 'strict sense', that is, defects in the ship's seaworthiness not attributable to anyone's fault[46] – and latent defects in the 'ordinary sense', that is, defects attributable to someone's fault but where this 'someone' does not belong to the class of persons for whom the shipowner would be responsible.

The House adopted both of these meanings: faults made to the ship before it came into the shipowner's 'orbit' or stemming from defective (sub-)supplies during repairs, would, if not being reasonable discoverable by the shipowner or his regular servants, be considered latent in the 'ordinary sense', so exempting the shipowner from liability. On the other hand, defects resulting from bad workmanship in repair situations would have to be latent in the 'strict sense' for the shipowner to be exempt from liability.

According to the case report, Counsel for the defendant shipowner argued as follows: "After examining the Hague Rules and the acts incorporating them, Counsel submitted that if a carrier was protected only in the case of a latent defect [in the above stated strict sense], the protection given by the Rules was extremely limited and illusory. The body of the Rules was made up of rights and immunities, responsibilities and liabilities, and the rights conferred by Acts which incorporated the rules

[46] This could pertain to the concept of seaworthiness itself: a ship built according to prevailing standard of ship safety could nevertheless turn out to suffer from latent defects but without this being attributable to anyone's fault; the state-of-the-art knowledge at the time could simply turn out to be insufficient.

should not be whittled away so that the position of carriers was put back to that which existed before the Acts were passed."[47]

To this Lord Keith responded later in the judgment: "The Hague Rules abolished the absolute warranty of seaworthiness. They substituted a lower measure of obligation. The old law no doubt worked hardly on shipowners and charterers, in the absence of exception or exclusion. The change in law, not confined entirely to England, operated to afford relief to shipowners, as well as some protection to shippers. It would, however, be a most sweeping change if it had the result of providing carriers with a simple escape from their new obligation to exercise due diligence to make a ship seaworthy. […] The carrier will have some relief which, weighed in the scale, is not inconsiderable when contrasted with his previous common-law position. He will be protected against latent defects, in the strict sense, in work done on his ship, that is to say, defect not due to any negligent workmanship of repairers or others employed by the repairers[48] and, as I see it, against defects making for unseaworthiness in the ship, however caused, before it became his ship, if these could not be discovered by him, or competent experts employed by him, by the exercise of due diligence."[49]

An observation of general nature is, moreover, that determination of the scope of a shipowner's vicarious liability cannot be made in the abstract without looking into any given legal system and the idiosyncrasies involved therein. The *Muncaster* gives good illustration, e.g. with respect to the Court's detailed discussion of what constitutes the *ratio decidendi* of the earlier *Angliss* case.

Lord Merriman submitted that the Court of Appeal in the *Muncaster* was misled by analyses of the *Angliss* in earlier House of Lords cases, when taking the view that faults made by workmen at a repair yard must be likened with those of a building yard: "In my opinion, this ignores the *ratio decidendi* of *Angliss*, which is based upon the consideration that whether a ship is built for, bought by, or chartered to

47 P. 64. This prior legal position contemplates the common law position whereby a carrier's liability was close to strict, with an absolute warranty of seaworthiness, as taken from the general rules of liability in bailment.

48 As examples of failure of ships not (necessarily) attributable to anyone's negligence, see Solvang (2021) pp. 100–104.

49 P. 87.

the carrier, he should not be held liable for bad workmanship for which he had no responsibility before the ship came into his possession."[50]

Finally, a principled discussion of interest concerned the proper approach to be taken in determining the scope of a shipowner's vicarious liability under the Hague Rules. One such approach would be to start by analyzing the nature of the duties of care imposed on the shipowner, as generally found in the common law tort cases. This approach would, according to the House (Lord Radcliffe's speech), in the present case likely lead to the shipowner not becoming liable.

Lord Radcliffe stated: "Now, I am quite satisfied that, treating the carrier as a legal person, a limited company whose mind, will and actions are determined by its officers and servants, they did nothing but what they should have done as responsible and careful persons in the carrying business. They were not themselves in the repair business and there is no reason why they should have been, but they were mindful of their duty to have their ship in good order for its voyage or voyages and they […] entrusted her to a ship-repairing company of repute […]. I see no ground, therefore, for saying that the carriers themselves were negligent in anything that they did. If the content of their obligation is that they should, as a legal person, observe the standard of reasonable care that would be required at common law in a matter of this sort, which involves skilled and technical work, and if there is nothing more in their obligation than that, then I should not regard them as in default or, consequently, as liable to the cargo owners."[51]

Alternatively, one might start from the cargo owners' perspective by asking what was in their reasonable expectation as to a carrier's exercise of due diligence to make the ship seaworthy, and let the answer to such an inquiry determine the scope of a carrier's liability.

Lord Radcliffe: "But there is, on the other hand, a way of looking at the intrinsic nature of the obligation that is materially different from this. It is to ask the question, when there has been damage to cargo and that damage is traceable to unseaworthiness of the vessel, whether that unseaworthiness is due to any lack of diligence

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50 P. 81. Similarly Lord Keith of Avonholm at p. 89. We revert to this point about in-chartered ships, below.

51 P. 81–82.

in those who have been implicated by the carriers in the work of keeping or making the vessel seaworthy. […] An inquiry on these lines is not concerned with distinctions between carelessness on the part of officers or servants of the carriers, or their supervising agents on the one hand and carelessness on the part of their contractors or those contractors' contractors on the other. The carrier must answer for anything that has been done amiss in the work. It is the work itself that delimits the area of the obligation, just as it is the period 'before or at the beginning of the voyage'[52] that delimits the time at which any obligation imputed to the carriers can be thought to begin."[53]

The House (Lord Radcliffe) expressed doubt as to what approach was the more appropriate in the context of the Hague Rules, but found that policy considerations pointed in the direction of the latter.

Lord Radcliffe stated, first: "If one had to choose between these two alternatives without any background in the way of previous authority or opinion with regard to the interpretation of this section of the Hague Rules, I think it would be very difficult to know which way one ought to turn."[54] He then proceeded to discuss the policy considerations pointing towards the second alternative: "I should regard it as unsatisfactory, where a cargo-owner has found his goods damaged through a defect in the seaworthiness of the vessel, that his rights of recovering from the carrier should depend on particular circumstances in the carrier's situation and arrangements with which the cargo-owner has nothing to do; as for instance, that liability should depend upon the measure of control that the carrier had exercised over persons engaged in on surveying or repairing the ship […]."[55]

These considerations are basically founded on the notion that since it is the shipowner who decides the arrangements concerning maintenance and repair works of his ship, the shipowner should also bear the risk of any faults made, by whomever, in the course of the arrangements thus chosen.

Although perhaps appealing at first sight, these latter considerations are in the author's view not entirely persuasive. The reason is, first, that

52 With reference to the Hague Rules Art. III.

53 P. 82.

54 P. 82.

55 P. 82–83.

since under English law a carrier's liability does not extend to faults made to the ship before it came into the shipowner's 'orbit' or possession (and thus becoming what may be labelled 'latent defects'), this approach becomes a mere half-way-house in favour of the cargo owners; to them it makes no difference whether a defect of the ship stemmed from a time before or after the ship came into the shipowner's 'orbit' or possession. Second, and on a general basis, such an approach of taking as a starting point a claimant's reasonable expectations, does – in the realm of liability for negligence, as here – typically relate to a defendant's degree of care in the interest of the claimant, not to the scope of servants for whom a defendant should be considered liable.[56] We shall later revert to these points under Norwegian law.

As a brief epilogue to the *Muncaster* it may be mentioned that the shipping industry reacted negatively to the House of Lords' decision, proposing through CMI[57] the introduction of an '*anti-Muncaster clause*', hence through contractual means bringing the legal position back to the more facts specific functional test as applied by the Court of Appeal. This initiative was eventually abandoned.[58]

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[56] The point will be further illustrated relating to the Norwegian Torts Act section 2-1 (below) to the effect that the required degree of care may well be influenced by a claimant's reasonable expectations, but that is a separate point from for whom the defendant might be vicariously liable. Under the scope of the Torts Act section 2-1 a defendant would as a main rule be responsible only for faults made by his employees, not those of independent contractors. Moreover, the relevant expectations by a claimant involving harm caused by ships, would, again, concern the prudent conduct by employees or others performing work in the service or the ship/shipowner (the Maritime Code section 151), not the state of quality or safety of a ship in itself; the ship may be unseaworthy (thus 'act unexpectedly') without anyone being at fault.

[57] Comite Maritime Internationale – the international maritime law organization originally drafting the Hague Rules.

[58] Støen, Kontraktshjelperidentifikasjon ved sjørettslig transportansvar. Den engelske dommen 'The Muncaster Castle' vurdert i en nordisk-rettslig ramme, MarIus nr. 464, 2016, p. 49.

2.3 The *Hopestar* – primarily tort but also contract

2.3.1 Background of the case and the Court's main findings

In the review of the *Muncaster* we saw that case law from common law pertaining to vicarious liability, formed an important part of the premises to the discussion of the corresponding question within the ambit of contract law and construction of legislation based on the Hague/Hague-Visby Rules. This was particularly so in the Court of Appeal's discussion but also in the discussion by the House, although the House questioned whether some of the authorities – from areas other than maritime law – were ripe for reconsideration.

This interlink between case law pertaining to the Hague/Hague-Visby Rules and the position at common law, exists also the other way around. An example is the *Hopestar*.[59] This case was referred to in illustration of the common law position by the Court of Appeal in the *Muncaster*, and the Court in the *Hopestar* uses case law taken from the Hague/Hague-Visby Rules as authority to illustrate the common law tort position. Moreover, the *Hopestar* illustrates rooted notions of vicarious liability and its scope relating to independent contractors at common law, and it contains methodological aspects of interest from a Norwegian law perspective. The case may perhaps be of limited authoritative value since it is a Commercial Court decision[60] and much of the discussions were made *obiter* – but its illustrative value merits review.

The freighter *Hopestar*, including its 40 crewmembers, was lost in the North Atlantic with no trace as to the immediate cause of the incident; there was e.g. no emergency radio message transmitted. A claim for damages against the shipowner was made by the wife of one of the deceased crewmembers.

The case primarily hinged on causation. The Court found the most likely cause of the casualty to be that the ship had hit a floating mine,

[59] Lloyds' Rep. [1952] 2 105.

[60] However, the case was decided by the influential Justice Devlin, later appointed Lord Justice of the Court of Appeal.

rather than, as argued by the claimant, that it was unseaworthy by reason of structural weaknesses which had caused the ship to sink while encountering rough weather, and that – as argued by the claimant – the shipowner was vicariously liable for the mistakes leading to such alleged unseaworthiness.

Since the Court held the most likely cause to be the striking of a mine,[61] the unseaworthiness issue was not authoritatively decided, but important *obiter dicta* were made. The Court found that the ship did suffer from structural weaknesses in terms of lack of longitudinal strength but that these weaknesses were not sufficiently severe to make the ship incapable of withstanding the prevailing stresses from weather and sea conditions. Despite this finding of lack of causation between such unseaworthiness and the casualty, the Court elaborated on the background of the structural weaknesses, and found that they were attributable partly to errors committed during the building process, and partly to errors committed during a subsequent modification to the ship.

As to the essential facts, the Court stated: "If on the other hand, the minimum freeboard, as happened in the case of the *Hopestar*, is erroneously allotted to a vessel of insufficient strength, the deficiency in strength can be conveniently described by a percentage figure below 100 per cent.[62] […] By reason of errors or omissions, the responsibility for which I have to investigate, the conventional strength of the *Hopestar* as built in 1936 was only 91.6 per cent. of what it should have been; and by reason of some alterations made in 1947 it was further reduced to 85 per cent.[63] […] She could have been 15 per cent. stronger and therefore safer. But that does not mean that she was not strong enough to withstand the stress of wind and wave which she in fact encountered on her last voyage. That involves a calculation of stresses and depends very largely on the distribution of her load at the material time."[64]

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61 The Court is aware of the fact that such striking was, in general terms, extremely unlikely to occur but discusses the evidentiary problems involved when there is genuine uncertainty as to what in fact happened, and with the Court needing to reach a decision on the facts as to the most likely cause – see below.

62 P. 122.

63 P. 123.

64 P. 127.

The errors during the modification to the ship were found to have been made by servants of the shipowner, for whom the shipowner (as employer of the deceased) would have been vicariously liable if there had been causation with the casualty. These errors consisted in miscommunication between the agents/managers of the shipowner in connection with the furnishing of structural data of the ship to the repair yard performing the modifications.

The errors during the building process were, on the other hand, found to have been committed by the classification society's (Lloyd's Register) surveyor in connection with measurement and calculation of steel thickness and hull strength, after the ship's design had been duly approved by the classification society pursuant to its safety requirements. The Court found that the shipowner (employer) would *not* have been vicariously responsible for the mistake made by the surveyor (if there had been causation with the casualty), and this is the legal topic now to be addressed in some detail.

2.3.2 Questions of vicarious liability for the classification society as independent contractor

This discussion involved the duty of care owed by an employer to its employee, which at the time was governed by common law[65] and which, as a starting point, consisted of a non-delegable duty; an employer cannot rid himself of that duty by delegating safety related tasks to independent contractors. According to the Court, such principles were however not absolute. They had to be assessed on the basis of the facts of any given case, taking into account the nature of the role of the person having made the mistake, and the nature of the employer's duty of care in that respect.

The Court stated: "The last question […] is whether the defendants are responsible for the errors of Lloyd's Register surveyor in the one instance and the omission of the repairers in the other. The question is not answered by compiling categories of

[65] In a Norwegian law context this would be statutorily regulated through the social security scheme for workers' entitlement to compensation in work related accidents (yrkesskadetrygd).

independent contractors such as builders, repairers, architects and surveyors, and saying that some are and some are not categories for which the employer is vicariously liable. It is answered by ascertaining the extent of the duty which falls on the employer. It is a universal principle (and not special doctrine imported into this type of case) that if a man owes a duty to another to perform an act carefully, he cannot rid himself of liability by appointing somebody else, however competent, to do it for him. A person so appointed becomes his agent *pro hac vice* in the discharge of the duty; and the principle *respondeat superior* applies to him just as much as it applies to a whole-time servant of the employer. […] The true question is, what is the extent of the duty attaching to the employer?"[66]

As part of this discussion, the Court resorted to the *Angliss* case for guidance. As we have seen, the *Angliss* concerned cargo damage under the Hague/Hague-Visby Rules and formed an important premise to the decision of both the Court of Appeal and the House of Lords in the *Muncaster Castle*. The essential question relating to a shipowner's duty of care was, according to the Court in the *Hopestar*, similar in the two types of cases, namely that of exercising due care to make the ship seaworthy.

The Court stated: "The case [*Angliss*] was directly concerned with the obligation of a carrier under the Hague Rules to exercise due diligence to make the ship seaworthy; but later, in *Wilson & Clyde Coal Company, Ltd. v. English* […][67] Lord Wright treats the duty under these rules as analogous to the duty of an employer to an employee. In *W. Angliss & Co.* […] damage to the plaintiff's cargo was due to defects in the design of the ship, although it may have been contributed to by bad workmanship which was the fault of individual workmen employed by the builder and could not have been detected by any reasonable inspection; the defect in design did not amount to negligence, having regard to the standard of knowledge at the time. The application of a principle depends, of course, on the facts of each particular case, but some of Mr. Justice Wright's observations in this somewhat similar case afford usual

66 P. 129.

67 *Wilsons & Clyde Coal Company, Ltd. v. English*, [1938] A.C. 57. In that case the House of Lords laid down the principle that an employer, *Wilsons & Clyde Co Ltd,* was under a duty of care to ensure a safe working environment, and that this duty could not be fully delegated to another employee. Hence, an employer always remains responsible for a safe workplace for their employees and is vicariously liable for any negligence by another. This duty was held to include i.a. the provision of proper materials, employment of competent workers, and performance of valuable supervision. See generally on employers' liability, Cooke (2017) p. 300 et seq.

guidance. At pp. 462 and 214 of the respective reports, he expresses the view that a carrier would not be liable for an error of design on the part of one of the classification societies, such as Lloyd's Register, which occupy a public and *quasi*-judicial position."[68]

As in the *Muncaster Castle*, also the Court in the *Hopestar* pointed to the dilemma of "an almost unlimited retrogression" if one were to trace any (contributory) cause of unseaworthiness to its very origin, no matter how remote from the actions of the shipowner, given that the nature of shipowners' activities generally consisted of the running and operation of ships, not e.g. in manufacturing spare parts for ships.

Along the lines of such reasoning, the Court held that a shipowner would generally not be liable for mistakes made by the shipbuilder in the course of building of the ship, nor for mistakes made by the classification society in connection with safety approval of the ship – on the rationale that a shipowner (as purchaser) would generally be entitled to rely on the competence and actions of these entities without being obliged to make independent inquiries.

The Court stated: "How far back in the case of the purchase or adaptation of an article or the building or repair of premises or of a ship ought the employer's inquiries and inspection to go? Inasmuch as he cannot be expected to manufacture the article himself, he cannot be held responsible for every fault of manufacture. An employer who buys a new car of a well-known make from a reputable firm might well permit it to be used by an employee without first having it tested or inspected. The standard of care depends upon prudent practice in each case. In the case of a purchase of a new ship, which has just been completed by a well-known firm of builders, and passed as 100 A1 by Lloyd's Register, I think that an employer has no further duty of survey or inspection. I see no distinction between the purchase of a ship which has been built for the market generally, and the purchase of one which has been completed specifically to the requirements of the purchaser, unless, of course, his requirements were of an unusual character. Accordingly, I hold that the defendants are not responsible for the original error of design, whether it was due to the builders or to Lloyd's Register."[69]

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68 P. 129.

69 P. 130.

According to the Court, the fact that a shipowner would generally not be liable for errors made in a classification society's safety approval of the design of a ship, applied correspondingly to mistakes made by a classification society surveyor in the course of the building of a ship, as in the present case. When the surveyor had issued clean safety certificates relating to the ship, a shipowner (*qua* employer) would generally not be obliged to go 'behind' such a certificate.

The Court stated: "But I have held that in fact it was an error of Lloyd's Register surveyor; and, if I am wrong in the general view which I have just expressed,[70] I should hold that the employer was not under a duty to go behind, as it were, the Lloyd's Register certificate. I say this on the ground that such an inquiry would involve a retrogression beyond the point to which a reasonable employer can be expected to go, rather than on the ground that the duty of Lloyd's Register surveyor is public or *quasi*-public."[71]

This latter remark concerning a classification society being of a public or quasi-public nature, is made in response to the reasoning given on this point in the *Angliss*. It is in itself of interest in respect of a discussion in Norwegian law as to whether public authorities would be vicariously liable for mistakes made by a classification society when performing delegated functions for the maritime authorities – see below.

While in this respect the shipowner, on the facts, was found not to be responsible for mistakes by the classification society or its surveyor, nor for mistakes by the building yard, this pertains to the general reservation made at the opening of this article: It could well be that e.g. in respect of autonomous ship systems, a shipowner may be more closely involved in the design and development of such systems than what is common in traditional shipping. It is therefore worth underlining that the *Hopestar* involved traditional ways of allocation tasks and responsibilities relating to the design, safety approval and building of a ship.

70 That a shipowner would not be liable for mistakes by the builder or classification society in safety approval of the ship's design.

71 P. 130.

The background to the building project was described: "The defendant company was formed in July, 1935. Some time before that a Mr. Mann, a director of a Newcastle firm of ship managers, who subsequently became a director of the defendant company and the registered manager of the *Hopestar*, had begun to interest himself in the building of the *Hopestar* and in the formation of a company to take her over. One of the objects of building her was to provide a vessel to try out a new and experimental form of machinery. The vessel was designed and built by Messrs. Swan Hunter, and Wigham Richardsson, the well-known Tyne shipbuilders, at their Wallsend yard. There was nothing experimental about the hull design, which was taken from that of another ship which had given satisfaction. The plan was sent to Lloyd's Register on May 10, 1935. It was returned by Lloyd's Register approved on May 17, subject to some additional thicknesses in some of the plates."[72]

2.3.3 Methodological aspects relating to common law and statutory duties of ship safety

The above discussion has revolved around the common law position of a shipowner's duty of care in respect of safety aspects relating to a ship's seaworthiness. The *Hopestar* also involved the relationship between common law and statutory law – as did the *Muncaster Castle*.

In the *Hopestar* the relationship to statutory law concerned the Merchant Shipping Act (1894), a ship safety act of public law nature, generally applicable to the construction and safety of ships. The Merchant Shipping Act contained provisions which led to some paradoxical effects in the context of arguments before the Court. On the one hand, the Act was invoked by the claimant in support of the common law position, forming the basis for her claim. On the other hand, the Act was also invoked by the defendant in support of arguments that the Act diminished the scope of liability which otherwise would follow from common law.

The essence of this discussion concerned the fact that the Act contained wording which seemingly limited the class of assistants for whom a shipowner (employer) would become vicariously liable under common law. In that respect, the case demonstrates how the Court found ways of reducing the impact of the relevant provision of the Act, by holding

[72] P. 123.

that the Parliament, when enacting it, could not be presumed to have full insight into the common law position.

The Act imposed mandatory duties on shipowners (and granted corresponding rights to seafarers) by stating that certain safety requirements were impliedly contained in any employment contract between shipowners and seafarers. The essence, as the relevant section 458 of the Act was phrased,[73] was that:

> "there shall be implied […] an obligation of the owner of the ship, that the owner of the ship, and the master, and every agent charged with the loading of the ship, or preparing of the ship for sea, or the sending of the ship to sea, shall use all reasonable means to insure the seaworthiness of the ship for the voyage […] and during the voyage […]."

The question before the Court was whether this wording was incompatible with a general notion that the shipowner would be liable for whomever had been delegated tasks of performing maintenance work on the ship, since the wording referred to a specific class of assistants, thus envisaging the preparation for each specific voyage, not that of preparing and maintaining the ship in a general way.

The background for this discussion is thus described: "The plaintiff relies on the general principle that the defendants, as the deceased's employers, were under a duty to make the ship as safe as reasonable skill and care could make her; that they cannot escape responsibility by delegating that duty; and that there has been a breach of it. […] The plaintiff relies also upon the statutory duty imposed upon the owners under the Merchant shipping Act, 1894, Sect. 458. This section provides that in every contract of service between the owner of a ship and any seaman, [the wording of Section 458, as quoted in the main text above]. This section adds nothing to the common law liability of the defendant as I have stated above. Instead of helping the plaintiff, it has proved a stumbling block in her way; for the defendants rely on it as cutting down the obligation which the common law might otherwise imply."[74]

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73 The author has not checked the current version of the Act.

74 P. 128.

The plaintiff argued that the wording of section 458 must be construed in such a way that it becomes aligned with the general requirement of making a ship seaworthy under common law, but the Court disagreed, holding that the wording of the provision did not allow for such a construction. Rather, section 458, by its wording, envisaged the preparation of seaworthiness for any given voyage, not that of preparing the ship's seaworthiness in general.

From a Norwegian standpoint such a relatively rigid construction of the statute's wording seems essentially foreign; we shall see that a similar view could perhaps be taken in respect of the wording of the Maritime Code section 151, which also – by its enumeration of examples of delegation of tasks – could be said to be confined to any specific voyage. Such arguments, specifically linked to the wording of section 151, do however not form part of the discussion under Norwegian law.

The reasoning by the Court in response to the parties' arguments, was: "If the section had provided simply that the owner should use all reasonable means to ensure the seaworthiness, etc., it should no doubt have been construed as making the owner vicariously liable for the acts of any person to whom he delegated the performance of that duty. But if that be the true effect of the words which refer to the owner himself, there can be no need for the express reference to the master and certain types of agent. The result of their inclusion can only be, it is argued, to limit the class of persons for whose acts the owner is vicarious liable; and the repairers fall outside that class. It was contended on behalf of the plaintiff that they were agents charged with the preparing of the ship or with sending of the ship to sea; but I do not think that is a proper construction of those words.[75] What is being dealt with in the section is the preparation of the ship for sea for the voyage. While repairers might conceivably be said to be preparing a ship for sea generally, they are not preparing her for any specific voyage. Accordingly the defendants argue that there is by statute an implied term in the contract of service [i.e. employment contract] which does not help the plaintiff in this case; and that where term is implied by statute, it supplants any term that might otherwise have been implied from the relationship of master and servant at common law."[76]

[75] As stated above, such a wider, purpose oriented construction would seem to appear natural from a Norwegian approach to construction.

[76] P. 128–129.

Since the Court held that section 458, according to its wording, did curtail what would otherwise follow from common law and in that respect constituted "a stumbling block" for the plaintiff's case, the Court saw a need to inquire into the presumed intention of the legislator at the time – by asking whether the legislator could be presumed to possess full knowledge of the common law position, so that such curtailment of the common law was in fact intended. This discussion, therefore, contained complex questions of the relationship between common law and statutory law.

The Court first inquired into what the common law position was at the time of the legislation, and found that what might have appeared from case law at the time to be the legal position, was not necessarily the true legal position, due to difficulties in construing the *ratio* of the different decisions which existed at the time, forming the basis of common law.

This uncertainty stemmed from the fact that in 1854 there was a first instance maritime law case, *Couch v. Steel*,[77] which had held that liability for unseaworthiness required personal negligence by the shipowner (employer). That case was, however, at odds with a wider principle of liability as had been laid down by the House of Lords in the later *Wilson & Clyde v. English* from 1938,[78] which was not a maritime law case, but which the Court in the *Hopestar* considered should be taken to apply to maritime law as well. Therefore, the Court in the *Hopestar* held that the House of Lords, in hypothetical retrospection, would have overturned the earlier lower courts' maritime law decision of *Couch v. Steel*, despite the House in the later *Wilson & Clyde v. English* not having expressly done so. The Court in the *Hopestar* stated that *Couch v. Steel* "in holding that without personal negligence no cause of action lay, cannot any longer be regarded as good law. In *Wilson & Clyde* […][79] a number of cases of this sort, such as […][80] were overruled, and I do not doubt that *Couch v. Steel* […] would have been treated in the same way if the attention of their Lordships had been drawn to it."[81]

The paradox therefore ensued that, according to the Court, the common law position at the time of legislating the Merchant Shipping Act, was

77 (1854) 23 L.J. (Q.B.) 121.

78 The case is referred to in [1938] A.C. 57.

79 By the House of Lords in 1838 – reference omitted.

80 Reference omitted.

81 P. 128.

more favourable to the seafarer than what (through a proper construction) was enacted in section 458 of the Act – despite the fact that the Act generally aimed at protecting the position of seafarers.

This constellation led the Court to the – from a Norwegian perspective – peculiar proposition that the Parliament cannot generally be presumed to know the law (i.e. common law) when legislating, and that one should therefore demand clear wording of its Acts in order for the Acts to set aside what must be viewed as the true position under common law. Hence, in effect, common law overrides statutory law – as the latter is understood by taking into account the intention and purpose as expressed in the statutory wording.[82]

A similar, from a Norwegian perspective, strange constellation between express contract terms and principles of implied terms as taken from common law, can be found in case law dealing with construction of contracts. An example, from a Norwegian perspective, of an almost absurd constellation, can be seen from the arbitrators' reasoning in the case Linardos.[83] The case concerned commencement of laytime under a voyage charter and the question whether a charterer's making actual use of the ship for loading purposes, could repair an invalid formal notice from the shipowner to the effect that the ship was placed at charterer's disposal for loading The position under common law dictated that such valid notice from the shipowner was an absolute requirement for laytime to commence, while the charterparty clause in question contained deviating wording in the shipowner's favour. Rather than simply applying the express wording of the clause to the situation at hand, the arbitrators found it necessary, in addition, to imply a term into the clause to the effect that the clause set aside the legal position at common law.[84]

This, according to the Court, meant that "there is no presumption of law in construing a statute that Parliament knows the law, and certainly no presumption of fact that it knows such principles of law as are still unrevealed by the House of Lords."[85] In consequence, the Court held that

[82] As to the methodological aspects of implied terms, on a comparative law level, see Solvang, Forsinkelse i havn. Risikofordeling ved reisebefraktning, 2009, p. 126 et seq.

[83] [1994] 1 Lloyd's Rep 28.

[84] Solvang (2009) p. 708.

[85] P. 129.

section 458 of the Merchant Shipping Act "is of no value, and can now, I think, be treated as obsolete."[86]

The reasoning put in its entirety, reads: "The answer is, I think, that the Act ought not to be construed as altering the common law unless it does so clearly and explicitly. There can be no doubt that the object of the section, […] was to benefit the seaman and to enable him to escape some of the more drastic consequences of the doctrine of common employment. Parliament, I dare say, thought that the law had been correctly declared in *Couch v. Steel* […].[87] It is no doubt true in theory that when the House of Lords declare the law, it declares what must be taken to always have been the law; but there is no presumption of law in construing a statute that Parliament knows the law, and certainly no presumption of fact that it knows such principles of law as are still unrevealed by the House of Lords. The object of the section being to benefit the workman, it would be wrong to construe it as curtailing his rights under his contract of service. It can be given a useful effect, even in light of *Wilsons Clyde Coal Company, Ltd. v. English* […][88] by giving the seaman a right in cases of acts or omissions by the agents specified in it which might have been outside *Wilsons Clyde Coal Company, Ltd. v. English* […] and therefore governed by the doctrine of common employment. With the abolition of that doctrine, however, the section is of no value, and can now, I think, be treated as obsolete."[89]

In summary, the *Hopestar* gives a multitude of hypothetical findings: first, by the legal discussion being of *obiter* nature due to the Court's findings on causation; second, since – if the requirement of causation had been met in that structural weaknesses were to be found to be the cause of the casualty – the shiowner would not have been liable, due to the relevant faults falling beyond the scope of a shipowner's vicarious liability; third, by resolving intricate questions of the relationship between statutory law and common law, which were also *obiter* as not being necessary for the result.

This notwithstanding, the *Hopestar* was (as earlier mentioned) referred to by the Court of Appeal in the *Muncaster Castle* due to its argumentative value in setting out the common law position of shipowners' vicarious liability.

86 P. 129.
87 Referenced above.
88 Referenced to above.
89 P. 129.

2.4 Summary

From this review of the *Muncaster Castle* and the *Hopestar,* the following may be summarized.

Under the Hague/Hague-Visby Rules – that is legislation based on the Rules[90] – a shipowner would be held vicariously responsible for whatever steps performed by independent contractors retained for ship repair and maintenance purposes performed while the ship is in the shipowner's 'orbit' or time of possession. This means that such vicarious responsibility would not extend to whatever prior faults made to the ship leading to it suffering from latent defects when entering the shipowner's 'orbit'.

Under common law, the same result would apply in respect of prior faults made to the ship before entering the shipowner's 'orbit'. With respect to situations of ship repair or maintenance, general common law principles would apply, which means that, as a starting point, shipowners would not become vicariously responsible for independent contractors – however so that this depends on the nature of work being delegated; whether it falls within the shipowner's ordinary course of business or area of expertise.

With respect to the common law position as here presented, it could perhaps be objected that the two cases reviewed – the *Muncaster* and the *Hopestar* – are old, thus not reflecting the up to date legal position, but that seems not to be case. Contemporaneous volumes on tort law seem to fully accord with the said position, and with several of the authorities referred to in the *Muncaster* and the *Hopestar* still constituting precedents.[91]

Moreover, when operating with the term of the shipowner's 'orbit' or time of possession of the ship as a restricting factor for vicarious liability both under the Hague/Hague-Visby Rules and at common law, it is important to observe the connection between these criteria and the phenomenon of delegation of tasks. It would not make good sense to talk about tasks being 'delegated' by a shipowner if those tasks

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90 In the *Muncaster* this concerned the Australian COGSA, which clearly would have rendered the same result under English COGSA.

91 See e.g. Witting (2018) p. 604 et seq.

are performed before the ship enters the shipowner's 'orbit' or time of possession.[92] In this respect it is worth quoting Atiyah, from his standard work on vicarious liability under English law, where – with reference to the (non-maritime) case *Davie v. New Merton Board Mills, Ltd*.[93] – he states that «even in those cases where there is liability for the acts of an independent contractor, the defendant will only be liable where the contractor was *employed by him* and where the contractor has been negligent in performing a task which has been *delegated to him by the defendant*."[94] (author's emphasis)

[92] See the reasoning by the House in the *Muncaster*, above.

[93] (1959) AC 604.

[94] Atiyah, Vicarious Liability in the Law of Torts, 1967, quoted from Selvig, Det såkalte husbondsansvar, 1968, footnote 72.

3 Norwegian law

3.1 Tort law and the Maritime Code section 151

3.1.1 The essence of the provision

Under Norwegian law a shipowner's vicarious liability for third party damage is statutorily regulated, in section 151 of the Maritime Code:

> "The shipowner[95] shall be liable to compensate damage caused in the service by the fault or neglect of the master, crew, pilot tug or others performing work in the service of the ship."

This provision may be seen as *lex specialis* to a general provision in the Norwegian Torts Act, 1969, section 2-1 which imposes vicarious liability on employers (whether in the public or private sector) for damage to third parties attributable to fault committed by employees in the course of their employment. There are interlinks between the two sets of rules but essentially section 151 is the governing source in the maritime sector.[96] We revert – in chapter 4 – to a more detailed discussion of interlinks between the two sets of rules.

To our inquiry primarily concerning autonomous ships and a shipowner's liability for technical failure of the ship attributable to faults by suppliers of automation systems, the answer essentially depends on the proper construction of section 151. In this respect, there is sparse case law directly on point, but there is case law reflecting general notions of the scope of a shipowner's vicarious liability, and there are two influential scholarly works providing analyses of the legal position.

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95 The term 'reder' is used in the official translation of the Code. We shall not go into this distinction but shall simplify it by using the term 'shipowner'. Some aspects concerning the 'reder' as 'drifstsherre' are discussed in chapter 4.4. below.

96 See Falkanger, Bull, Brautaset, Scandinavian maritime law – the Norwegian perspective, 2017, p. 189 et seq. concerning the interrelation between the two sets of rules.

3.1.2 Case law relevant to the provision

Case law shedding light on the ambit of section 151 generally deals with situations where the ship causes or is involved in damage to third parties while under repair at repair yards, not situations where acts of repair leads to subsequent damage caused by the ship, as in the *Muncaster Castle*. With this reservation, it seems clear that workmen employed by a repair yard are not generally considered servants of the shipowner.

In the relevant cases concerning ship repair or maintenance, such a line of argument – that a shipowner be vicariously liable for the faults of the yard's workmen – has not even been raised by claimants.[97]

In a Norwegian Supreme Court case from 1931[98] a workman of the repair yard died after falling down an uncovered hatch while walking along the ship in the dark in connection with repair works. The shipowner was sued on the basis that it was the task of the ship's crew to put on hatch covers and that failure in that respect created the dangerous situation – but the claim failed. Although the crew had earlier the same day worked on the ship (bringing stores into one of the holds) and put hatch covers on some of the hatches, the yard's personnel had explicitly asked them not to put cover on the relevant hatch, as they were working in the hold (cleaning it) and needed light and air from above. The ship's crew then left for the day. The responsibility for securing the hatch was held to rest solely on the yard. There is no mention, nor was it argued, that the shipowner should somehow be vicariously liable for mistakes made by the yard's personnel.

Brækhus, on a general basis aska the question whether shipowners in such instances of extended repairs at yards might be responsible for the acts of the yard and its personnel, according to Maritime Code section 151 (at the time section 8) and answers his own question: "The answer must undoubtedly be in the negative."[99]

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97 See also the comment by Brækhus, Rederens husbondsansvar, p. 294. Brækhus' article was first published in SGS nr 2, 1958, later in Brækhus, Juridiske arbeider fra sjø og land, 1968, p. 269 et seq. – here the latter publication is the source referred to.

98 Rt. 1931.788.

99 Brækhus (1968) p. 294.

(author's translations) and bases this view on what he sees as the legislative considerations behind the provision.[100]

Selvig approaches the question from a slightly different angle; that of general tort law relating to harm caused in connection with construction work, and also in maritime cases, where there is a temporary shift in the managing functions which establish the criteria for a principal (business enterprise) being vicariously responsible for independent contractors (see further chapter 4.4 below). However, Selvig concurs with Brækhus' view in the sense that his (Selvig's) more overarching approach is seen as being aligned with Brækhus' view, being more directly connected to the construction of Maritime Code section 151 (at the time section 8) – see also the next chapter below.

There is also a Danish case (the Maritime Codes being identical in the Nordic countries) from 1914,[101] where the ship, lying at the repair yard's pier, started up its engine for testing purposes after repairs, thus causing the current from the ship's propeller to disturb the maneuvering of another ship which suffered damage. The owner of the ship under repair was sued in damages, but the claim failed. The start-up of the engine, being in violation of port regulations, was approved by the ship's mate. However, such approval was given at the request of the yard, and the Court held that the mate acted as part of the yard's repair work, hence under the vicarious responsibility of the yard, not of the shipowner.

That case was criticized in legal doctrine, to the effect that a shipowner ought to be held responsible for negligent acts of the crew, even though the crew acted at the request of a yard as part of the yard's repair work.[102] A Swedish Supreme Court case from 1939[103] meets such criticism: In connection with repairs, a yard's repairman died when standing too close to the rudder machinery in connection with start-up testing of the machinery. The ship's mate, together with those in charge at the yard, was found to have acted negligently in not giving sufficient warning that the machinery was being tested. The yard and the shipowner were held jointly liable. The approach was here not taken that the mate acted (solely)

100 Brækhus (1968) p. 294 with reference to his account of such considerations pp. 274–278.

101 First instance Maritime and Commercial Court, ND 1914.26.

102 Brækhus (1968) p. 292.

103 ND 1939.201.

in the interest and as part of the yard's work. On the other hand, there is no mention, nor was it argued, that the shipowner ought to be held vicariously liable for the negligent acts of the yard's personnel.

A Norwegian Supreme Court case from 1939[104] also illustrates the point. A ship was lent to a sports rowing club. Its mast broke and caused damage to property lying on the pier. The mast turned out to be rotten and the shipowner was, by a majority of the Court, held liable for the damage on the basis of negligence in not having discovered and warned the lender about the condition of the mast. The dissenting judges found the shipowner not liable in that the shipowner had reason to believe that the independent contracting caretaker for the ship's winter storage had prudently maintained the mast as well as other equipment, as ordered by the shipowner. Neither the majority nor the minority suggested that the shipowner be held vicariously liable for the faults of the caretaking company.

The same type of negative finding of arguments concerning shipowners' vicarious liability can be found also in other cases unrelated to ship repair or maintenance.

An example, involving – at the time – sophisticated navigational equipment, is the Norwegian Supreme Court case from 1973.[105] The submarine *Uthaug* hit and damaged a submerged fishing trawl. Both the navigators onboard the submarine and the navigational expertise of the Norwegian Navy were of the misconceived belief that the submarine's sonar system was capable of picking up sound-echoes from objects like submerged trawls. This mistaken belief was found by the Court not to constitute negligence, neither by the navigators onboard[106] nor by the Navy's on-shore expertise.[107] There is no indication, nor arguments made, to the effect that one should perhaps look to the manufacturer or supplier of the equipment, e.g. on the footing that these parties should

104 ND 1939.388.

105 Rt. 1973.1364.

106 The navigators did hear some echoes and were in doubt as to their origin but decided against them coming from an object.

107 For example for not having conducted more extensive testing to be better informed about the limitation of the system.

have provided the end-user with more extensive information as to the sonar system's capabilities, and that possible failure in that respect should be imputed to the shipowner. The point is not that there would be any merit to such arguments but that there is no trace of this kind of thinking.

The *Uthaug* also illustrates the general point that negligence is essentially measured against the state of knowledge at any given time, by those considered to possess the required expertise – while mishaps may still occur without anyone necessarily being at fault. Rather, this phenomenon seems to be an inherent feature of technological or other advances made by mankind in combination with a fault based liability system: advances are generally not foolproof, and the standard of negligence (or rather: the degree of care negating it) is not perfection.[108]

The same kind of negative finding concerning shipowner's vicarious liability, applies to cases from the lower courts, involving ship collision resulting from technical failure of ships' autopilot systems. In a Court of Appeal case from 1990[109] the relay of a ship's autopilot short circuited ('burned') with no prior warning. As a result, the ship made a sudden turn and collided with a meeting ship. In the ensuing court case, none of the ships were found to be at fault. It is telling that the lawyers for the ship being run into did not entertain arguments to the effect that one should investigate into possible negligence in the production of the autopilot, on the assumption that such negligence – or possible anonymous faults in the production line – would be imputable to the shipowner within the ambit of Maritime Code section 151.[110]

3.1.3 Legal commentary to the provision

Comments in scholarly works are more directly on point with respect to our inquiry.

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[108] Which is the essential point in Solvang (2021) – advocating rules of strict liability in this respect.

[109] ND 1990.362, see also ND 1972.35.

[110] And/or the corresponding fault based rule for collision cases in Maritime Code section 161.

In his influential article on shipowners' vicarious liability,[111] Brækhus discusses the class of persons for whom a shipowner is vicariously responsible, and draws the line along the functional criterion of what belongs to a shipowner's ordinary course of business or area of expertise. The thinking is strikingly similar to that expressed under English common law in the *Muncaster Castle* and the *Hopestar*.

Brækhus states: "A shipowner must in a variety of situations use technical experts of different sorts. The mechanical yard which builds or repairs the ship, the classification society which controls it, the companies which deliver, install or control specialized equipment such as radio stations, sonar, radar etc. A mistake made by one or more of these assistants may well lead to a third party suffering damage. The repair yard's workmen fail to properly tighten a nut so that after a while it loosens through vibrations.[112] Can the shipowner in these instances become liable under the Maritime Code s. [151]?[113] The answer must undoubtedly be in the negative. It all concerns assistance which admittedly is necessary for the maritime trade[114] but which in itself cannot be said to form part of the shipowning business[115] and which according to the considerations stated above cannot be covered by the Maritime Code s. [151]."[116] (author's translation).

This can be compared with the following passage by the House of Lords in the *Muncaster*, summarizing the English common law tort position as presented by the carrier's counsel: "Where what had to be done did not ordinarily form part of his trade or business in his capacity as a carrier, in contrast with loading, stowing, carrying and discharge, the carrier performed his duty if he engaged and properly instructed a competent expert to carry out the necessary work and, where appropriate, provided proper supervision by persons representing him who acted without negligence."[117]

According to this line of thinking, a shipowner would not become vicariously liable for that kind of supply of technical automation systems

111 Brækhus, Rederens husbondsansvar (1968) – see earlier footnote.

112 This example is almost visionary in light of the later English case, the *Muncaster Castle*.

113 In the previous Code section 8, now section 151.

114 Norwegian: 'skipsfarten'.

115 Norwegian: 'rederinæringen'.

116 Brækhus (1968) p. 293–294.

117 House of Lords p. 64.

or equipment, which is the subject matter of our inquiry. The rationale behind it is essentially that a shipowner's business consists in the operation and running of ships, not in building them or developing technical devices for them, and that the scope of vicarious liability is restricted accordingly.

A later scholarly work by Selvig[118] is also of significant influence (as further discussed in chapter 4.4). Selvig takes issue with some of Brækhus' analyses in respect of how to identify the liable party as shipowner[119] in various contexts, but on the point of primary interest to our inquiry, he essentially concurs; the criterion for determining a shipowner's vicarious liability must be taken from the nature of its operational tasks *qua* shipowner.

Selvig states: "I essentially agree with and can refer to Brækhus' main proposition, namely that the work must be typical for the shipping industry;[120] the work must be connected to the operation or management of the ship or to the management of the cargo. Whether work (an operation) is in 'the service of the ship' will therefore to some extent depend on the type of ship. The delineation must e.g. be somewhat different for a passenger ship than for a cargo ship. Similarly one will presumably have to distinguish between tanker vessels, dry-cargo vessels and various types of specialized vessels, etc. […]".[121] Selvig states elsewhere: "The decisive point is whether the person's mistake is committed as part of a work which according to its nature has such connection to the operation of the ship that it must be viewed as being performed in the service of the ship."[122] (author's translation).

Moreover, Selvig addresses the point that such functional criteria may have disadvantages in that they are not easily applicable as legal standards but instead depend on factual considerations in any given case – but this, he points out, is nothing peculiar to this area of law.

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118 Selvig, Det såkalte husbondsansvar, 1968.

119 This concerns the concepts of 'reder' or 'driftsherre' in the Norwegian law context.

120 Norwegian: 'skibsfartsvirksomhet'.

121 Selvig (1968) p. 66. Admittedly, the discussion there concerns distribution of functions or tasks between various companies involved in cargo operations, not the question of retroactivity of services or supplies, but the basic notion still applies.

122 Selvig (1968) p. 74–75.

Addressing questions of cargo operations and delineation between typical ship and typical land based activities, Selvig states: "In quite a few cases it will presumably involve some challenges to determine what will constitute normal work in the ship's service. Difficulties in drawing the outer line for activities relevant to tort liability is, however, nothing peculiar to the Maritime Code § 8;[123] such difficulties may also arise in the application of other statutory rules, cf. the Aviation Act § 153 and the Car-liability Act §4 […]".[124] (author's translation).

It may be recalled that the House of Lords addressed the same topic in the *Muncaster Castle*, by criticizing the Court of Appeal for adopting this type of functional criteria in ship repair situations. Such criteria were, according to the House, unworkable as a matter of foreseeability and certainty of law within the ambit of the Hague/Hague-Visby Rules. It should however be kept in mind that the topic in the *Muncaster Castle* concerned contract law, not tort, where different considerations are at play – as also illustrated by the earlier discussion under English law.

Despite Brækhus' and Selvig's works being older, they still form the primary source of today's legal thinking, as their works are carried on into today's standard volume on maritime law, by Falkanger and Bull.[125] On the point of particular relevance to our inquiry, Brækhus' views are reflected almost verbatim – highlighting the functional criterion of what belongs to the shipowner's ordinary course of business or expertise. The English version of the book states:

> "Shipyards, repairers, classification societies, technical consultants etc. may all commit errors during assignments for the shipowner. Does liability arise under MC § 151? The answer depends on the nature of the work. If the work can be categorized as a typical shipowner's activity, the owner will be liable even if he has delegated

123 Now section 151.

124 Selvig (1968) p. 72. This area concerning transition between ship-based and land-based cargo operations falls outside the scope of the seaworthiness considerations relating to acts done to the ship relating to its pre-history, as discussed in the *Muncaster Castle*. It is, however, worth noticing that the type of situation here discussed by Selvig would also arise under English tort law, but without such delineation being discussed, nor any guidance given, in the *Muncaster Castle*.

125 Falkanger and Bull, Sjørett, 2016. Here the English version is used: Falkanger et al (2017).

> the work to a technical consultant. Major works carried out at a shipyard are a good example of work which does not result in liability for the shipowner under MC § 151 (7:1)[126] (although the shipowner may be liable in negligence in the choice of shipyard or for insufficient supervision/control of the work)."[127]

This, as we have seen, essentially corresponds with the thinking under English common law In tort.

3.2 Contract law – the Norwegian and Nordic position concerning the *Muncaster Castle*

3.2.1 Introductory remarks

Turning to Norwegian (and Nordic) contract law, there is, unsurprisingly, a similar discussion as to the relationship between vicarious liability under the Hague/Hague-Visby Rules (as the latter are incorporated into the Maritime Code), and under tort law (Maritime Code section 151) – but the direction it takes is somewhat different from that under English law.

We have seen that the scope of a shipowner's vicarious liability in tort under Maritime Code section 151 seems essentially to accord with that of English common law in tort; the legal criterion is functional in the sense that the scope of vicarious liability for independent contractors depends on the nature of a shipowner's ordinary course of business or expertise.

This coordinated view in respect of tort liability under the two legal systems should, on the other hand, not prevent a different and wider principle applied to the Norwegian contract law position, equivalent to what was under consideration in the *Muncaster Castle*, namely the proper construction of the Hague/Hague-Visby Rules as implemented in the Maritime Code, through sections 275 and 276.

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126 The numbers in brackets signify the Swedish numbering of the provisions of the (identical) Code.

127 Falkanger et al (2017) p. 206–207.

Section 275 sets out the general rule on liability based on negligence by the carrier or its assistants. Section 276 then incorporates the essence of Hague-Visby Rule III, 2 about the carrier exercising due diligence to make the ship seaworthy before the voyage, by stating that liability exceptions for navigational fault do not apply to events having occurred before commencement of the voyage. Thus, the system of the Hague Visby is redrafted, in that the obligation to make the ship initially seaworthy is inserted elsewhere, in a general, and inconspicuous, provision in section 262, imposing on the carrier a general duty to care for the cargo. This redrafting and re-editing may be considered unfortunate from an international perspective of uniform construction of the Rules, and it complicates a direct comparison with the point of construction in the *Muncaster Castle*.

Another complicating factor of construction exists in the form of a linkage having been made between tort and contract law; section 151 in tort has 'borrowed' its wording from the carriage of goods rules, by mentioning "… master, crew, pilot, tug or others performing work in the service of the ship" – as this is taken from Hague-Visby Rules IV litra b), and as contained in section 276 of the Code. This type of enumeration may be considered unfortunate in the context of tort law in that it signifies acts or omissions merely during voyages, as this with a similar wording became a crucial point of discussion under English law in the *Hopestar* – as illustrated above.

In this respect considerations of harmonization of the Hague-Visby Rules could point in the direction of construing these provisions in line with the *Muncaster*, i.e. that a shipowner (carrier) becomes liable for the fault of workers of an independent contractor repair yard, irrespective of the nature of the relevant work.

The prevailing view under Norwegian and Nordic law seems nevertheless to be that this is not the case. Although with some reservation, the standard volume by Falkanger and Bull indicates the opposite. Taking as a starting point the *Muncaster Castle* under English law, they state:

> "Should the carrier be responsible for the negligence of the shipyard worker? The House of Lords answered in the affirmative. The required standard is 'due diligence with work of repair by whomsoever it may be done.'[128] Scandinavian courts would not be likely to

[128] It should be noted that merely repair is mentioned, not the English law position as stated in the *Muncaster Castle* concerning e.g. faults made during building of the ship or during prior ownership.

> reach the same conclusion.[129] See ND 1979.383 FSC.[130] See *Bjørkelund* […], *Riska* […] and *Selvig* […]. But it must be acknowledged that it is not easy to establish the scope of vicarious liability. Note also the strict rule in the Road Carriage Act § 28 second paragraph: 'In claiming exemption from liability, the carrier cannot invoke defects of the vehicle used for the transport, or the fault or neglect of a party he may have rented the vehicle from or his servants.')"[131]

Since this view is expressed in the standard volume on maritime law, it seems expedient to use it – including the legal sources enlisted therein – as a means of reviewing and discussing the legal position under Norwegian and Nordic law.

3.2.2 Case law

First, Falkanger and Bull mentions the Finnish Supreme Court case from 1979.[132] In that case a shipowner was held not liable under the Finnish Maritime Code, identical to the Norwegian, on the footing that fault committed by a workman of a repair yard, during repairs under the supervision of the classification society, was not something for which the shipowner was responsible.

Cargo damage under a voyage charter occurred due to seawater ingress, in rough seas, through a drainage pipe on the ship's upper decks. The water ingress was occasioned by the cover of the drainage pipe having been lost due to a broken tightening bolt. The broken bolt was the result of it having been tightened too hard by the workman of a repair yard in connection with routine periodic classification survey of the ship, in combination with stresses to the bolt (and the cover) in connection with a subsequent ship-to-ship- cargo transfer operation in rough seas. The ship was found to have been unseaworthy for the relevant voyage, but

[129] Norwegian: 'ville neppe komme til samme resultat', which in the author's view is a stronger expression than the translated 'not be likely to' – rather it would translate as: 'would hardly come to the same result'.

[130] Abbreviation for Finnish Supreme Court.

[131] Falkanger et al (2017) p. 353.

[132] ND 1979.383.

the broken bolt was found not to be discoverable by reasonable means, hence there was no want of due diligence on the shipowner's part, and the shipowner was not held vicariously liable for the prior fault by the repair yard's workman.

The first instance court stated in this respect that "the shipowner according to the prevailing legal view in the Nordic states could not be held responsible for a latent defect[133] caused by workers during work at a well reputed yard and under the supervision of a classification society […]."[134]

Upon appeal to the Appeals Court, the decision of the first instance was upheld and leave to further appeal was not granted by the Supreme Court, hence the Supreme Court did not make an express ruling on the legal point. This essentially meant that the result, not the reasoning, of the lower court was authoritatively decided.[135] On the other hand, the discussion concerning the *Muncaster Castle*, including its harmonizing scheme of construction, was at the time up for discussion in Nordic law, as evidenced by the lower courts pointing to this discussion, so that it can be reasonably assumed that the Supreme Court found the lower courts' reasoning, including the departure from the *Muncaster Castle*, legally tenable.

Another case of relevance, not mentioned by Falkanger and Bull, is a Danish Court of Appeal decision from 1966.[136] That case concerned cargo damage resulting from oil leakage into the cargo hold through a ventilation pipe which was pitted due to bad workmanship by welders during newbuilding. Delivery from the building yard had taken place just a couple of months before the relevant voyage where cargo damage occurred. The leakage had not been detected by a routine pressure test undertaken by the yard under supervision of the classification society, before delivery from the yard. The carrier was held liable for the cargo damage, however on the basis of negligence in having failed to detect

133 Swedish: 'svårupptäckt mistag'; hard-detectable mistake.

134 ND 1979.383 with the lower court's decision referenced by the appeal court (author's translation).

135 Støen (2016) pp. 25–50, with an account given (p. 77) of this procedural point.

136 UfR 1966.529=ND 1966.45.

the pitting, on the implicit premise that had the defect resulted solely from mistakes the yard and/or the classification society, liability would not have ensued.[137] Negligence on the part of the shipowner was found to exist on a combination of facts: the shipowner could have taken part in the pressure test before delivery but chose to rely on the test performed by the yard and classification society; there were prior incidents of other leakages from the piping system before the relevant voyage, which should have alerted the shipowner to make further investigations.

Moreover, the case involved discussion of the concept of latent defects, as this was up for discussion also in the *Muncaster Castle*. However, since the Court found that the shipowner through its regular servants was negligent in not having discovered the defect, the shipowner's defense based on latent defects failed. Based on the facts, the defect could according to the Court not be considered 'latent' within the meaning of the Hague-Visby Rules Article IV litra p).[138] According to the Court, the pitting was discoverable, although not easily so, since it was located towards the hull side of the pipe, not towards the more visible cargo hold side.[139]

3.2.3 Legal commentary

As to the legal commentaries mentioned by Falkanger and Bull, the first is an article from 1967 by the Swedish scholar Björkelund,[140] who objected to Brækhus' views to the effect that shipowners would not be vicariously

[137] See the quoted parts from the Court's reasoning in Støen 2016 p. 73–74. The case is also mentioned by Selvig (1968) p. 200.

[138] The Hague-Visby Rules were at the time implemented verbatim into the then Danish Act on Bills of Lading (Konnossementsloven), which was later redrafted – although content wise retained – in the present Code of 1994. The question concerning latent defect in the Hague-Visby Rules is clearly of significance: if a shipowner were to be held vicariously liable for anyone's mistake, regardless of when and how it occurred, even if occurring during new building, the Hague-Visby liability exception based on latent defects, would for practical purposes risk being rendered void of meaning – as this was discussed in the *Muncaster Castle* under English law, see chapter 2.2.3 above.

[139] Støen (2016) p. 71–72 gives a more fully account of the case.

[140] Björkelund, Redarens ansvar för självstandiga medhjälpare, AfS 8 1966, p. 245 et seq.

responsible for faults committed by what Brækhus called "technical assistants".[141]

Björkelund advocated the reasoning by the House of Lords in the *Muncaster Castle* as being applicable also under Nordic law, namely that the criterion of a shipowner's ordinary course of business was, as a matter of legal efficacy, unworkable in delineating the class of persons for whom the shipowner would be vicariously responsible. Björkelund submitted that since, in his view, no clear solution was discernable from the prevailing legal sources under Nordic law,[142] it would be correct to look to and adopt the English law solution in the *Muncaster Castle* as a matter of internationally harmonized construction of the Hague-Visby Rules.

Björkelund referred to Brækhus' view according to which shipowners are responsible for independent contractors "but only for those who perform work that form part of the typical shipowning activity[143] to which the work of technical assistants is not considered to form part." To this Björkelund submitted: "Against this reasoning one might ask: what is shipowning activity?[144] Is that something very particular? If building of ships does not fall within shipowning activity, does also not repair work do so? Maybe the answer to this is that major repair does not fall within shipowning activity, but only minor work does – but where is the line to be drawn?[145] Or, if the answer is that the shipowner never becomes liable for a repair yard's failure in repairs, shall then the cargo owner's claim depend on whether the shipowner has

141 See chapter 3.1.3 above.

142 This was from before the Finnish Supreme Court case from 1979, as discussed above. On the other hand, the Finnish lower courts, when referring to a common view under Nordic law, seem not to have taken account of (or not being persuaded by) the views submitted by Björkelund.

143 Swedish: 'rederiverksamhet' – shipowning business/activity.

144 Swedish: 'rederinäring' – shipowning industry/business.

145 This can be compared to the remark by the House of Lords (Lord Simonds) in the *Muncaster Castle*, as quoted in chapter 2.2.3 above: "I have no love for the argumentative question 'Where is the line to be drawn?', but it would be an impossible task for the Court to examine into the facts of each case and determine whether the negligence of the independent contractor should be imputed to the shipowner. I do not know what criterion or criteria should be used nor were any suggested. Take the case of repair: Is there to be one result if the necessary repair is slight, another if it is extensive? Is it relevant that the shipowner might have done the work by its own servants but preferred to have it done by a reputable shipyard?"

left the work to a repair yard, for whose work he is not responsible, or by his own employees, for whose faults he is responsible?"[146]

It is at this juncture worth noticing a certain mixture which exists in the Nordic legal discourse between separate areas of law (tort and contract) – more so than under English law. Under English law, views derived from tort law were, by the House of Lords in the *Muncaster Castle*, held not to be decisive in the statutory construction of legislation based on the Hague/Hague-Visby Rules. There is therefore no necessary connection between Brækhus' views expressed primarily on tort law and the position on the Hague/Hague-Visby equivalent under Nordic law.<?> In other words, one does not have to 'surmount' Brækhus' views (on tort law) in order to advocate the English position under the Hague/Hague-Visby Rules and their equivalent in the Nordic Codes.

The second article mentioned by Falkanger and Bull is from 1967, by the Swedish scholar Riska[147] who favoured the views expressed by Brækhus (primarily) in respect of tort liability, which, in Riska's view, would be correspondingly applicable in the context of cargo damage and the Hague-Visby Rules. In effect, Riska's arguments are therefore similar to those of the English Court of Appeal in the *Muncaster Castle*.

According to Riska, "it is important to remember that the Hague Rules[148] apply to the sea transport business which the shipowner is carrying out, or to the shipping business in general, and that it seems arbitrary to extend the rules to such activities which fall outside the typical shipping, as for instance the very technical activities of constructing machinery or producing electronic equipment. Similarly, repairs to a ship have long been a very technical procedure, and I think Brækhus has good ground for his argument that repairs to a ship must be described as an auxiliary activity from the point of view of the shipping business."[149]

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146 Björkelund (1966) p. 274 (author's translation). This point also mirrors the essential part of the reasoning by the House of Lords in the *Muncaster Castle*.

147 Riska, Shipowners' Liability for Damage caused by the Negligence of an Independent Contractor Performing Work for the Ship, SGS no. 3/1967, p. 89 et seq.

148 As later promulgated by the Hague-Visby Rules with no change in substance on this point.

149 Riska (1967) p. 102.

Third, Selvig's work is referred to by Falkanger and Bull – but without, as far as the author can see, Selvig expressing any view directly on point at the referenced place.[150] In addition to those scholarly works referred to by Falkanger and Bull, others (of older date) could also have been mentioned.[151]

3.2.4 Parallels from carriage by road

3.2.4.1 Liability for latent defects of vehicles versus vessels

The fourth type of legal source Falkanger and Bull brings into play is that of the Road Carriage Act, 1974, and its section 28 providing for strict liability for defects in the vehicle used for carriage. This is a source of a different order from the others, which all are of maritime law nature. It is in the author's view questionable whether such reference to road carriage is illustrative as a matter of legal analysis.

A road carrier's liability is essentially strict, as provided for in the first paragraph of section 28; a carrier is liable unless he can demonstrate that the damage was unavoidable and outside of his control. The fact that latent technical defect of the vehicle used is expressly stated not to give grounds for exceptions to liability, is in this respect not surprising: such events are, in principle, not beyond a carrier's control.

This type of thinking is particularly apt under Norwegian and Nordic law as it can be compared to the corresponding liability rule under the Sale of Goods Act, 1988,

150 Selvig (1968) p. 124 is referred to, but on the referenced place mere general remarks are made as to the relationship between a shipowner's liability in contract (current sections 274–276) and tort (current section 151). Selvig (p. 11, footnote 10) makes brief reference to the English law position as laid down by the House in the *Muncaster Castle* but without referring to that case. On pp. 199–200 he discusses questions of a shipowner's liability for unseaworthiness but primarily focusing on the effect of fio-clauses, thus dealing with allocation of tasks and responsibilities in connection with cargo operations, rather than what is the core of our inquiry; defects to ships caused by independent contractors at a time prior to performance of the relevant voyage. However, based on Selvig's general functional oriented criterion relating to tort law and the Maritime Code section 151, it seems unlikely that he would unreservedly advocate the English law solution in the *Muncaster Castle* as being applicable in respect of contract law and cargo damage.

151 See Støen (2016) and his further references on p. 81 and pp. 85–86.

(based on the CISG to which e.g. England is not party) and the so called 'control liability', as amply illustrated in the Norwegian Supreme Court decision, *Agurkpinne*.[152] In that case the seller of wooden support sticks for growing and cultivation of cucumbers, was held liable for hidden defects (contamination ruining the plants) even though neither the seller nor the sub-supplier was to blame for not having detected the defect.[153]

Moreover, the fact that a road carrier is responsible for latent defect of the vehicle used, pertains to important aspects of the Hague/Hague-Visby Rules and their background. At the time of introduction of the Hague Rules (in 1924) common law under both English and American law provided for strict liability for cargo damage, by way of an absolute warranty of seaworthiness imposed on carriers.[154] By replacing such strict liability with – in the Hague Rules Art III – a duty for carriers to exercise due diligence in making the ship seaworthy, the effect of this was that a carrier would not be liable for latent defects leading to unseaworthiness[155] – as expressly provided for as exception to the carrier's liability in Hague/Hague-Visby Rules Art. IV litra (p). Hence, the Hague/Hague-Visby Rules have on this point an express provision incompatible with that of the Road Carriage Act section 28.

Furthermore, the fact that this provision of the Hague-Visby Rules concerning latent defects was, as a matter of legislative technique, omitted from the Maritime Code (in its 1994 revision) – as it was considered to form part of (and thus consumed by) the general notion of carrier's liability for negligence in caring for the cargo[156] – does not detract from the fact that Norway has undertaken to implement (also) this part of the Hague-Visby Rules.[157]

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152 Rt. 2004.675 ('cucumber stake').

153 See the discussion in the preparatory works to the Act in Ot.prp.nr.80 (1986–1987), p. 91–92.

154 See the account given by the House of Lords in the *Muncaster Castle*, above.

155 With the meaning of the concept being nuanced and open for discussion, as demonstrated by the House of Lords in the *Muncaster Castle*, above.

156 As provided for in section 275 and with the duty of carrier under Hague-Visby Art. III somewhat concealed in Section 262, as earlier discussed.

157 See as illustration the Danish case ND 1966.45, discussed above, involving the concept of 'latent defects' under the Hague-Visby Rules, at a time when the Rules were adopted

The preparatory works to the Norwegian 1994-Code, NOU states: "The Committee takes the view that it is not necessary to retain the provisions in the Maritime Code Section 118 second paragraph litras c to p ('the Catalogue') even if Norway remains a Hague-Visby state. These provisions have no independent meaning as exemptions from liability apart from the general rule based on negligence with reversed burden of proof, see [….]."[158] (author's translation)

Brækhus[159] has given a thorough analysis of why 'the Catalogue' cannot be taken to have an independent meaning, apart from a general duty of due diligence. In this respect he states, i.a.: "At first sight all the cases enumerated seem to be cases where there can be no *culpa* on the part of the carrier. In par. (p) this is explicitly stated: 'Latent defects' are defined as 'defects not discoverable by due diligence'. And the other paragraphs apparently must be construed in the same way."[160]

Brækhus' further point was that no separate meaning could be discerned from the all-embracing provision in litra q) of the Catalogue (optional for the Hague Rules states), providing liability exception for: "Any other cause arising without the actual fault or privity of the carrier, or without the fault or neglect of the agents or servants of the carrier, but the burden of proof shal be on the person claiming the bebefit of this exception […]."

Brækhus discusses whether this provision could perhaps be given a separate meaning on a (procedural) burden of proof rule basis under Norwegian law, but concludes against it. He then makes an interesting observation, on a comparative law level, to English law and the standard volume by Scrutton, Charterparties and Bills of Lading. In an early version of that book, from 1925, after adoption of the English COGSA, Scrutton concludes that litra q has no other effect than being of an *ejusdem generis* rule of construction, but since the preceding exceptions have no common *genus*, then "this general provision [litra q] appears to make all the previous particular exceptions from (b) to (p) unnecessary."[161] In later versions of Scrutton this part was amended to the effect that litra q would have a separate meaning as a burden of proof rule of construction.

Brækhus comment to this amendment of Scrutton, with which Brækhus disagreed (at least as a matter of Norwegian law), was: "Perhaps it was considered tactless to use the word 'unnecessary' about a catalogue declared by the British

verbatim in Nordic (Danish) legislation.

158 NOU 1993:36 p. 35. Reference is here made to the preparatory works of the earlier revision of the Code in 1973 where, however, 'the catalogue' was retained.

159 See Brækhus, The Hague Rules Catalogue, published in Juridiske arbeider fra sjø og land, 1968, (Brækhus (1968a)), p. 587 et seq.

160 Brækhus (1968a) p. 592.

161 Quoted from Brækhus (1968a) p. 601.

delegates in the Hague and Brussels to be a *'sine qua non'* for British acceptance of the Hague rules! We need not accept such considerations. My conclusion, and the conclusion by the Norwegian Law Revision Committee, is that the catalogue should be left out in connection with the forthcoming revision of the chapter on affreightment in the Maritime Code."[162]

The point is not to question the merits of those analyses made by the legislator at the time, but to point to the fact that by omitting parts of the original wording of the Convention, important aspects risk not being brought to the surface. This may involve questions forming part of a wider context of construction, as here illustrated concerning the relationship between the concept of latent defects and the extent of a carrier's vicarious liability.[163]

We are then back to the starting point of our main inquiry, with the question: who are to be considered the servants of the shipowner for the purpose of discovering (or avoiding or preventing) what is a 'latent' (or conversely: 'patent') defect in the ship? This crucial question pertains i.a. to the dilemma of 'an almost indefinite retrogression' as discussed in the *Muncaster Castle* – a discussion which may be lost under Norwegian law when, by a whim, the wording and structure of the regulatory scheme is changed.

To take an example: if electronic equipment mounted during building of the ship has a 'latent' defect, which later materializes into damage during the shipowner's operation of the ship, and if anyone involved in the building of the ship, including any parts or components used were to be considered the shipowner's 'servants' for the purpose of making the ship seaworthy, then hardly any defect to the ship would be considered 'latent' in the legal sense – regardless of how concealed to the shipowner or his (regular) servants. As discussed by the House of Lords in the *Muncaster*

[162] Brækhus (1968a) p. 601.

[163] A separate point is that rather than leaving the point about the meaning of 'the catalogue' by these fairly hostile remarks by Brækhus, one could – also from a Norwegian law perspective – benefit from looking at subsequent case law from nations which did retain 'the catalogue' in their legislation, e.g. decisions by the Australian Supreme Court on the concept of 'perils of the sea'. That lies however beyond the scope of this article.

Castle, this topic formed part of the broader analysis of the concept of latent defects in the 'narrow' and 'regular' sense, which went to the core of how to delineate the class of persons for whom the shipowner would, and would not, become vicariously liable.

This, therefore, goes to the core of the complexity of our topic, and it does not, in the author's view, assist in the context of sea carriage and a carrier's due diligence obligation, to bring into the equation road carriage and its system of (close to) strict liability.

3.2.4.2 Liability for sub-contractors' fault

Despite this skepticism as to the Road Carriage Act as being capable of shedding light on liability aspects involving the concept of latent defects within the realm of the Hague-Visby Rules, there are other points of principle related to the Road Carriage Act which warrant some further discussion.

Section 28 second paragraph)of the Road Carriage Act provides for non-exception to liability for the faults of (the servants of) subcontractors to the contracting carrier.[164] Such a provision makes good sense in the context of a system of (close to) strict liability, but it also makes good sense in the context of fault based liability as under the Hague-Visby Rules; one cannot 'escape' from being otherwise liable by appointing subcontractors to perform what lies within the party's duty of contractual performance.

This is a slightly different topic from what we have discussed above concerning (latent) defects to the device (vehicle or vessel) used for carriage, but there still are meeting points between the two, as illustrated in the *Muncaster Castle* with respect to what constitutes the carrier's 'orbit' or possession of the ship. In that respect one of the Justices[165]

[164] The provision is in Falkanger et al (2017) p. 292, translated as follows: "In claiming exemption from liability, the carrier cannot invoke defects of the vehicle used for the transport, or the fault or neglect of a party he may have rented the vehicle from or his servants." The latter part would in the author's view be better translated: "…. the fault or neglect of the party he may have rented the vehicle from or the servants of such party."

[165] Lord Merriman, with the other Justices concurring, referred to the earlier *Angliss* case according to which the ship would be outside the carrier's 'orbit' in case of in-chartering: "He [Mr. Justice Wright in the *Angliss*] pointed out that the carrier might

gave as an example that if the ship was in-chartered by the (contracting) carrier, defects to the ship in existence before such in-chartering, and not being detectable by the exercise of due diligence (and thus of 'latent' nature), were beyond the (contracting) carrier's 'orbit'. This topic relating to in-chartered ships was not made subject to any real discussion in the House of Lords, and it has later been criticized in English legal commentary, in the author's view, rightly so. Cooke et al, Voyage Charters, states in this respect:

> "This result is unattractive and it is submitted that it is avoidable because the charterer uses the shipowner effectively as his independent contractor in order to perform his obligations as carrier and the vessel is, therefore, within his orbit as long as it is in the orbit of the owner as his agent."[166]

That is a statement with which one can also concur under Norwegian law, on the basis that a (contracting) carrier shall not be any better off by engaging a sub-contractor to perform the contract than by performing it himself. This type of thinking is also reflected in the Maritime Code, concerning sub-contracting and a cargo claimant's right of direct action against the sub-contractor (performing carrier). According to section 286, a sub-contractor is liable for cargo damages on the same terms as the (contracting) carrier.[167]

In other words, whatever solution chosen as a (contracting) carrier's vicarious liability for the class of persons involved in making the ship

not be the owner of the ship but merely the charterer; he might not have contracted for the building of the ship, as in the *Angliss*, but merely have purchased her, possibly years after she had been built, and added: '[…] In the two latter cases the builders and their men cannot possibly be deemed to have been the agents or servants of the carrier […]." – p. 77 of the House's decision.

166 Cooke et al, Voyage Charters, 2007, p. 973.

167 No corresponding right of direct action is provided for in the Hague-Visby Rules. The provision in the Code is taken from the Hamburg Rules but formed part of the Nordic Codes from their revisions in 1972–73, see NOU 1993:36, p. 12. For the historic background of section 286, see also Solvang, Choice of law vs. scope of application – the Rome I and the Hague-Visby Rules contrasted, SIMPLY 2019/MarIus 535, 2020, p. 160 et seq (pp. 167–174).

seaworthy, will apply correspondingly to a subcontractor's vicarious liability. On the other hand, this coordinated solution between the scope of liability of a contracting and a performing carrier, does not answer our question of what is the delimitation of the class of persons for whom either would be vicariously liable.

3.2.4.3 The scope of performance as a criterion for vicarious liability

A further topic of interest relating to the Road Carriage Act is the following:

The Road Carriage Act operates with a scheme of (close to) strict liability, unlike the fault based system of sea carriage. This makes a difference in principle in that – somewhat simplified – in case of a fault based system, liability requires someone's (the carrier's) breach of a duty of care, with the question being how far this duty extends to the relevant class of assistants – while in the case of strict liability one starts from the end of damage having occurred and looks to possible exceptions from such liability (e.g. force majeure or other events lying outside of the carrier's sphere of control).[168]

However, also in this latter system of strict liability, there may be limits as to the nature of involvement in the carrier's *performance* by the person having made the relevant mistake leading to cargo damage. If, for example, cargo damage is caused by the cargo owner or someone for whom the cargo owner is responsible, such damage is clearly not attributable to the carrier.[169] Similarly, there may be third parties involved in the course of carriage who commit faults leading to cargo damage, but whose faults are not imputable to the carrier, even under a system

[168] As in the Road Carriage Act section 28 first paragraph, or in the Sale of Goods Act, 1988, sections 40 and 27.

[169] This could e.g. result from faults made by the shipper in insufficient packaging of the goods or wrongful instructions given to the carrier. Similar questions of allocation of risks or imposition of obligation, on the respective parties in situations of 'overlapping performance', can be found in multiple areas of contract law. An illustrative case in a voyage charter situation is the Atlantic Sunbeam, [1975] 1 Lloyd's Rep 482, discussed in Solvang (2009) p. 659–664.

of (close to) strict liability. Such third party could for example belong to the logistical system of which a road carrier makes use.

Illustrative is a Norwegian Court of Appeal decision on road carriage from 2012.[170] The road carrier exercised an option to carry the goods by rail. The goods were damaged while in the possession of the (sub-carrying) rail carrier due the train derailing. That, in turn, was caused by negligent maintenance work on the rails by a sub-company of the railway carrier,[171] consisting in insufficient spacing between rails which caused misalignment of the rails due to heat expansion during warm summer days (Norwegian: 'solslyng'). This negligent act by workmen performing maintenance work on the logistics system for railroads, was found to lie beyond the scope of the *performance* of carriage undertaken by the contracting road carrier, and on that basis the contracting road carrier was held not liable.

In other words, the concept of *performance* undertaken by a carrier under a system of (close to) strict liability, may serve as a criterion for delineating the class of persons for whom the carrier becomes vicariously liable. This criterion is, in a principled sense, the same under a fault based system, as in sea carriage; there too the notion applies that the logistical system – for example the state's organization and management of navigational marks – would lie outside the scope of contractual *performance* undertaken by a carrier (shipowner).

Moreover, this criterion in contract law of the scope of *performance* bears resemblance to the criterion under tort law of what belongs to a carrier's (shipowner's) ordinary course of business, as discussed earlier. There are, therefore, potential meeting points under the two systems of law; liability in contract and in tort, as also illustrated in the *Muncaster* where the Court of Appeal relied heavily on common law tort cases in support of its solution under the Hague/Hague-Visby Rules; the nature of *activity* of a shipowner under tort law could in that respect be seen as a governing criterion on a par with the nature of *performance* by a shipowner under contract law.

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170 LB-2012-88290, discussed by Støen (2016) p. 93–99.

171 Maintenance work carried out by the state run agency 'Jernbaneverket'.

3.2.5 Parallels from carriage by air

Although not mentioned in the enumerated legal sources by Falkanger and Bull, some comments relating to air carriage may be of general interest to our topic.

In situations of delayed delivery of goods, there is fault based liability (with reversed burden of proof) under the Aviation Act, 2004, Section 10–20;[172] the carrier is liable unless he can show that "he himself and his assistants"<?> have taken all reasonable steps to avoid the delay. The provision is taken from the Montreal Convention[173] Article 19 which uses the corresponding term "[the carrier] and its servants or agents".

According to international legal commentary, the class of servants for whom a carrier is vicariously liable, would have to be determined by national law, which may take different directions.[174] Under Norwegian law, the provision relating to delayed delivery of goods had a corresponding regulation under the previous Aviation Act.[175] Under that Act the Norwegian scholar Lødrup adopted Brækhus' approach taken from maritime tort law (above), to the effect that the relevant class of assistants must be determined by the criterion of what belongs to a shipowner's – or aviation company's – ordinary course of business. This, according to Lødrup, might lead to different solutions under Norwegian law and e.g. under English law as laid down in the *Muncaster Castle*. Lødrup underlined, however, that the legal outcome in aviation and shipping matters might differ since aviation companies traditionally do not use third party contractors (yards) for maintenance and repair work purposes to the extent common in the maritime industry – but instead perform such work in-house.[176]

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172 Section 10–19 first paragraph provides that liability is essentially strict for damage or loss of the goods, Støen (2016) p. 99–100.

173 Convention for the Unification of Certain Rules for International Carriage by Air, Montreal 1999, implemented into Norwegian law by the said Aviation Act, 2004 section 10–20.

174 Støen (2016) p. 102.

175 Aviation Act, 1987, and before that: Aviation Act, 1960, and 1936 – see Støen (2016) p. 101–102.

176 Støen (2016) p. 103, with further references to Lødrup.

Although Lødrup's remarks are from some time back, they still illustrate how notions of vicarious liable under tort law (Brækhus' views) are transferred to the realm of contract law – and again it may be worth paying a visit to the *Muncaster Castle*. Here the House of Lords distanced itself from a transferal of national tort law principles into contract law for purposes of achieving international harmonized construction of the Hague/Hague-Visby Rules. In aviation law, such endeavors seem to be deemed unrealistic in view of differences under national law on this type of complex legal questions.

3.2.6 Parallels from general contractual notions concerning 'retroactive assistants'

As a matter of completeness – in view of Falkanger and Bull's enumeration of legal sources to aid in the understanding of a shipowner's vicarious liability – it may be added that this question concerning the scope of a contracting *obligor's* vicarious liability, has been the subject of a more general discourse under Norwegian contract law. It lies beyond the scope of this article to enter into such a discussion – but a brief note may still be made: There is, under various types of contracts, a general reluctance to make an *obligor* responsible for mistakes made by what are called 'retroactive assistants'.[177] Such reluctance is founded on much of the same reservations as can be seen in the *Muncaster Castle* and the House's adoption of the delineating criteria of a shipowner's 'orbit' or time of possession of the relevant ship.[178]

Moreover, as a matter of law and semantics it may be seen as unfortunate – or illogical – to use such terms since 'assistants' (or similar) denote that the 'assistant' assists in something, i.e. in the performance by the principal (contracting *obligor*) – while the point in making the demarcation may be that legally this is not the case. In that sense, the term could just as well be 'retroactive non-assistants'. E.g. in the *Muncaster Castle*: the point that workmen of a building yard are not to be deemed

177 Norwegian: 'retroaktive hjelpere'.

178 See the further review and discussion by Støen (2016) p. 105 et seq.

a shipowner's assistants, means that the person is beyond the scope of 'assistance' to the shipowner altogether – and this meaning may be lost by calling such personnel 'retroactive assistants'. This, in turn, has a side to the concept of delegation, as earlier discussed.[179]

3.3 Reflections on a comparative level

Having reviewed the main sources under Norwegian (and Nordic) maritime law concerning both tort and contract, some reflection may be made on a comparative level.

If one were to take the tentative view that the English *Muncaster Castle* ought to be followed under Norwegian law, e.g. for purposes of international harmonized construction of the Hague/Hague-Visby Rules, it is important to note that this would not dispose of the additional questions raised under English law.

We have seen that the House of Lords adopts an important distinction between faults made to the ship before and after it came into the shipowner's possession or 'orbit'. Should the same line be drawn also under Norwegian law? This concerns a wider discussion involving general contract law considerations under Norwegian (Nordic) law, as illustrated in the previous chapter.

We have further seen that even under a situation of ship repair under English law, there is a line to be drawn between faults by the repair yard's workmen (for whom vicarious liability would attach) and other faults, e.g involving spare parts suffering from latent defects and applied by the repair yard. Should one also aim here at copying English law?

For those who advocate the adoption of English law and the *Muncaster Castle* under Nordic law, it is surprising to note that these types

[179] Similar conceptions of (non-liability for) 'retroactive assistants' have been up for discussion also in Norwegian and Nordic tort law, see Selvig (1968) p. 52 discussing the Danish Supreme Court case, UfR 1964.59, where a house owner was not held liable for faulty electrical work leading to personal injury and where the electrician in question had been retained (and committed the fault) decades before the incident happened. The house owner was incapable of retroactively identifying who the relevant tortfeasor-electrician was.

of questions, which pertain to the holism under English law and which are apparent from the *Muncaster Castle* decision itself, are not seriously addressed.

We do not aim here to bring this discussion to a close, other than raising such points of uncertainty, which also involves important aspects concerning the relationship between the Hague-Visby Rules, as implemented into the Maritime Code, and the tort rules under the Maritime Code section 151. If the above English law inspired delineation were to be adopted in respect of the class of persons for whom the carrier would be responsible in connection with carriage of goods, should that solution necessarily also follow under the tort rule of section 151?

In the same way as under English law, there is also under Norwegian law a need to see these sets of rules in conjunction. It would probably not be a desirable situation if various groups of claimants, to maybe one of the same marine accident, were to be given recovery on different legal bases under, in principle, one and the same standard of due diligence by the shipowner. But that does not mean that in other respects the liability rules of contract law (the Hague-Visby Rules as implemented in the Code) and tort (section 151) may not differ, due to different considerations in play under the different sets of rules.[180]

In Norwegian law there has been a general discussion concerning whether the scope of liability under section 151 should, or could, be used as a basis for liability also under the almost identically worded provisions under contract law.[181] This discussion has its parallel under English law (as illustrated by the *Muncaster Castle* and the *Hopestar*) but seems to be more developed under Norwegian law, essentially thanks to the scholarly works of Selvig. By analyzing the various constellations of distribution of tasks and functions under contract law in chartering of ships and carriage of goods, he demonstrates how the contractual scope of liability in this respect cannot be the same under the two sets of rules.

[180] This a recurring topic in Selvig (1968), see e.g. pp. 75 and 89, and the account given in chapter 4.4 below.

[181] See the discussion above concerning section 151 having 'borrowed' much of its phraseology from the Hague-Visby, as implemented into the Code.

For example in a liner trade situation, the carrier may have tasks to be performed in the handling of goods at the loading terminal, but faults made in the course of such tasks would not be considered tasks in the service of the ship relating to tort liability under section 151 – although it would be tasks for which the shipowner (carrier) is responsible vs-a-vis its contacting party; the charterer or cargo owner.[182]

The main purpose of this review has been to point to the complexity of the relationship between tort rules and contract law rules – both under English and Norwegian law. Going back to the starting point, there is therefore in the author's view no reason to adopt an English law decision, like the *Muncaster Castle,* for the purposes of harmonization of law (i.e. the Hague-Visby Rules) without taking a broader view of the legal implications of such an adoption.

[182] See Selvig (1968) p. 123 et seq. Selvig holds open the possibility of using section 151 as a legal basis for liability under both tort and contract, but points to the obvious disadvantage in having one and the same provision changing in meaning depending on the nature of any given dispute; whether in tort or in contract. See also Selvig (1968) p. 69, including footnote 89, concerning the history of the Maritime Code relating to the wording chosen.

4 Norwegian law – vicarious liability in maritime law and its relationship to general tort law

4.1 Introductory remarks

The above review of both Norwegian and English maritime tort and contract law gives occasion to some final remarks concerning Norwegian tort law, with particular emphasis on the vicarious liability maritime tort law position compared to that of vicarious liability under general Norwegian tort law.

We have seen that under Maritime Code section 151 the functional criterion of a shipowner's ordinary course of business or expertise, seems to be well established in delineating the relevant class of assistants, both through legal commentary and at least partly backed up by case law. We have further seen that the same criterion is generally adopted under English tort law.

Such a criterion may comprise a significant degree of flexibility; it essentially depends on the facts of a given case where such a line is to be drawn. In the area of ship repair that is particularly apposite; what is the typical nature of repairs undertaken by a shipowner as opposed to more specialized or extensive work, being handed over to third party repair yards? That discussion formed part of the English tort law discussion in the *Muncaster Castle* (although the case was in essence a contract law dispute), and it formed part of the *Hopestar*.

At the same time, a clear line is drawn under English law with respect to mistakes made in relation to the ship at an earlier time; under a previous owner's time of ownership or during newbuilding of the ship. At such time, the ship has not come within the shipowner's 'orbit' or possession, and those who at such earlier time have caused defects to the ship, which to the shipowner becomes 'latent' in nature, are not considered the shipowner's servants within the ambit of the vicarious liability rules.

This seems to be well established under English law, both in contract and in tort. Moreover, in these latter situations it would not fall naturally to talk about the shipowner 'delegating' tasks at all, since that phrase (and the underlying legal phenomenon) is closely linked to the shipowner (or other principal) being *vicariously* liable for the fault of others; someone must somehow have acted within the sphere of the shipowner's business activity, through some kind of delegation.[183] If there is no such connection, in space and time, it would – as stated in the *Muncaster Castle* – be "unjust and unfair"[184] to hold the shipowner liable on a vicarious basis.

Under Norwegian law that type of borderline, being centered around concepts of 'orbit' and time of possession, has been little discussed as a delineation criterion, although the same basic solution would seem naturally to follow: Maritime Code section 151 aims at a shipowner's operation and running of ships, which does not comprise e.g. the business of building of a ship or developing and manufacturing equipment to the ship; be that steel products of various sorts, or sophisticated electronic navigational equipment as may be prevalent in connection with future automation systems.

This solution, given effect to a delineation of the class of persons falling within the scope of shipowners' vicarious liability, might from a claimant's perspective appear unsatisfactory. We have seen examples of it in the English *Muncaster Castle*: in a situation of ship repairs it was held that the manner in which a shipowner chooses to arrange such tasks, should not be at a cargo claimant's peril: 'arrange it how you please, you are liable for mistakes in the course of your arrangements'. On the other hand, that approach was not adopted in respect of mistakes made prior to the ship entering the shipowner's 'orbit', since such mistakes do not belong to a shipowner's tasks of preparing the ship's seaworthiness. Thus, for a claimant, these latter types of mistakes, materializing into unseaworthiness and damage, are in that sense at his/her peril. And – it is submitted – the same result would follow from Maritime Code section 151, based on the notion that building of ships etc. forms no part of the ship's service as envisaged in that provision.

[183] See the quote from Aiytah (1967), chapter 2.4 above.

[184] See the House of Lords' decision, p. 63.

It is worth looking further into this topic since, again, from a claimant's perspective such a solution may be said to constitute a void: why should a shipowner not become liable for all cases of a ship malfunctioning and thus causing damage, regardless of the background of the failure? Put differently: could it not be said to belong to risks intrinsic to a shipowner's business of operating and running of ships, that ships cause damage – irrespective of the cause?

In the author's view, that is not the case, and the reason is the fundamental nature of fault based as opposed to strict liability systems. The reason is, moreover, that within a fault based system of vicarious liability, there is a need for delimiting the class of persons whose faults are to be imputed to the defendant (shipowner). This deserves some further reflections, also since it pertains to general developments (or the lack thereof) under Norwegian maritime tort law as compared to the developments of (non-maritime) Norwegian tort law. We shall therefore look further into some selected aspects of this relationship between the liability system in maritime law and general tort law.

4.2 General account of the relationship between an enterprise's vicarious liability and the doctrine of strict liability for 'dangerous activity'

In Norwegian tort law, parallel to the development of vicarious liability for mistakes made by employees of an enterprise, as eventually enacted the Torts Act 1969 section 2-1 (below), there was a case law based doctrine, led by the Supreme Court, imposing strict liability for what may be called 'dangerous activity'.

The starting point for the development involved property damage to adjacent land. Two important cases from the 19th century[185] were maritime in nature, in that they concerned steam driven ships in river traffic, which, at the time, caused unusual waves which had the effect of eroding land along adjacent river banks. The Supreme

[185] Rt. 1874.145 and Rt. 1889.642, discussed in Solvang, Rederiorganisering og ansvar – rettslige utviklingstrekk, MarIus 484, 2018, p. 54–55.

Court awarded the land owners damages on a strict basis, essentially on the rationale that when shipowners introduced inventions with such novel risks, they ought to bear the consequences. These cases later formed part of legislation providing for strict liability in land based neighbour relations and in inland water ways traffic.[186] The significance for shipping in general was limited since the nature of the damage, erosion of river banks, had no real parallel to ocean going ships.

Other cases in this early stage involved other types of land based activities, such as a nitroglycerine factory exploding and causing personal injury to bystanders,[187] and a municipal water pipe leaking and causing damage to private housing.[188] Later the development also encompassed personal injury; workers of railway companies leaving behind explosive devices from construction work, being picked up by kids and causing injury;[189] tiles falling off the roof of city housing causing injury to passers-by;[190] a hatch cover in a restaurant premises leading guests to open it out of curiosity and fall down through the hatch, suffering injury.[191]

Common to these cases is that the activity in question, whether of public or private nature, introduced a risk of harm to the surroundings – such risk being of an intrinsic and lasting nature ('dangerous activity'). When such risk materialized into damage, liability was imposed on the legal person in charge of the activity, on the rationale that those introducing such risks were closer to bearing the consequences than an innocent third party suffering damage therefrom.[192]

In simplified terms, this development stemmed from a combination of policy based factors: First, realization that activities with damage creating potential would – when the potential materialized into damage – not always be attributable to anyone's fault. Second, realization that there is a limit to the means of 'stretching' the concept of fault and that it would not be right as a matter of law to impose liability based on fault where there is none. Third, relieving the courts of the often difficult task of inquiring into whether there in fact was fault committed by someone,

186 Leading up to the current Neighbour Act, 1961, and Waterways Act, 1940.
187 Rt. 1875.330.
188 Rt. 1905.715.
189 Rt. 1917.202.
190 Rt. 1972.965.
191 Rt. 1991.1303.
192 See e.g. Hagstrøm/Stenvik, Erstatningsrett, 2019, p. 174 et seq.

and with the additional question: whether this 'someone' is one for whom the defendant would be vicariously liable.

In general tort law, this development of the strict liability for 'dangerous activity' went hand in hand with the development of an enterprise's vicarious liability for its employees, which was statutorily based,[193] and with the two liability systems to a large extent complementing one another.[194]

A fairly recent example is the Supreme Court case, *Gulvluke*.[195] A hatch under the floor of a restaurant premise was furnished with a hatch cover which was capable of being opened by guests – although not conveniently so; the cover was fairly heavy, forming part of an old construction of the building, which was subject to historical preservation. A guest opened the cover out of curiosity, fell into the hatch and was injured. The company running the restaurant was, by a majority of the Court, held liable under the doctrine of 'dangerous activity'; the hatch cover, being insufficiently secured, constituted the kind of intrinsic danger envisaged by the criteria for liability under the doctrine. The dissenting Justice concurred in the result but held that liability should rather be imposed on the basis of negligence, either on the part of the company (its alter ego) or its employees, on the footing that the risk of someone getting injured was reasonably foreseeable, hence should have been detected and averted through the exercise of due care.

The Supreme Court case of *Gol Bygg*[196] may also be mentioned. A building serving as storage and a retail center for explosives exploded and caused property damage to its surroundings. Both the owning and the operating (retail) company were held liable under the doctrine of 'dangerous activity'. The background for the explosion was an employee (caretaker) of the operating company who, being mentally unstable, ignited the explosives. This fact would as a starting point mean that the operating company would have been vicariously liable for the acts of the employee through the Torts Act section 2-1, subject to the reservation that the act of putting fire to the building by an employee would probably be considered unforeseeable and extraordinary, to an extent which would render it outside the scope of vicarious liability.[197] The point is however to illustrate the complementary

[193] At the time Norske Lov (NL) 3-21-2, later replaced by the Torts Act, 1969 – see chapter 4.4.2 below.

[194] See the further account given in chapter 4.4 below.

[195] Rt. 1991.1303 ('floor hatch-cover')

[196] Rt. 1983.1052.

[197] Chapter 4.3.4 below.

function of the doctrine of 'dangerous activity' – also in such cases where the vicarious liability rules, for one reason or the other, would not lead to liability.

This does not mean that all activity making vicarious liability applicable under the Torts Act is at the same time 'dangerous activity' within the meaning of the said strict liability doctrine. The point is merely to indicate a tendency to the effect that this complementary role of the two systems exists and, as part of this, that there is no general pressure towards imposing liability based on 'fictitious negligence' under the vicarious liability system of the Torts Act, which might have been there had it not been for the doctrine of 'dangerous activity'.

It is worth observing that such complementary role does not exist under English law, where there is no real parallel to the Norwegian doctrine of strict liability for damage caused by 'dangerous activity'.[198]

Moreover, this complementary system in general tort law has not undergone the same development in Norwegian maritime law. Here the Supreme Court has generally held that the statutory fault based system within the maritime field[199] creates obstacles to the adoption of the doctrine of strict liability. The doctrine is considered confined to a few earlier precedents involving ships which, due to technical failure in connection with berthing operations, caused property damage to stationary facilities.

This development of strict liability for technical failure began with a case from 1916 involving failure of a motor car's steering rod (due to material fatigue), which caused the car to crash into a shop window.[200] The Supreme Court imposed liability on the car owner irrespective of fault, on the basis that "with respect to a transportation vehicle such as an automobile, [the Court] finds that the owner must be the one proximate to bear the damage caused by the machinery not functioning satisfactorily." (author's translation)

Similarly, technical failure of the breaking system of a streetcar led to the imposition of strict liability on the operating company in a personal injury case.[201]

198 Solvang (2021) p. 113–116.

199 Maritime Code section 151 and the fault based collision rules in section 161.

200 Rt. 1916.9.

201 Rt.1937.563.

Two maritime cases followed suit. They are of particular importance as they probably still stand as precedents today, within their factual scope.

First, there was the *Neptun* from 1921.[202] Here the reversing system of the engine failed so that the ship ran into and damaged a railway bridge adjacent to the quay to which it was about to berth. The shipowner was held liable regardless of fault by reference to the motorcar case from 1916, and upon the reasoning that "such incident may occur by the use of any machine, and the [shipowner's] activity cannot be performed without a certain risk that something in the machinery may fail […]",[203] thus entailing 'dangerous activity' as laid down in the strict liability doctrine.[204]

Next, there was the *Sokrates* from 1952.[205] Here the same type of technical failure occurred but the ship instead hit and damaged the quay to which it attempted to berth. The cause of the incident was a connecting bolt which had fallen out of the mechanical command lever operated from the wheelhouse and connected to the engine. There was dissent on the reasoning for holding the shipowner liable. The majority applied the doctrine of 'dangerous activity', relying on the previous *Neptun* case. The minority based its finding on negligence: the command lever could have been inspected – although inconvenient as this would require removal of the wheelhouse floor – and prudence dictated such inspection, according to the minority.[206]

It may therefore be said that claimants in maritime law cases depend on the statutory rules of a shipowner's vicarious liability (the Maritime Code section 151) to a greater extent than a claimant under general tort law depends on the corresponding rules of an enterprise's vicarious liability (Torts Act section 2-1). In other words, accidents involving ships which if projected onto land based activity most likely would have constituted 'dangerous activity' under the said doctrine, are in maritime law, eclipsed by what the Supreme Court has perceived to be obstacles to the development of the doctrine, due to peculiarities of maritime law.

A marked decision in this respect is the *Uthaug* from 1973[207] – the facts set out in chapter 3.1.2 above – where the Supreme Court, both

202 ND 1921.401/Rt. 1921.519.

203 Author's translation.

204 At this stage the doctrine of "dangerous activity" was heralded into maritime law on a general basis, see Knoph, Norsk Sjørett, 1931, p. 126.

205 ND 1952.320/Rt. 1952.1170.

206 For further details, see Solvang (2021) pp. 113– 116.

207 Rt. 1973.1364.

the majority and minority fractions, held that the accident and thus the claimant's claim for damages, would have been covered by the rationale of the strict liability doctrine, had it not been for the fact that the case was maritime in nature. The majority for that reason dismissed the claim, while the minority took the view that risks caused by submarines were not of a kind typical to the shipping industry and, for that reason, held that the doctrine of strict liability ought to be applied.

Against that background of the general state of the maritime law, and against the background of the – perhaps – scarce legal protection of a group of claimants under maritime law as compared to land based law,[208] it is of interest to explore some aspects of the relationship between vicarious liability under maritime law and under general tort law.

More precisely: since the functional criterion of a shipowner's course of ordinary business as delineating the scope of vicarious liability under the Maritime Code, has been criticized in legal commentaries in the past,[209] and similarly challenged in recent scholarly works,[210] it is of interest to explore whether the maritime law development has missed out on parts of the development under the Torts Act. Or perhaps better; whether the Torts Act contains aspects which should be taken into account, more than what has been the case in maritime law commentary, to the possible aid of claimants subjected to the above described 'void' resulting from the limited applicability of the liability doctrine of 'dangerous activity' in the maritime sector. In this respect Selvig's scholarly work, Det såkalte husbondsansvar, is of particular interest. However, since that works dates back to 1968, it is deemed appropriate to first review the legal position as it now appears, and then give a separate account of his findings – chapter 4.4.

208 See for a review of the relevant groups of maritime law claimants, Solvang (2021) p. 99.

209 See the account given of Björkelund in chapter 3.2.3 above.

210 Røsæg (2021) p. 136, footnotes 29, 31 and 32.

4.3 The interrelation between the Torts Act section 2-1 and the Maritime Codesection 151

4.3.1 The Torts Act and its relation to independent contractors

From these introductory remarks concerning the relationship between the jurisprudential doctrine of strict liability for 'dangerous activity' and statutorily based systems of vicarious liability, we return to the topic of vicarious liability proper. We look at parallels and differences between the vicarious liability systems of the Torts Act and the Maritime Code, on the footing that there are central interlinks between the two, which appear not to have been properly addressed in legal commentary.

Torts Act section 2-1 reads (in relevant parts):

> "An employer is liable for damage or injury caused intentionally or negligently during an employer's work or functions for the employer, taking into account whether the requirements which an aggrieved person can reasonably make to the activity or service, have been neglected. […]"

Looking at the first part of the provision, its parallel to the Maritime Code section 151 is apparent. The Torts Act talks about faults by employees during 'work or functions' for the employer.[211] Section 151 correspondingly talks about 'fault of the master […] and others performing work in the service of the ship'.[212] The basic idea is that of vicarious liability for faults committed in the course of the relevant activity being initiated or conducted by the legal person in charge of it; the employer (principal) under the Torts Act, and the shipowner (principal) in operating or running ships under the Maritime Code.

There are however differences between the two legal systems stemming from the nature of the relevant activities. In the Torts Act an employer

[211] Norwegian: '... under arbeidtakers utføring av arbeid eller verv for arbeidsgiveren ...'.

[212] Norwegian: '... skade forårsaket av feil eller forsømmelse i tjenesten av skipsføreren eller andre som utfører arbeid i skipets tjeneste.'

(principal) is as a main rule vicariously liable only for faults by its employees, not for those of independent contractors.

This does not mean that a principal (an employer) could not be liable on another basis than that of vicarious liability for an independent contractor's fault, e.g. on the basis of the principal's own negligence in not preventing the fault of the independent contractor. An example is the Supreme Court decision, *Asfaltklump*.[213] A municipality had engaged an independent contractor to restore a building owned by the municipality. Such restoration included removal of chunks of tarmac from an upper floor. This work was performed by chunks being thrown out the window (rather than carried down the stairways). Due to insufficient safety arrangements, a passer-by on the street below was hit by a chunk of tarmac and suffered personal injury. The claimant sued the municipality, rather than the two-person company being retained as contractor – and prevailed, not on the basis that the municipality was vicariously liable for the unsafe and negligent *modus operandi* of the contractor, but because the head of administration (Norwegian: bygningssjefen) of the municipality had consented to the method of throwing chunks from upper floor windows, albeit with safety guidelines given but without sufficient supervision and means of ensuring compliance with the quidelines. The municipality was therefore held liability for its own negligence, through its alter-ego; the head of administration.

Under section 151, a shipowner is vicariously responsible not only for its employees but also for certain independent contractors who are retained as part of the ship's service – such as pilotage or towage. This, in turn, pertains to the criterion of the activity of a shipowner in the operating or running of ships. In other words, it makes sense to have the topic of independent contractors treated somewhat differently in the area of vicarious liability in the shipping industry, as compared to the area of an employer's vicarious liability *qua* employer in the Torts Act. The operation of ships occasionally requires independent contractors engaged on a par with employees and the criterion determinative for a principal's (shipowner's) vicarious liability, is designed accordingly.

It should in this respect be noted that the question of whether also independent contractors should be included in the Torts Act's provision for vicarious liability, was discussed as part of the preparatory works

[213] Rt. 1967.597 ('tarmac chunk') also discussed below.

to the Act. Such a solution was proposed by the Law Commission but rejected by the Ministry in its Bill to Parliament.[214] In other words: the idea of legislating for a broader type of vicarious liability – in line with the notion embedded in the Maritime Code – was at the time not foreign to the legislator.

Moreover, this part of the Act – limiting the scope to faults by employees – has in recent case law been expanded on, beyond the wording of the Act, in circumstances where tasks by the defendant (principal/employer) are delegated to independent contractors and where the principal would ordinarily undertake the same kind of tasks itself. Such a result is essentially based on the notion that a claimant should not be prejudiced by the principal's selection of whether or not to undertake the relevant tasks itself.

The Supreme Court decision, *Asfaltkant*[215] can serve as illustration. The case concerned a motorcyclist who died in an accident caused by the road being slippery when wet, combined with an uneven height of the tarmac surface, after road construction work. The State was sued based on alleged negligence by the independent contractor; a road construction company engaged by the State for doing the work. The State did not invoke any defence based on the fact that the company was an independent contractor but denied that the work, including that of putting up warning signs as to the dangerous conditions, had been negligently performed. The fact that the State chose not to invoke any defence based on non-liability for independent contractors, is strong indication that such a defence would not have prevailed.[216]

Another recent Supreme Court case, *Haavind*,[217] may also serve as illustration, although from a slightly different angle. The case concerned financial losses suffered when a partner in a law firm intentionally transferred to himself the values of stocks in privately owned companies, belonging to the children of his client. The claimants (children of the client) succeeded in their damages claim against the law firm, despite

214 See the account given in Selvig (1968) pp. 3 and 48 where it transpires that the proposal was intended to be restricted to harm caused by commercial activity and/or in connection with the use of land.

215 Rt. 2000.253 ('tarmac edge / tarmac heap').

216 As to its significance, see Hagstrøm/Stenvik (2019) p. 272, indicating that this would follow in any event, and that the courts are not bound by agreements as to the state of law by the litigating parties, indicating that the Supreme Court in this instance concurred with the parties' agreement.

217 Rt. 2015.475.

the partner being a partner, not an employee of the firm – essentially on the rationale that the way in which the law firm was organized should not work to the detriment of the claimants.

It may then be asked whether this expansion beyond the wording of Torts Act section 1-2 has, or could have, an effect on corresponding questions of expanding the scope of the Maritime Code section 151, e.g. in the context of what can be seen as the typical risk profile of modern shipping, involving technical failure of various sorts.

In the author's view this would essentially not be the case. The Maritime Code already embodies independent contractors as part of its liability scheme, and the said expansion under the Torts Act always envisages acts within the nature of activity of the principal (employer). This, therefore, does not provide any support for an expansion of the scope of vicarious liability in the system of the Maritime Code, e.g. in the form of a shipowner being held responsible for faults committed during shipbuilding or in the manufacturing of equipment of spare parts for the ship. We are back to the main question of what belongs to the typical nature of activity of shipowners, as earlier discussed.

Rather, this example from general Norwegian tort law shows parallels to English common law. Here the same *prima facie* rule exists to the effect that a principal (employer) is only responsible for the acts of its employees.[218] However, this *prima facie* rule is departed from in given circumstances, depending on the nature of the principal's activity, and the background for choosing to retain an independent contractor to perform certain tasks.[219]

It may be added that this discussion about the scope of the Torts Act section 2-1 and its expansion into the realm of independent contractors, pertains to questions of principle of an overarching nature. As pointed

[218] Chapter 2.1 above.

[219] See in general Witting (2018) p. 589 et seq. See also the earlier review of case law by the Court of Appeal in the *Muncaster Castle*, e.g. showing that the task of adjusting compasses onboard ships would form part of an employer's (shipowner's) vicarious liability albeit performed by an independent contractor, and that cleaning of snow from a school yard would fall within an employer's (municipality's) vicarious liability albeit performed by an independent contractor.

out by Hagstrøm/Stenvik[220] there is legal uncertainty concerning the topic of delegation of tasks which an entity would ordinarily perform itself, such as privatization of tasks hitherto undertaken by public authorities but being outsourced as part of privatization – as illustrated in the case, *Asfaltkant*.[221] There may be strong policy considerations pointing to disallowing a corresponding 'delegation of liability' – a view bearing resemblance to the English concept of 'non-delegable duties'.[222]

However, this discussion also has, in the author's view, limited relevance to our main inquiry. A shipowner does not 'outsource' tasks but rather is in need of certain services by independent contractors (external experts) in the course of performing the activity of running and operating ships, as already envisaged in the Maritime Code.

On the other hand, it is worth noticing a general topic discussed in the *Muncaster Castle*: The Court of Appeal took the view that general modernization and technical sophistication in the shipping industry led to shipowners needing to resort to external experts (independent contractors) to an increasing degree – but that this development should not lead to a shipowner's vicarious liability being correspondingly expanded into the realm of independent contractors. The Supreme Court took a different overarching stance: this factual development should not be allowed to diminish a shipowner's vicarious liability for external assistants used, i.e. independent contractors. However, these considerations were always confined to the area of ship repairs and maintenance, not extending to events occurring before the ship entered the shipowner's 'orbit', as earlier discussed.

220 Hagstrøm/Stenvik (2019) p. 274.

221 Rt. 200.253, discussed above.

222 This English law phenomenon is touched upon by Hagstrøm/Stenvik (2019) p. 271 et seq, but in rudimentary form. It is also touched upon by Selvig (1968) pp. 11, 13, 47–54 in similar rudimentary form. It may be of interest that the details of this doctrine have no clear boundaries under English law, see Witting (2018) and his remarks to the effect that "there is considerable confusion" in this area of law (p. 607) and that it is "poorly theorised" (footnote 143, p. 608).

4.3.2 The Torts Act and the significance of 'reasonable expectations' by the claimant

4.3.2.1 Opening remarks – some parallels to English law and the *Muncaster Castle*

It follows from to the last part of the Torts Act section 2-1 that one should take into account "whether the requirements which an aggrieved person can reasonably make to the activity or service, have been neglected" – when assessing the applicability of a principal's (employer's) vicarious liability for the faults of its employees.

This criterion for a claimant's 'reasonable expectations' is of interest for several reasons. It has parallels to discussions raised in the *Muncaster Castle,* and it pertains to what flexibility is envisaged within the context of the Torts Act, which, by analogy, could have corresponding impact on questions under the Maritime Code section 151.

In giving an account of this criterion, we first make a detour to the considerations at play in the *Muncaster Castle* before returning to the Torts Act. The *Muncaster Castle* concerned liability in contract (as part of a statutory duty), not in tort, but the considerations are still of relevance.

In the *Muncaster Castle* the House of Lords raised a point of principle: should one, when determining the carrier's liability, start from the end of analyzing a shipowner's duty of care, as extended into the duty of care by the class of assistants for whom the shipowner would be vicariously liable – or should one start from the end of inquiring into a claimant's reasonable expectation as to the standard of care by anyone having been retained by the shipowner in connection with preparing the ship's seaworthiness?

In the context of the Hague/Hague-Visby Rules, the House answered this question in favour of the latter, on the footing that a claimant should not have to bear the risk of whatever arrangements a shipowner chose to make in preparing the ship's seaworthiness.

This constellation, or switching of approaches, has overriding potential. If the approach were taken solely from a claimants perspective, then in every situation where something were to go wrong and leading to damage, one might ask: was this type of happening outside the

reasonable expectation of a claimant – and probably it would be. Ships are expected to act 'normally'. To a claimant who suffers damage from 'abnormal' ship behavior, it would not matter whether this 'misbehavior' is caused by human mistakes on board (e.g. navigational error), or from someone's mistake in the course of repairs of the ship, or from the fault by a supplier of defective equipment to the ship, or from someone's fault in the production process of the ship as a newbuilding – or from someone's fault at all.[223]

In the discussion of the *Muncaster Castle,* we submitted that such an approach based of 'reasonable expectations' could, in the context of that case, be labeled a half-way-house, as it would not dispose of the general thinking concerning vicarious liability and lines needed to be drawn in relation to faults of assistants within or outside the shipowner's 'orbit'. From a claimant's perspective it would appear arbitrary that its 'reasonable expectation' should not apply to e.g. hidden (latent) defects of a ship attributable to fault of a building yard's personnel.

Rather, it is generally speaking the ship as 'a system' (a devise with damage creating potential) which is at the core of such expectations, and that relates to classical notions of strict liability, either in terms of product liability, or the Norwegian doctrine of strict liability for 'dangerous activity'. Put differently, there are multiple factors which potentially could lead to a ship 'misbehaving', thus causing damage – and a legal model based on shipowners' vicarious liability for servants' faults, is generally speaking inappropriate in dealing with it from a claimant's perspective of 'reasonable expectations'. This model based on a ship as 'a system' (with damage creating potential) is different from most other areas of vicarious liability, which typically relate to more singular acts of harm, such as an employee (or contractor) dropping an hammer causing injury to passers-by as part of construction work, etc.[224] This latter type of situation is, as we shall see, at the forefront of the discussion concerning the ambit of the Torts Act.

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[223] Which is the main point intended to be conveyed in Solvang (2021).

[224] See e.g. the English case *Padbury v Holiday and Greenwood Ltd*, referred to in chapter 4.4.5 below.

4.3.2.2 The Torts Act – 'reasonable expectations' signifying a lenient standard of care for certain public services

From these general observations, we turn to the background and purpose of the phrase as adopted in the Torts Act section 2-1 relating to a claimant's 'reasonable expectations' directed towards the activity of the defendant (principal/employer). In this respect the meaning is twofold, and provides flexibility to cater for two markedly separate legal phenomena; a lenient standard of care relating to certain tasks undertaken by public services, and a basis for taking into account anonymous and cumulative faults.

The former – a lenient standard of care for certain public services – probably is of limited interest in our context of (primarily) commercial shipping, but the background of it is partly maritime in nature and thus worth mentioning.

Enactment of the phrase 'reasonable expectations' was made against the backdrop of situations where it was found inappropriate for a claimant to be entitled to rely solely on the degree of fault of certain public service providers, without taking into account other aspects relevant to the question of imposition of liability. This involved the more remote areas of services provided by public authorities. An important Supreme Court decision illustrating, and bolstering, this type of thinking, is the *Tirranna* from 1970[225] which involved insufficiency of navigational marks, leading to ship casualty.

The freighter *Tirranna* grounded due to a combination of a navigational light buoy being unlit, attributable to negligence by a local public servant in charge of overseeing the light buoy system, and the fact that the ship master (in conjunction with advise from the local pilot) did not deploy other means of navigation than reliance on the navigational buoy – such as plotting the relevant course by the use of radar marks. The shipowner claimed damages from the State on the basis of vicarious liability by the State for the negligence of the local public servant. The Supreme Court, by a majority, dismissed the claim, holding that although the basic requirements for negligence and causation were met, this kind of navigational service was not intended to be the sole means for ships' navigation. For that reason, as combined

[225] Rt. 1970.1154.

with notions of acceptance of risk by the claimant (the master having solely relied on the light buoy for navigation), a lenient standard for the State's potential liability was adopted.

The Court, by a majority, stated: "But a particular limitation seems to be natural and appropriate in relation to public services aimed at contributing to safety in traffic and other activities, such as that of the authorities responsible for navigational marks:[226] Error and neglect which may lead to legal liability, must constitute a significant departure from that level of safety to seafarers which the activity aims at achieving."[227] (author's translation)

Such considerations were up for discussion also in two more recent Supreme Court decisions, *Asfaltkant*[228] and *Ulmebrann*,[229] illustrating the type of considerations involved.

In the *Asfaltkant* (discussed in chapter 4.2) the State, as defendant, unsuccessfully denied that the work – including that of putting up warning signs as to the slippery road conditions combined with an uneven tarmac surface – had been negligently performed. The claimant prevailed by a majority of the Supreme Court, holding that there should have been better warnings, and that such omission amounted to negligence. The minority considered that the warnings deployed met the required standard of care, and in that respect elaborated on the principle of a lenient standard of care applicable to certain public services, as in the present case – as taken from the preparatory works to the Torts Act.

The *Ulmebrann* concerned property damage relating to fire. After believing that a fire in a building had been properly extinguished, the fire brigade left the premises without leaving behind a guard to oversee the further development of the extinguishing work. After some hours, the fire reignited due to smoldering and further property damage was suffered. The municipality in charge of the fire brigade was sued in damages for the harm caused by the subsequent fire, but the claim failed. The Supreme Court made an overall assessment of the relevant circumstances – including e.g. the availability of property insurance for the damaged housing – by invoking statements in the preparatory works to the Torts Act, providing for a

226 Norwegian: Fyr- og merkevesenet.

227 As quoted from the *Asfaltkant*, Rt. 2000.253, p. 261. This type of considerations are expressed also in the preparatory works to the Torts Act, Ot.prp.nr.48 (1965–1966) p. 56. As to the current legal position on this point, see e.g. Hagstrøm/Stenvik (2019) p. 257 et seq.

228 Rt. 2000.253 – discussed above.

229 Rt. 2011.991 ('smouldering fire').

lenient standard of care for certain public services. The Court stated that the phrase of the Act concerning a claimant's 'reasonable expectation' as to the services provided, was intended i.a. to "exclude liability in certain cases where it […] would not be reasonable to impose liability even though 'it may be said that damage is caused through negligence', see [ref.]".[230] (author's translation)

One aspect involved in these type of considerations concerns a distinction to be made between, on the one hand, the duty of public authorities to have a prudent arrangement (organizational set-up) in place for the relevant services and, on the other hand, isolated mistakes by those performing the service as part of such arrangements. Considerations of a lenient standard of care applies primarily to the latter. This was an issue in the above *Tirranna* where the reasoning of the majority, which led to the State being acquitted, primarily concerned the fact that the mistake in question – a navigational mark being unlit – was the result of a singular mistake by the navigational mark inspector. The minority instead emphasized what it considered to be a structural deficiency in the State's own arrangement of the relevant services – illustrating the said distinction.

This type of distinction also formed part of the considerations expressed in the preparatory works to the Torts Act. It also has an aspect relevant to our review of the *Hopestar*, above, where a question concerned the role of classification societies; that the shipowner ought not be held vicariously liable for the faults of a surveyor of a classification society, since such societies filled a semi-governmental role.[231] The same point comes up from a different angle in the present context of the Torts Act, to the effect that the State would generally not be vicariously responsible for the delegated functions performed by classification societies, provided the safety system behind instructing such an external agent is in itself prudently arranged by the State. Thus, the preparatory works state:

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230 Para. 23 of the decision.

231 That was not the position taken by the Court in the *Hopestar*, but the position taken in the earlier case, the *Angliss*, as discussed in the *Hopestar* – see above.

> "The tasks[232] of the State must first and foremost be to ensure that a prudent arrangement is in place concerning the control of ships' seaworthiness. If a prudent arrangement is in place, there are probably no legislative grounds for holding the State responsible if on one singular occasions failure were to be demonstrated in the control performed by private classification societies."[233] (author's translation)

In the realm of autonomous ships, this pertains to the State's potential liability if a classification society were to make mistakes in respect of delegated functions of e.g. certifying and approving automated navigational systems.[234] At the same time, it opens for questions, as in the English *Hopestar*, whether a shipowner could be held vicariously liable for this type of mistakes of a classification society, which in the author's view seems doubtful, given the traditional thinking in respect of delegation of tasks and the category of servants to whom a shipowner's vicarious liability applies.[235]

4.3.2.3 The Torts Act – 'reasonable expectations' signifying anonymous and cumulative faults

Of perhaps more interest is the other aspect of the phrase; that of providing for anonymous and cumulative faults.

According to the preparatory works, anonymous faults exist when "it is clear that there is actionable fault or neglect committed by someone belonging to the employer's personnel, […] even though it cannot be established exactly who committed the fault."[236] (author's translation)

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232 Norwegian: 'oppgaver' which in this context could also be translated 'responsibilities',

233 Ot.prp. nr. 48 (1965–1966) p. 59, quoted from Hagstrøm/Stenvik (2019) p. 273.

234 See general considerations relating to this topic, Solvang, From the role of classification societies, to theories of norms and autonomous ships – some cross-disciplinary reflections, SIMPLY 2018/MarIus 519, 2019, p. 240 et seq.

235 See the views of Brækhus (1968) and Falkanger et al (2017), above.

236 Ot.prp.nr. 48, 1965–66, p. 78–79, quoted from Hagstrøm/Stenvik (2019) p. 242. The same quote can be found in Kjelland, Erstatningsrett, 2016, p. 225, and in Wilhelmsen/Hagland, Om erstatningsrett, 2017, p. 154.

According to the preparatory works, cumulative faults exist "when several faults or neglects are committed which viewed in isolation are not sufficient to establish liability, but where the entirety of events seen in conjunction must be considered to constitute liability."[237] Moreover: "[I]t should also not be required that one singular event of fault or neglect be demonstrated which viewed in isolation would lead to liability, if circumstances are such that several less severe faults seen in conjunction ('cumulated faults') leads to the view that the employer ought to be held liable."[238] (author's translation)

The underlying rationale of the principle of cumulative faults is put well by Hagstrøm/Stenvik:

> "Had the employer assigned the relevant task to A alone, A would according to general experience (erfaringssetninger) sooner or later have caused negligent harm which would have provided the basis for liability; when tasks are instead distributed to several employees, the aggregate risk for negligent events will certainly not be reduced by there being several people involved in performing them. It could rather be argued that allocating tasks among several employees, creates an added risk factor. For these reasons cumulative faults form part of employers' vicarious liability."[239] (author's translation)

Or the same point as put by Kjelland:

> "When allocating tasks to several employees it would be unacceptable if a defence were to exist in an employer pointing to the fact that each person's contribution to an event of damage was not sufficiently severe to justify liability, since such allocation of tasks may in fact also increase the likelihood of something going wrong."[240] (author's translation)

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237 Ot.prp.nr. 48, 1965–66, p. 79, quoted from Hagstrøm/Stenvik (2019) p. 218. The same quote is made in Kjelland (2016) p. 225, and in Wilhelmsen/Hagland (2017) p. 154.

238 Innst. II p. 20, quoted from Hagstrøm/Stenvik (2019) p. 242.

239 Hagstrøm/Stenvik (2019) p. 242 (author's translation).

240 Kjelland (2016) p. 225 (author's translation).

Hence, this formulation in the Torts Act is not intended to expand the nature of the fault based system of vicarious liability into strict liability, in the sense that strict liability (as it were) 'takes over' when or if the requirements for fault as to the cause of a given harm, are not met.[241] Its scope is restricted to situations as here described – however the principle of cumulative faults could in a sense be seen as 'fictitious negligence', since each event of fault may not meet the threshold of actionable negligence, as also pointed out by Hagstrøm/Stenvik.[242]

There are several Supreme Court cases illustrating the principles of anonymous and cumulative faults.

The case *Mobbedom II*[243] concerned a claim against a municipality for allegedly having failed to have in place sufficient protective measures to avoid mental harassment to the claimant by schoolmates during elementary school. The claimant was later diagnosed with mental disorder resulting from harassment, and claimed damages for loss of income from the municipality as employer of those in charge of the schooling system at the time. The claim prevailed. The Supreme Court noted that it was not necessary as part of the negligence test for the claimant to point to exactly who in the educational system (the schoolmaster, the individual teachers, the psychiatric support system etc.) had failed and in what way. Rather, it was held that the overall standard of the schooling system, in view of the fact that attending school was mandatory to every child, had failed to meet the standard of care as this could be derived from the wording in Torts Act section 2-1, last sentence.

The case *Hauketo*[244] is also illustrative: A person suffered serious injury when, standing on a railway station platform, he was hit by a protruding signal light from a train passing at high speed. The person was standing too close to the railway tracks but this was found not to constitute contributory negligence on his part, since the train passed on a different track than the one announced. This, in combination with other factors of cumulative faults (the positioning of the light signal on the wagon, and lack of clear marking of safety distance to the railway track) rendered the railway company liable in negligence.

The case *Asfaltkant*, discussed above, is also in the present respect illustrative: the State conceded to liability for independent contractors and also to the fact that

241 Røsæg (2021) pp. 136–137 seems to understand the phenomenon in this direction.
242 (2019) p. 218.
243 Rt. 2012.146 – ('harassment').
244 Rt. 1985.1011.

faults might have been anonymously and cumulatively committed (with respect to exactly who had failed to put up warning signs, and where) but disputed that these circumstances amounted to negligence – to which the Supreme Court disagreed, by a majority. As in the *Hauketo*, the Court pointed to what constituted want of a prudent safety standard; the road should have been better marked with warnings of dangers, which the Court considered would be likely to have given the motorcyclist the required incentive to be better prepared for the road conditions. By pointing to such a failure, there was no need to point to exactly who was responsible for, and failed in, doing this act.

Maritime Code section 151 is silent on these points about anonymous and cumulative faults, in that it contains no similar wording concerning an aggrieved party's 'reasonable expectation' directed towards the business activity of the shipowner and the standard of care applicable to instances of fault. Despite such silence, it seems clear that the same thinking would apply as under the Torts Act; the phenomena of anonymous and cumulative faults might, surely, occur just as much in maritime as in land-based cases.

On the other hand, these principles – as illustrated by case law – would in the author's view not assist in answering the questions inquired into in this article; how to draw the line for personnel covered by shipowners' vicarious liability in a scenario of technical failure typical to the risk profile of autonomous ships. The core of such questions involves considerations of what would belong to a shipowner's business activity, *qua* shipowner. That question presupposes situations of anonymous or cumulative faults deriving from such a business activity. The case law illustrating the applicability of principles of anonymous and cumulative faults, proves this point; the relevant anonymous and cumulative faults are well placed within the defendant's nature of activity – while this is the very question to be answered in the future realm of autonomous ships.

In the *Hauketo*: all the cumulative faults lay within, and were fully detectable by, the defendant railway operator's activity and sphere of control: the positioning of the signal light on the railway wagon; the placing of sufficient safety marks indicating safety distance to the tracks; the correct announcement of trains passing. Similarly in the *Mobbedom II*: all aspects leading to the claimant suffering from harassment

lay within the activity of running an elementary school – and similarly in the *Asfaltkant*: all anonymous and/or cumulative faults leading to dangerous road conditions, lay within the sphere of the construction company's activity.

4.3.2.4 Cumulative faults and parallels to the English doctrine of *res ipsa loquitor* – the *Hopestar*

Under English law, the equivalent to our system of anonymous and cumulative fault is known as the doctrine of *res ipsa loquitor* – the essence being that if the situation 'speaks for itself', there is no need for a claimant to demonstrate exactly who committed a fault and in what way. In other words, if the circumstances leading up to the damage cannot be attributable to anything but the fault of someone for whom the defendant is responsible, then liability ensues, through inference from the available facts.[245] This means that the doctrine is premised on the assumption that there is in fact such an (undisclosed) instance of fault.

A maritime law case which illustrates the application, and non-application, of the doctrine, is the *Hopestar* – discussed above. The case shows that the doctrine only takes effect if there is no evidence capable of shedding light on the facts, relating to an instance of fault. If there is such evidence, albeit scarce in nature, ordinary assessment of evidence takes place.

In the *Hopestar* this is illustrated in connection with discussions of the uncertainty of the cause of the casualty – the ship disappearing with all crew members being lost, and with no prior warning being conveyed, so that evidence as to the cause of the casualty was scarce. The evidentiary aspect on point relating to our topic of *res ipsa loquitur* was that the plaintiff (widow of a deceased seafarer) did adduce sufficient evidence to demonstrate that the ship suffered from structural weakness – however not that such weakness was of sufficient severe nature to be causative of the casualty. On this evidentiary constellation, the Court stated:

> "I do not think this [question of evidence] involves anything more than the sort of presumption that is ordinarily raised by the res ipsa loquitur rule. The prima facie presumption is of value only if no

[245] See e.g. Witting (2018) p. 142–148.

> further evidence is elucidated. As soon as further evidence is adduced, a plaintiff has to make out his case on the whole of the evidence. Since in the end the plaintiff has not satisfied me that, on the balance of probability, the vessel was at the material time in a dangerous condition, she fails. Alternatively, the plaintiff fails if, at the end of the evidence, there are two possible explanations, each equally consistent with the evidence and one involves no liability. Here I think the defendants [shipowners] have advanced an alternative hypothesis[246] which is at least as plausible as the plaintiff's hypothesis, and so her case fails. The res ipsa loquitur rule is designed to relieve the plaintiff in the first instance from proving negligence or breach of duty otherwise than by proof of the accident itself."[247]

As part of this discussion concerning the *res ipsa loquitur,* a previous case was referred to, which further illustrates the doctrine's relation to general principles of burden of proof. The case referred to bears some resemblance to the Norwegian case, *Hauketo*,[248] as it involved personal injury in a railway accident, however in the English case the evidentiary aspect of causation was far from clear. That uncertainty was resolved in the defendant's favor based on principles of burden of proof rather than through application of the *res ipsa loquitur* doctrine. The Court in the *Hopestar* stated:

> "In Wakelin v London and South Western Railway Company, (1886) 12 App. Cas. 41, the plaintiff's husband was found dead on a level crossing, having been struck by a train which (it was assumed) had not taken proper precautions at the crossing. Lord Watson (with whom Lord Blackburn agreed) said, at p. 47:
>
> 'Mere allegation or proof that the company were guilty of negligence is altogether irrelevant; they might be guilty of many negligent acts or omissions, which might possibly have occasioned injury to somebody, but had no connection whatever with the injury for which redress is sought, and therefore the plaintiff must

[246] I.e. that of striking of a mine as opposed to the ship's structural weaknesses.
[247] *Hopestar* p. 139.
[248] See the previous chapter.

> allege and prove, not merely that they were negligent, but that their negligence caused or materially contributed to the injury.'"[249]

Part of the plaintiff's argument in the *Hopestar* was that, by establishing evidence of unseaworthiness (which she did), the doctrine of *res ipsa loquitur* would lead to a finding that such unseaworthiness was the result of negligent acts. The Court disagreed. A finding of unseaworthiness had the effect of shifting the burden to the defendant (shipowner) to show that the unseaworthiness was not attributable to negligence, or that it was caused by someone outside the class of persons for whom the shipowner would be vicariously liable. The adducing of such evidence would be open to the defendant (shipowner) irrespective of the doctrine of *res ipsa loquitur*. The Court stated:

> "But the burden of establishing all that[250] would have been upon them [the shipowner]. It is a burden which is not, in my judgment, transferred to them unless the nature of the loss or damage and its relationship to the breach has first been ascertained and proved. In the same way, it may be that, if structural weakness was the cause of the loss, the defendants would have been held liable for it, notwithstanding that they were responsible for a part only of the weakness, unless they could show that, but for the additional weakness for which they were not responsible, the loss would not have happened. But this point does not now arise."[251]

This latter point concerning causation is familiar also under Norwegian law, in the area of contributing causes to an event of damages, for some of which a shipowner is responsible, others not, as regulated e.g. in the Maritime Code section 275 concerning contract law and cargo damage. That type of complex questions could also arise in the present context of tort law, e.g. that one contributing factor stemmed from a (latent) defect from before the ship entered the shipowner's 'orbit', which became

[249] *Hopestar* p. 140.

[250] I.e.for the defendant shipowner to prove that possible unseaworthiness was not attributable to fault within the scope of vicarious liability.

[251] *Hopestar* p. 141.

exacerbated or materialized into harm being caused, through another event for which the shipowner would be responsible. Such constellations are however nothing peculiar to this area of law and would be resolved through ordinary principles of causation.[252]

These questions of causation do not detract from the main legal point, namely that vicarious liability requires fault to have been committed by someone for whom the shipowner is responsible, and so we are back to the main question of how to delineate the scope of such a class.

A separate point on a comparative law level is that the above quotes from the *Hopestar* illustrates notions about the interrelation between doctrines (rules of presumption) like the *res ipsa loquitur*, and their effect on the shifting (back and forth) of burdens of proof – which is not necessarily how a Norwegian lawyer would look at the same phenomena. This has, in turn, a side to what is discussed in chapter 3 concerning the Hague-Visby Rules and 'the catalogue' providing for liability exceptions, as disposed of under the Norwegian legislative tradition. Brækhus ridiculed the English way of drafting the Rules, and as part of this, demonstrated how – from a Norwegian procedural point of view – 'the catalogue' could not be justified as system for allocating burdens of proof.[253] It may, on the other hand, be doubtful that an English lawyer would agree to the Norwegian way of, in essence, disposing of the phenomena of burdens of proof, along the rationale given by Brækhus, in furtherance of prior analyses by the scholars Augdahl and Eckhoff.[254] This procedural comparative law aspect does however lie beyond the scope of this article.

4.3.3 The requirement of fault by the tortfeasor-servant – some comparative law reflection

The fact that vicarious liability is a fault based system is already apparent from the wording of the relevant Acts. The Torts Act section 2-1 uses the phrase "injury caused intentionally or negligently during an employer's work […]". The Maritime Code section 151 mentions "fault or neglect by the master […]". Similar phraseology is found under contract law based

252 See e.g. the important decision by the Supreme Court, Rt. 1992.64, *P-pille II*, concerning the legal requirement of causation in instances where there are cumulative causes for which the defendant is only responsible for one out of several.

253 Chapter 3.2.4.1 above.

254 See Brækhus (1968a) pp. 595–600.

on the Hague-Visby Rules where section 275 mentions "fault or neglect of anyone for whom a shipowner is responsible."

This underlying idea of a tortfeasor-servant's fault, is bolstered by other provisions of the regulative system, such as Torts Act section 2-3 which governs abatement and with four scenarios envisaged: the employer's (principal's) claim for indemnity against the tortfeasor-servant; the tortfeasor-servant's right of abatement when being held directly liable towards third party claimants; the tortfeasor-servant's claim for indemnity against the employer (principal) after having been held to be directly liable towards third party claimants; the tortfeasor-servant causing damage to the employer's property. In corresponding situations under the Maritime Code, section 151, the second paragraph of that provision refers to this regulation of the Torts Act.

We shall look further into how this model of liability is theorized under English and Norwegian law, that is: what is (in simplified terms) the nature of the fault committed by the tortfeasor-servant for which the principal is held liable? – in view of the fact that the tortfeasor-servant is typically not made party to such proceedings by the claimants against the principal.

Under English law the essence may be summarized: As a starting point there is a requirement that the person for whom a principal is responsible, commits a tort, which for practical purposes means the tort of negligence, or a statutory tort, as illustrated in the *Muncaster Castle* and the *Hopestar*. Such a requirement of the tortfeasor-servant having breached a tort, does not however mean that a claimant claiming against the principal must demonstrate that the requirements of an actionable tort are, or would be, met vis-à-vis the tortfeasor-servant. This is trite from the cases we have looked into, and it is apparent from any English law volume on vicarious liability. Such a requirement of the tortfeasor having committed a tort, is instead a prerequisite which forms part of the legal action brought against the principal.[255]

[255] E.g. in the *Muncaster Castle* it is not clear who on the repair yard's part that committed the wrong by failing to tighten the relevant bolts for the storm valve covers, and what was the circumstances behind such failure.

In the context of statutory tort and the Hague/Hague-Visby Rules, the schematic thinking is put thus in the *Muncaster Castle*: "The long line of authority showed that although a shipowner could perform through another person his obligation to make a ship seaworthy […], if that other person – servant agent or independent contractor – failed to do so, *then the failure was that of the shipowner.*[256] (emphasis added)

The same point is illustrated in the *Hopestar*. When the Court in that case stated that the shipowner would have been liable if there had been causation between the structural weakness of the ship and the casualty, and if the structural weaknesses had stemmed from insufficient information being conveyed by the shipowner's agents to the building yard which performed the relevant conversion work (see chapter 2.3.2 above) – the Court did no more than pointing to there being such an omission (i.e. insufficient information being conveyed) on the part of the shipowner's agents – on the footing that this omission would have been imputable to the principal (shipowner).

This legal phenomenon is, moreover, reflected in the very terminology chosen. The generic term 'vicarious liability' seems well put; the 'vicarious' phenomenon consists in the fact that someone is responsible for something done by another; its 'vicar'. The phraseology used by the courts is similarly apt, in that the tortfeasor-servant's fault is, as typically expressed, 'imputed to' or 'ascribed to' the defendant (principal). The legal system could in that sense be called a system of liability imposed 'by imputation' or 'by ascription'.

In Norwegian law the terminology and phraseology is different, but – interestingly – without this difference being the result of semantic differences from the English language.

Under Norwegian law there is no singular generic term like the English 'vicarious liability'. Rather the termonology is directed towards the relevant areas of law, such as 'rederansvar' (shipowner's liability) in the Maritime Code, and 'arbeidsgiveransvar' (employer's liability) in the Torts Act. An overarching generic term 'prinsipalansvar' (principal's

[256] *Muncaster Castle*, House of Lords, p. 63, as the point was put by Counsel for the cargo side.

liability) is sometimes used – and is predominantly used in this article, since 'arbeidsgiveransvar' (employer's liability') is too narrow a term in the maritime sector. However, there would be nothing to prevent the terminology from being semantically changed and placed closer to its English equivalent – by calling it 'tilskrivingsansvar' (liability through imputation/ascription) or 'stedfortrederansvar' (vicarious liability).

Moreover, Norwegian courts and legal commentary operate with the phraseology '(active) identification'.[257] The idea is that the principal (defendant) is 'identified with' the fault of the tortfeasor-servant. The semantic-legal imagery is in that way close to that of 'vicarious liability' under English law. However, under Norwegian law the use of the term 'identification' has given occasion for a peculiar and in many ways quasi-analytical discussion in legal commentary, and with no parallel under English law from the corresponding English terminology.[258]

The discussion in Norwegian legal commentary concerns whether the vicarious liability system is properly to be considered a 'derivated' system or an 'identification' system of liability; the former connoting that the principal's liability is derived from a separately existing liability of the torfeasor-employee; the latter that the tortfeasor's acts are deemed to be those of the principal, thus 'identifiying' the principal's legal position with that of the tortfeasor.

Hagstrøm/Stenvig starts the discussion from the proposition (imagery) of 'identification-liability':

> "By identification liability one deems one legal subject's acts or omissions to have been performed by another legal subject. One often talks about the act or omission being *ascribed* to another."[259] (author's translation)

[257] See e.g. the Supreme Court in Rt. 2015.475 *Haavind*, para. 68. The opposite imagery of 'passive identification' connotes situations where a claimant's damages claim is reduced on the basis of some kind of contributing factors to the damage, attributable to persons within the claimant's sphere of responsibility.

[258] At least it has not been found in the English volumes read by the author.

[259] Hagstrøm/Stenvik (2019) p. 230.

Hagstrøm/Stenvik gives as an example of such identification liability, situations where a legal person is held responsible for the conduct of a physical person acting as the legal person's alter-ego, e.g. a municipality being held liable for negligent acts of its mayor.[260]

'Derivated liability' means, on the other hand, according to these authors, that "one makes one legal subject responsible[261] for the liability in damages of another legal subject." (author's translation)

From these premises Hagstrøm/Stenvik continue:

> "The employer's liability in Torts Act section 2-1 is as a starting point derivated liability since the employer is liable for[262] certain damage which is intentionally or negligently inflicted by the employees. It is however not a question of derivated liability in its genuine form, because it is not necessary to demonstrate that one or more individual employees are liable in damages. Genuine derivated liability will only occur in contract relations, where one party has provided guarantee for the liability in damages of another legal subject (or for such a subject's obligations more generally)."[263] (author's translation)

It is difficult to see how this type of analysis adds anything to the understanding of the phenomenon of vicarious liability. When these authors use alter-ego type of liability ('organansvar') as the proper example of 'identification liability', why should this prevent a corresponding use relating to vicarious liability – in line with the terminology used e.g. by the Supreme Court?[264] 'Identification liability' is no term of art.

Moreover, when – according to Hagstrøm/Stenvik – the Torts Act's system is as a starting point to be deemed 'derivated liability' but apparently is still not properly such, since there is no requirement to

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260 Hagstrøm/Stenvik (2019) p. 230.

261 The term 'ansvarlig' has all the time a dual meaning when translated into English: responsible and/or liable. Here the term 'responsible' is chosen.

262 The term 'svarer for' (answers for) has dual meaning when compared to the English terms 'responsibility'/ 'liability' – and could here also read 'liable for'.

263 Hagstrøm/Stenvik (2019) p. 230.

264 As used e.g. in the *Haavind* case, Rt. 2015.475.

demonstrate actionable fault on the part of the tortfeasor-servant, it is hard to grasp the usefulness of making this kind of categorization.[265] It seems then better to follow the more pragmatic and case oriented phraseology that one finds in English law.

The topic takes on an added twist when reading Wilhelmsen/Hagland's comments to the discussion by Hagstrøm/Stenvik. Wilhelmsen/Hagland state:

> "Hagstrøm/Stenvik p. 207[266] describes employer's liability as 'derivated liability'. We disagree. If the liability were to be 'derivated', it would be the norm of prudent conduct directed towards the employee that would form the basis. However, according to Torts Act § 2-1 no. 1, 'the expectations an aggrieved party reasonably had to the activity' shall be taken into account, which means that it is the norm of prudent conduct directed towards the activity[267] which is decisive."[268] (author's translation)

Reference is then made to the case, *Haavind*,[269] and with a quote from the Supreme Court in that case, to the effect that section 2-1 "forms part of a set of rules of active identification which […] is created through case law […]". (author's translation)

The meaning of what is stated here is somewhat hard to grasp.

First, the position of Hagstrøm/Stenvik is misrepresented in that they do not state their view in such simple terms as quoted here.

Second, the point about which norm of prudent conduct is to be applied to the acts or omissions of an employee, is an interesting one, but barely yields any meaning when put in such simplified terms as by Wilhelmsen/Hagland: clearly, the relevant duty of care must be directed towards an employee in the situation he or she is as part of the employer's activity; a person (an employee) cannot breach a duty of care directed

[265] Kjelland (2016) p. 219 essentially copies the text of Hagstrøm/Stenvik on this point (i.e. the text of the earlier 2016-version of their book, unchanged in the 2019-version).

[266] From the 2016-version of their book.

[267] Norwegian: 'virksomheten'.

[268] Wilhelmsen/Hagland (2017) footnote 304, p. 143.

[269] Rt. 2015.475, *Haavind*, discussed above.

towards someone else, i.e. a duty directed towards the employer's activity as such, as if that were something detached from the expectations of care directed towards the relevant employee.[270]

Third, the authors' notion about what norm can be distilled from the passage of the Torts Acts, to the effect that one shall take into account 'the expectations an aggrieved party reasonably had to the activity' of the clamant (employer), seems misguided. As we have seen, this phrase of the Act comprises a wide variety of policy considerations which form part of an overall assessment by the courts when deciding whether or not to impose liability on the principal (employer), including e.g. such remote circumstances as whether the aggrieved party had (or could have had) insurance cover for the property damage for which damages are sought.[271]

These considerations are not really capable of being distilled into a singular 'norm of prudent conduct' (aktsomhetsnorm) to be applied to a person's (an employee's) acts or omissions. The point can be illustrated by the case *Ulmebrann*.[272] Here, the Supreme Court held that negligence might have been committed by those involved in the fire extinction work but that the municipality was still not held vicariously liable due to the wider considerations comprised by the lenient standard of care applicable to certain public services. It would not make sense here for the Court to make use of the term 'negligence' if nobody had broken any duty of care. Negligence is by its nature breach of a duty of care (aktsomhetsplikt). Hence, it makes little sense to say, as Wilhelmsen/Hagland seem to say, that the norm applicable to the fire service as such, was applied to the personnel in question.

This point – that the duty of care of the tortfeasor-servant must be seen in the context of his/her role within the activity of the principal

[270] Selvig (1968) p. 83 points to the fact that expectations directed towards the quality of activity of enterprises may in general lead to an increased standard of care applicable (also) to the conduct of an employee, which in turn may lead to vicarious liability imposed on the enterprise (employer), while the employee may be 'protected' by a more lenient standard of care in his/her employment relationship with the enterprise, having the effect that the employee might escape liability in a possible recourse claim from the enterprise (employer). See further chapter 4.4 below.

[271] See e.g. Rt. 2011.991, *Ulmebrann*, discussed above.

[272] Ibid.

– is, moreover, addressed in English law, by the House of Lords, in *X v Bedfordshire County Council*[273] – here quoted from Witting:

> "The House of Lords said of such vicarious liability for public service employees generally that the employee would owe a duty of care to the individual member of the public only where (1) the existence of such duty is 'consistence with the proper performance of his duties to the … authority' [i.e. employer]; and (2) it is appropriate to impose such a duty on the employee. In [the cases] it was recognised that a duty of care was incumbent on the individual professionals for which the council [employer] could be vicariously liable."[274]

This way of making the point about what norms of conduct are directed towards whom, seems more aligned with the legal reality of vicarious liability than that found in Norwegian legal commentary.

On the other hand, this tentative analysis by Wilhelmsen/Hagland may perhaps touch upon some aspects being of illustrative value to our topic aimed at delineating the class of servants comprised by a principal's vicarious liability.

The norm of conduct appropriate to the business activity of the principal will have some connecting factors to the norm of conduct appropriately directed towards the acts of any given employee or servant. This in turn has a bearing on the earlier discussed functional criterion of a shipowner's ordinary course of business and area of expertise, and e.g. Brækhus' point that suppliers of sophisticated technical equipment to the ship would not be considered the shipowner's servants for purposes of vicarious liability.[275] This has a connection to analyses of norms (as tentatively made by Wilhelmsen/Hagland). Norms pertaining to prudent conduct of running and operating of ships would hardly be compatible with norms pertaining to prudent conduct in e.g. designing and manufacturing sophisticated autopilot systems for ships, which may fail and lead to ships causing damage – as illustrated in the two Norwegian

[273] [1995] 2 AC 633.
[274] Witting (2018) p. 116.
[275] Chapter 3.3 above.

Court of Appeal decisions earlier discussed concerning malfunctioning of ships' autopilots.[276]

Moreover, this example concerning autopilot failure may be transposed to future shipping and conceivable instances of capacity failure of e.g. algorithm software for automated collision avoidance. In such cases, those doing the software programming are not, so to speak, legally placed at the scenery where their programmed conduct may go wrong, thus causing the ship to 'misbehave' and potentially cause damage. An autonomous ship's 'misconduct' is clearly not tantamount to the conduct of the programmer, who may (or may not) have failed to realize that such a failure might occur. The legal standard for the conduct of programmers is in that sense detached, temporally and spatially: the standard is that of prudent programming behaviour, attaching at the time the relevant programming was made.[277]

With today's thinking, the activity of shipowning companies would not encompass the activity of software programming, in the same way as it would not encompass faults made by (sub)-suppliers of spare parts to the ship, as illustrated in the *Muncaster Castle* under English law, and as submitted by Brækhus under Norwegian law. Those principals (defendants) which would be vicariously liable for faults in the course of software programming, would typically be companies in charge of, and with expertise in, the business activity of software programming.[278]

4.3.4 The tortfeasor-servant acting outside the scope of employment

After this review of the concept of fault of the tortfeasor-employer within the ambit of vicarious liability, we turn to a final feature common to the two sets of rules – the Maritime Code section 151 and Torts Act section 2-1. Both sets of rule are based on the notion that if the conduct of the

[276] Chapter 3.3 above.

[277] Solvang (2019) p. 254–255.

[278] This, in turn, pertains to questions of product liability etc. on the part of such companies, which forms no part of the present inquiry.

tortfeasor-employee falls markedly outside the scope of what the person is expected to do as part of his/her assignment, e.g. through criminal acts or blatant violation of the employer's instructions, this may lead to exemption from an otherwise applicable vicarious liability.[279]

The Torts Act contains a specific provision addressing this type of situation, in section 2-1 second sentence:

> "The liability does not comprise damage or injury caused by the fact that the employee has exceeded the reasonable limits of his duties, considering the nature and range of the activity and the character of the work or function."

Section 151 contains no similar provision but, clearly, the same considerations will apply to employer-employee situations within the ambit of section 151. This is also amply illustrated by case law. An important Supreme Court case, *Alkejakt*,[280] did concern employment relations under the Maritime Code (at the time section 8). The case is generally presented as shedding light on the criterion in Torts Act section 2-1, without any discussion of possible differences under the two sets of rules.[281]

The case concerned the master of a naval torpedo boat who used his private gun for bird (auk) hunting from the bridge, on the way to port after having performed service in the form of test firing of a torpedo launching system. As part of this private hunting activity, he accidently shot another person, standing at his side on the bridge, in the foot, due to the private gun being unsecured – this person being a representative of the manufacturer of the torpedo launching system. The misfiring of the gun was clearly negligent. The State unsuccessfully argued that the hunting activity lay outside of the master's scope of service, and for that reason the State should be relieved from vicarious liability for the negligent act. The reasoning of the Court makes no point about the result being derived from the Maritime Code as opposed to the Torts Act. Moreover, the Court makes the general observation about the relevant risk and foreseeability aspects justifying the result of vicarious

279 See e.g. Hagstrøm/Stenvik (2019) p. 244 et seq, and for maritime law, Falkanger et al (2017) p. 202–206.

280 Rt. 1972.815 ('auk hunting').

281 Hagstrøm/Stenvik (2019) p. 244, Kjelland (2016) p. 227, Wilhelmsen/Hagland (2017) p. 157.

liability in this type of cases: "However, the hunting activity was connected to his functions as master. From the point of view of naval command, it was not unforeseeable that hunting would take place from the bridge."

Similarly, elder case law under the Maritime Code is in the standard volume on maritime law, by Falkanger and Bull, presented as not being aligned with today's standard under the Torts Act, on the assumption that the legal position applicable to employer-employee relationships, would be one and the same under the two sets of rules.

In a first instance case from 1914, *Sardinia*,[282] the ship's first mate celebrated New Year's eve by launching a firework from the ship's bridge. The firework hit and set fire to a storage building on the quay. The shipowner was not held liable in damages, on the basis that this activity was conducted by the master while being off duty, thus unrelated to his service on board. Falkanger and Bull questions this outcome as being obsolete and out of line with subsequent case law derived from the Torts Act.[283]

Furthermore, it is worth noticing that English law operates with the same type of reservation concerning tortfeasor-employees acting outside the scope of their employment, based on the same rationale as under Norwegian law.[284]

A curious observation is that the following two examples from English case law have for years been used as exercise cases for law students at the University of Oslo, without their origin being revealed.

The first is *Century Insurance Co v Northern Ireland Road Transport Board:*[285] The employee was employed by the defendant as a petrol tanker driver. While he was unloading his tanker he threw away a lighted match, which caused a fire and explosion. The defendants were held vicariously liable for his negligence as he was doing his job at the time of the accident, even if he was doing it in a negligent way.

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282 ND 1914.159.

283 Falkanger et al (2017) p. 203, and with further cases mentioned than those here selected for illustration.

284 See e.g. Cooke, Law of Tort, 2018, p. 520 et seq, which may be compared to Hagstrøm/Stenvik (2019) p. 244 et seq.

285 [1942] AC 509 – the summary is taken from Cooke (2018) p. 521.

The second case is *Warren v Henley Ltd:*[286] The employee was employed as a pump attendant at a garage owned by the defendants. He accused a customer of being about to drive away without paying. The customer threatened to call the police and the defendants. The employee then gave the customer 'one on the nose to get on with'. This was held to be an act of personal vengeance and outside the course of his employment.

This latter example from English law may in turn be compared to Brækhus' example from Norwegian maritime law where he hypothesize that a steward on board a ship poisoning one of the customers out of personal vengeance, would be outside the course of employment, relieving the shipowner from liability.[287]

For the purpose of this article, there is no reason to go further into details on the case law illustrating this topic. In the relevant cases, the tortfeasor-servant are all the time squarely positioned within the employment or otherwise activity of the principal (employer). It is the nature of the tortfeasor-servant's act itself; its graveness and unexpectedness, which is the focal point. Had it not been for this aspect of the unexpected and extraordinary nature of the committed wrong, there would be no (other) argument that the principal (employer) should not be held vicariously responsible for the tortfeasor's acts. In other words, had not the committed wrong in these cases been at the periphery of what may lead the principal being relieved of vicarious liability because of the *nature* of the committed wrong, the principal would have been liable – since, clearly, the principal would have been liable for *less severe* acts of misconduct by the tortfeasor-servant, e.g. that of ordinary negligent acts.

Our inquiry has an altogether different starting point: does whatever fault committed by someone, lie within the ambit of a shipowner's nature of activity? This pertains, so to speak, to the outer boundary of a tortfeasor's nexus to a shipowner's sphere of vicarious liability, while this nexus is squarely in place as an intrinsic premise in the relevant case law here discussed.

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[286] [1948] 2 All ER 935 – the summary is taken from the previous version of Cooke, Law of Tort, 2007, p. 469, the case being left out in Cooke (2018).

[287] Brækhus (1968) p. 315, also mentioned in Falkanger et al (2017) p. 203–204.

One additional aspect relating to this topic should however be mentioned. Within the ambit of the Torts Act, case law has in some instances expanded on the scope of vicariously liability beyond the scope of the Act's wording, which is confined to the principal's (employer's) vicarious liability for the faults of its employees. An example is the earlier discussed Supreme Court case *Haavind*[288] where a law firm was held vicariously liable for the deliberate misconduct (embezzlement) by a partner of the firm. As part of the policy considerations for holding the law firm liable, was "that there is sufficient proximity between the work tasks and the act [of wrong]."[289]

That is a statement of general importance to our inquiry. Even though section 151 expands on the *prima facie* restriction of vicarious liability only for employees, under the Torts Act, to certain kinds of independent contractors in section 151, there is – also in section 151 – always a requirement of "proximity between the work tasks and the act [of wrong]".

Such a requirement of proximity is reflected in the wording of section 151 itself ('work in the service of the ship') and would typically be met, e.g. in situations where stevedores as independent contractors were to steel from the cargo in the course of loading or unloading of ships.[290] Such a proximity is however hardly in place if one were to envisage situations of wrongs committed e.g. at the stage of the building of the ship, before the ship entered the shipowner's 'orbit'. We are then back to the recurring point of the nature of shipowners' business activity, which typically would not encompass the building of ships, and which, for the same reason, means that there would be no element of 'delegation of tasks' (retroactively to the builder) in this type of situations. This means that to our inquiry into delineating the class of persons for whom a shipowner would become vicariously responsible, questions about employees (or contractors) acting outside the scope of their employment, is of limited relevance.

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288 Rt. 2015. 475.

289 The quote is taken from Falkanger et al (2017) p. 205, as, in turn, taken from the *Haavind* case – in the translation of Falkanger et al. The quoted passage is, in the *Haavind* case, a quote from the Supreme Court's earlier decision in Rt. 2008.755.

290 See e.g. Falkanger et al (2017) p. 205–206.

A somewhat peculiar remark is in the author's view made in Falkanger et al. After having discussed parallels from section 151 to recent development of case law under the Torts Act, including that of the *Haavind* case, they state in a concluding passage:

"It must however be added that MC § 151 diverges from the Torts Act § 2-1 in that the liability encompasses assistants who are not included within the scope of employees in the Torts Act § 2-1. It may therefore be reason to show caution in expanding the scope of liability when in the maritime fields of liability."[291]

This is in the author's view an unnecessarily cryptic remark. It seems that when there is a regular employer-employee relationship, whether under the Torts Act or the Maritime Code, there should be no grounds for considering situations under the two sets of rules differently, as shown by the Supreme Court in the *Alkejakt*, and as also submitted by Falkanger et al in this respect, as illustrated above. In situations of independent contractors under section 151, this may perhaps be viewed differently, as Falkanger et al seem to indicate. But generally speaking, one would think that the considerations, as expressed e.g. in the *Haavind* case, would apply also here, i.e. that consideration must be had to the type of activity and risks generated from the relevant activity of the principal, irrespective of whether such risks (materializing e.g. through deliberate wrongful acts) stem from a shipowners' employees, or from independent contractors (or their employees) retained by the shipowner.

4.4 A wider perspective on vicarious liability – Selvig's analyses and schemata

4.4.1 Introduction

Reading today's standard volumes on Norwegian tort law, it is peculiar to note that employers' vicarious liability in the Torts Act is presented as the only example of vicarious liability – as if the Maritime Code section 151 did not exist, despite its existence for more than a century.[292]

[291] Falkanger et al (2017) p. 206.

[292] See Hagstrøm/Stenvik (2019) pp. 229–300 on vicarious liability, but with no mention of the Maritime Code and with only one reference (footnote 374 on p. 241), on a fairly remote topic, to Selvig's work. See also Wilhelmsen/Hagland (2017) p. 86 and pp. 143–172 with a single and remote reference (footnote 334 on p. 152) to the fact that Maritime Code section 151 provides for liability for certain independent contractors – but with no reference to Selvig's work. See also Kjelland (2016) pp. 219–247 with no reference to maritime law at all. Clearly, Falkanger et al (2017) covers the topic from a maritime law angle, but that does not mean that vicarious liability as reflected in the Maritime Code, does not exist as a matter of general Norwegian tort law.

Moreover, it springs to mind when viewing the Maritime Code section 151 in conjunction with the Torts Act section 2-1, that vicarious liability in Norwegian law exists, so to speak, at different levels. There is the 'narrower' employer-employee vicarious liability embodied in the Torts Act (being comprised also by section 151), and there is a wider type of vicarious liability, comprising not only employees but also independent contractors employed in the course of the relevant business activity – e.g. 'in the service of the ship', in section 151. This wider scope of vicarious liability forms the essence of Selvig's work, Det såkalte husbondsansvar, from 1968, which is the major academic work addressing these overriding aspects of vicarious liability under Norwegian (and Nordic) law. We shall in this chapter look into it further. The reason is threefold.

First, and as mentioned, his work is the only major work attempting at seeing Maritime Code section 151 in conjunction with general conceptions of vicarious liability. Second, his structural approach to these questions has, in the author's view, the capability of providing a framework within which the above discussed post-Torts Act development in case law, may be understood – better so than what is found in ordinary (non-maritime) volumes on tort law. Third, and for the same reasons, his approach facilitates seeing legal realities in Norwegian law on a par with the position in English law, e.g. in respect of the discussion concerning whether or not a principal should (or would) be responsible for the acts of independent contractors.

4.4.2 The essence of Selvig's term 'vicarious enterprise liability'

Selvig's starting point was that analyses of vicarious liability at the time (pre-1968) had too simplistically focused on employer-employee relationships and too indiscriminately mixed questions of vicarious liability in contract and in tort – as taken from the, at the time, legislated provision in NL 3-21-2.[293] In the area of tort law he adopted a more overriding structural approach which necessitated (for his purposes) a new terminology.

[293] NL, abbreviation of Norske Lov ('Norwegian Code') or the complete title: Kong Christian Den Femtis Norske Lov, dates back to 1687. At the time of Selvig's work,

In his schemata, Selvig operates with an overriding concept of enterprise liability (virksomhetsansvar) which denotes, in a single term, the various types of liability to which a business enterprise (private or public) could be subjected if causing harm as part of its enterprise activity (virksomhetsskader). This type of liability could e.g. be what we have discussed above in the form of strict liability for dangerous activity, and which could also be called, as Selvig called it, strict enterprise liability (objektivt virksomhetsansvar).[294]

Then follows what is of major importance to our topic: As another type of enterprise liability (virksomhetsansvar), in many ways alternatively or complementary to the said strict enterprise liability, is what he calls vicarious enterprise liability (driftsherreansvar), which also may be called strict in nature in that it does not require fault on the part of principal (driftsherre). Rather, the crucial point is that of fault on the tortfeasor-servant's part, for which the principal (driftsherre) becomes liable as part of the principal's business activity (virksomhetsansvar).[295] Such vicarious enterprise liability (driftsherreansvar) is what can be found

before the introduction of the Torts Act, this was generally called 'master-servant liability' (husbondsansvar), as the NL 3-21-2 dealt with traditional/historical master-servant relations, which, according to case law and legal doctrine up until 1968, was considered restricted to employer-employee relationships, not encompassing independent contractors. When the Torts Act (1969) section 2-1 was legislated as the primary basis of vicarious liability, the liability form became termed 'employer's liability' (arbeidsgiveransvar) which, in Selvig's terminology, characterises but one of the broader concept of 'enterprise liability' – see further in the main text below. Another aspect of this criticism by Selvig was that the term 'husbondsansvar' had indiscriminately been applied to tort law as well as contract law, Selvig (1968) e.g. pp. 8–9 and 80.

294 Apart from such strict liability for dangerous activity, Selvig also operated with the similar form of strict liability for technical failure of devices prone to causing damage – see e.g. his schemata in Selvig (1968) p. 7. In this article, the author does not go into whether these two types of strict liability should properly be treated separately – rather, they are treated as one and the same phenomenon. An in-depth analysis of this topic is given by Moss Westgård, Objektiv rederansvar for teknisk svikt. Fra dampskip til autonome fartøyer. Læren om teknisk svikt fra et sjørettslig perspektiv, Marius 527, 2019.

295 For those interested in tracing the historical background, one will find that parts of Selvig's ideas were not entirely novel: Stang, Erstatningansvar, 1919, had entertained the idea that NL 3-21-2 could be conceived of as a type of enterprise liability (virksomhetsansvar), Selvig (1968) p. 83, ref. footnote 9 – and Øvergaard, Norsk Erstatningsrett, 1942, adopted the term 'driftsherre'.

e.g. in the Maritime Code section 151, and where the underlying criterion of business activity leads to the result that such liability is not being restricted to employer-employee relationships but could also comprise independent contractors.

A sub-category of such vicarious enterprise liability (driftsherreansvar) consists in what Selvig calls (vicarious) employer's liability (arbeidsherreansvar), which is the form of liability envisaged in the Torts Act section 2-1 (enacted after Selvig's work), and which has as its sole criterion that of an employer-employee relationship. In other words, this (vicarious) employer's liability (arbeidsherreansvar) is narrower in scope than vicarious enterprise liability (driftsherreansvar), while also being more general in scope due to its criterion consisting solely in its employer-employee relationship.

There is a need also for some comments concerning the terminology chosen in Selvig's schemata, and how this best can be translated into English. Terminology in this respect has important semantic-legal imagery creating aspects, not the least due to what we have seen are, to a large extent, facts-specific or facts-related concepts, e.g. the earlier discussed criterion of what belongs to a shipowner's ordinary course of business, or what can be seen as the typical nature of the business activity of a defendant (principal).

This pertains particularly to the concept of 'driftsherreansvar' which we have translated into 'vicarious enterprise liability'. That English terminology is however a re-formulation of its literal meaning, which connotes the phenomenon of someone being in charge of the relevant business activity; 'driftsherre' means literally 'activity-master' or 'person/entity-in-charge-of-activity' – with the added post-fix: 'ansvar' (liability). Thus, Selvig's chosen terminology connotes what is the essence of the delineating criterion relating to the scope of vicarious liability.[296] For our purposes, it seems however convenient to use the more legally familiar

[296] This, in turn, is a gesture towards his title of his work, 'Det såkalte husbondsansvar', which could translate 'the so called master-servant liability' and where the use of the term 'the so called ' signifies important aspects of his very argument; that this term, being prevalent at the time, was unduly lacking in nuance.

'vicarious enterprise liability'. The mere term 'enterprise liability' could have been used but that would bring into confusion Selvig's use of the overarching generic term of 'virksomhetsansvar' (see above) which seems not to have any better English translation than 'enterprise liability' – hence the need for the use of 'vicarious enterprise liability' in our context.

In addition, the term 'arbeidsherreansvar', which we have translated into '(vicarious) employer's liability' or simply 'employer's liability', warrants some comments. Literally, the term 'arbeidsherre' means something like 'labour-master' or simply 'master' (as in the English concept of 'master-servant' relationships). In modern lingo there is no need to stick to the old fashioned terms of 'herre' ('master') in Norwegian but instead one can simply use the term 'employer', from the current Norwegian 'arbeidsgiver', as used in the Torts Act. However, in view of Selvig's chosen terminology and its denotations, it is still of relevance to realize the intention behind his chosen twin-concepts; 'drifts(herre)' has to do with the relevant activity while 'arbeids(herre)' has to do with the relevant role (as employer), which says nothing about the type of business activity.

Before we expand on these analyses in selected topics of relevance to our inquiry, it is worth setting out Selvig's own formulation of his essential schemata.

> "When assessing liability for the person/entity in charge of a business activity (virksomhetsleders ansvar) it is of importance that the requirements for being made subject to liability for harm caused by its activity (virksomhetsskader) vary according to the different kinds of enterprise liability (virksomhetsansvar). The fact that an employment relationship exists between the person/entity in charge of the activity (virksomhetsleder) and the torfeasor, is a precondition for liability only in relation to one of the various kinds of liability. In terms of liability (erstatningsrettslig), his liability *in his capacity as employer of the tortfeasor* must be kept separate from the other kinds of enterprise liability (virksomhetsansvar), which operate with other requirements for being held liable.[297] Another reason for this is that employer's liability (arbeidsherreansvar) can in that sense be described as the *ordinary* enterprise liability (virksomhets-

[297] I.a. the doctrine of strict liability for 'dangerous activity'.

> ansvar) which becomes applicable irrespective of the nature of the business activity; such liability comprises harm caused by the business activity (virksomhetsskader) which is attributable to negligence by employees."[298] (author's translation)

When, on the other hand, considering the applicability of other types of enterprise liability (virksomhetsansvar) than employer's liability, one must look into the nature of the relevant business activity; whether that concerns strict liability for certain activities with intrinsically dangerous characteristics (the doctrine of 'dangerous activity') or vicarious liability for independent contractors (driftsherreansvar). Selvig states:

> "These other types of enterprise liability are, on the other hand, of relevance only to *activities of a certain nature*.[299] It is a matter of legal policy considerations (rettspolitisk vurdering) of the circumstances of the various types of activities that become determinative both for the question whether harm caused by the activity (virksomhetsskader) shall be made subject to stricter types of liability (objektiviseres) and for establishing the content of liability in the choice between, or possibly a combination of, different kinds of such more extensive schemes of liability, e.g. liability for independent contractors, liability for 'technical failure', genuine (rent) strict liability for harm caused by the activity,[300] etc."[301] (author's translation)

Recent legal commentary may be read to the effect that Selvig's conception of vicarious enterprise liability entails strict liability in the sense that there is no requirement for a finding of fault on the part of the tortfeasor-servant.[302] Such an understanding is in the author's view misconceived. Selvig's analyses and schemata are based on traditional notions of the

298 Selvig (1968) p. 12.

299 Such as the activity envisaged by Maritime Code section 151.

300 Whether there is a difference between these two bases of strict liability: liability for technical failure of a device used as part of the activity, or liability for 'dangerous activity' in a wider sense, may be subject to debate, but is a topic beyond the scope of this article.

301 Selvig (1968) p. 13.

302 Røsæg (2021) p. 136 footnote 32.

component of fault as an intrinsic part of the system of vicarious liability, as we have discussed in earlier chapters and as is apparent e.g. from the wording of section 151. Selvig states in these respects:

> "The existence of fault or negligence is a *necessary* precondition for liability in respect of both employer's liability (arbeidsherreansvar) and vicarious enterprise liability (driftsherreansvar) for independent contractors: the distinction from other types of enterprise liability[303] is in that respect clear enough. When it comes to liability for independent contractors such fault or negligence is however not in itself *sufficient* to justify liability; the difficult and interesting question in respect of the extent of liability, is in *what circumstances* such fault or negligence on the part of the independent contractor leads to liability for the instructing party (oppdragsgiveren). It is in determining this question that the connection between liability for independent contractors and other types of enterprise liability (driftsherreansvar) must be kept clearly in mind."[304] (author's translation)

What is here stated to be "the difficult and interesting question" is essentially what we are inquiring into in this article concerning the scope of the Maritime Code section 151 – and what we turn to in the following chapters.

4.4.3 The delineation of class of servants within vicarious enterprise liability

Of particular interest to our topic are Selvig's attempts at delineating the criteria applicable to his conception of vicarios enterprise liability (driftsherreansvar) in the maritime sector. In that respect he makes a general

[303] E.g. the jurisprudential based strict liability for 'dangerous activity'.

[304] Selvig (1968) pp. 13 and 83. In this respect, Selvig (footnote 12, p. 13) refers to English law and its concept of 'non-delegable duties' which can be seen as enterprise liability (driftsherreansvar) in the sense that it involves various kinds of 'personal duties' (typically imposed by safety requirements of a public/administrative law nature), the performance of which is strict in the sense that liability for failure of performance cannot be escaped through delegation of the task of performance.

observation to the effect that the Maritime Code Section 151[305] forms but one example of such a vicarious liability system (driftsherreansvar).

After having made a general observation to the effect that imposition of vicarious liability for independent contractors would, according to case law, require some case-specific elements of apparent risk of harm related to the activity for which contractors are retained,[306] he goes on to state:

> "In other instances of retention of services (oppdragsforhold) where the work of the independent contractor must be said to form a natural or accessorial part of an activity under the principal's (oppdragsgivers) general control (almindelige rådighet), liability will rest with the enterprise (oppdragsgiver) as principal (driftsherre). As illustration shall be mentioned that it is retention of services (oppdragsforhold) of this kind which ordinarily is comprised by the Maritime Code section [151], according to which the shipowner becomes responsible for 'work in the service of the ship'."[307] (author's translation)

Inquiring further into this topic of section 151 and what in that respect constitutes the stated kind of "activity under the principal's [shipowner's] general control", we are back to our main discussion in chapter 3.1.3 above. What was there presented as the functional criterion of what belongs to a shipowner's 'ordinary course of business and expertise', is tantamount to what in the present context is called 'the nature of business activity' of the relevant principal (driftsherre). Selvig states in this respect – in a more extensive quote than that given in chapter 3.1.3:

> "*First of all*, it has to be ascertained what tasks which at all fall within the expression 'work in the *ship's* service'. This question shall not form the subject of any specific inquiry in this regard. I am in that respect in agreement with and can refer to Brækhus' main proposition, i.e. that the work must be *typical for the shipowning activity* (skibsfartsvirksomhet); the work must form part of

[305] I.e. its equivalent at the time.

[306] With an example taken from the case *Asfaltkant*, Rt. 1967.597, as earlier discussed.

[307] Selvig (1968) p. 53.

> the operation or navigation of the ship or form part of the handling of cargo (or passengers), Brækhus p. 22–23. I will however point out that the wording of Section [151] seems to entail that it has to be viewed as decisive what the typical characteristic of the operation of the relevant ship consists in. Whether or not the relevant work is in the 'service of the ship', will therefore to some extent vary according to the relevant type of ship. The demarcation must e.g. be somewhat different for passenger ships and for cargo ships. In a similar way one would presumably have to distinguish between tanker vessels, ordinary dry cargo ships and different kinds of specialized vessels, etc. [ref]."[308] (author's translation)

With respect to this latter comment concerning the significance of the relevant type of ship in delineating the scope of vicarious liability (driftsherreansvar), one could perhaps submit that with respect to autonomous ships, this would, per se, lead to a corresponding expansion of the scope of liability; all type of failure relating to the functions of the ship would determine the scope of a shipowner's liability.[309] This would however, in the author's view, be a flawed proposition. It fails to distinguish between the functions of a ship and the nature of business activity of the shipowner (driftsherre).[310] At the same time, and for the same reasons, it misses central distinctions between the nature of strict liability and fault based vicarious liability. In a scheme of strict liability it would suffice to look to the functions of a ship and whether these functions 'fail', thus leading to the ship causing harm – as we have seen e.g. under the Norwegian doctrine of strict liability for 'dangerous activity'. Vicarious liability, on the other

[308] Selvig (1968) p. 66.

[309] This is seemingly the view taken by Røsæg (2021) p. 136.

[310] It must, on the other hand, be admitted that the topic of delineating shipowners' liability under Maritime Code section 151, is in some respect elusive, e.g. by the fact that section 151 envisages incidents attributable one ship in particular, while incidents could be conceived of involving several of a shipowner's ships (e.g. a system failure of autonomous ships), or it could involve a shipowner's business activity unrelated to specific ships. Selvig (1968) p. 61–65 (particularly p. 64 – see also p. 83, in petit) touches upon these aspects of uncertainty. See, moreover, a somewhat similar discussion under English law in the *Hopestar* relating to common law tort liability and its relation to statutory tort, chapter 2.3.3 above.

hand, involves concepts of delegation of tasks, and requires fault on the part of the delegate – and we are back to these topics as earlier discussed.

Returning to Selvig's ideas about vicarious enterprise liability, it is worth observing that they essentially correspond with what we have seen are the main criteria developed under English law. It seems e.g. that when he expresses a general criterion for vicarious liability for independent contractors to the effect that such contractor must be retained for "an activity under the principal's (oppdragsgivers) general control (almindelige rådighet),"[311] this is well aligned with the English law metaphor of what belongs to a shipowner's 'orbit'. Here, notions of delegation, control and means of influence on the principal's part, play a crucial role, as e.g expressed by the House of Lords in the *Muncaster Castle*.

Selvig is conscious of this relationship to English law. In general terms he submits that the position under Norwegian law seems "by and large to accord with Anglo-American law".[312] Within the ambit of more specific discussions, he points to important similarities between his overarching concept of vicarious enterprise liability and what he sees as English law reflections of the same, e.g. through the doctrine of 'non-delegable duties'.[313]

4.4.4 Vicarious enterprise liability and its relation to recent Supreme Court cases

This approach by Selvig has the explanatory power also to put within a wider context the recent Supreme Court decisions, which, within the traditional framework of employer-employee liability in the Torts Act section 2-1 (arbeidsherreansvar), threatens to transgress the boundaries set by the wording of that provision – while fitting well within Selvig's overarching scheme of vicarious enterprise liability (driftsherreansvar).

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311 Taken from the quote above, Selvig (1968) p. 53.

312 Selvig (1968) p. 9. His comparative law analyses are however scarce, basically taken from secondary legal sources.

313 Selvig (1968) e.g. pp. 11, 13, 47–54 – and footnote 79.See in respect of such 'non-delegable duties' and their fairly elusive contours under English law, chapter 4.3.2.1 above.

This concerns e.g. the earlier discussed *Haavind* decision.[314] The fact that the Supreme Court here transgressed the wording of Torts Act section 2-1 by imposing liability on the law firm despite the tortfeasor being a partner of the firm, not an employee, could well be seen within the framework of Selvig's criteria for enterprise liability (driftsherreansvar).[315] It would lie within the very *nature of the activity* of a law firm to have lawyers act, and occasionally act wrongfully. Such activity of running of a law firm should not, liability wise, depend on whether lawyers are organizied as partners or employed lawyers. One could paraphrase the House of Lords in the *Muncaster Castle*: "Organize your business as you please, you are liable for faults committed in the course of your business activity."

The earlier discussed *Asfaltkant*[316] may also serve as an example. The fact that the State chose not to invoke as a defence that the relevant fault relating to road construction work, was committed by an independent contractor, fits well with the idea that the State[317] had the overriding responsibility for road construction and road maintenance work (drifts-herreansvar). Hence, the very *nature of activity* – during the course of which sub-standard work occurred – would become attributable to the State.

Also in this respect important parallels to English law may be drawn. As we have seen, the nature of the business activity of the principal may lead to expansion of the scope of vicarious liability from the *prima facie* rule of merely being liable for the faults of its employees, to the wider scope of also being liable for the faults of independent contractors.[318]

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314 Rt. 2014.475.

315 See Selvig (1968) e.g. p. 40 and his remarks, very much on point, concerning a principal's ways of organizing his business – including reference to considerations under English law.

316 Rt. 2000.253.

317 Or other similar public agencies on regional or municipal bases.

318 See e.g. Witting (2018) p. 589–593.

4.4.5 Negligence on the principal's part within the scheme of vicarious enterprise liability

When Selvig develops and adopts the general concept of vicarious enterprise liability (driftsherreansvar), it follows, as a natural extension of this, also to look to the acts or omissions of a business enterprise itself,[319] as separate from, or in conjunction with, the acts or omissions of an independent contractor for whom the business entity (principal) would *not* be vicariously responsible.[320]

Put differently: if, in given cases, there is no room for establishing vicarious liability for the fauls of an independent contractor, there may be ways of scrutinizing the acts or omissions of the business entity (the principal: 'driftsherre') in its role of e.g. supervising the work of the independent contractor.[321] This act of supervising – or adopting appropriate safety measures to avoid damage from occurring – might well have failed, thus being the cause of an instance of damages in conjunction with the (direct) cause of damage through the faults of independent contractors.[322]

Therefore, this aspect might conveniently be included in an overarching scheme of enterprise liability (driftsherreansvar). One could look at acts or omissions on the part of the principal (driftsherre) based on regular concepts of negligence – including the inherent flexibility of that concept – without disturbing, or complicating, the legal starting point

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319 In this context: 'organansvar' (alter-ego liability for legal persons), or vicarious liability for a principal's regular servants.

320 Either because under the Torts Act independent contractors are not covered, or because under Maritime Code section 151 the relevant contractor falls outside the criteria of being in 'the service of the ship', e.g. through latent defects before the ship entered the shipowner's 'orbit'.

321 To which could be added possible failure (negligence) in selecting the relevant contractor, as being of sub-standard in terms of quality or reputation (*culpa in eligendo*), but this aspect is to some extent detached from what Selvig aims at illustrating: the role of the principal in connection with work performed by the contractor. The discussion is by Selvig placed under the heading: "The positioning of employer's liability (arbeidsherreansvar) in business activities without vicarious enterprise liability (driftsherreansvar)" (author's translation), Selvig (1968) p. 34 et seq.

322 There may, as stated, also be instances of *culpa in eligendo* but we are here concerned with situations where there is involvement of some kind by the principal (oppdragsgiveren) in the work performed by the contractor.

under the Torts Act that vicarious liability is applicable only to genuine employer-employee relationships (arbeidsherreansvar).

The same systemic approach is found in standard volumes on English law, where, under the main heading: "Liability in respect of independent contractors" one finds as a sub-heading: "Personal negligence on the part of the employer".[323]

Selvig incorporates this component of a principal's own negligence in its supervisory role, as part of a general scheme with tentative collection of criteria of what constitutes enterprise liability (driftsherreansvar). According to such schemata, there will have to be, alternatively or cumulatively: a) a permanent or long-lasting relationship between the principal and the contractor, akin to that a master-servant relationship;[324] b) that the principal (oppdragsgiver) has to some extent been in charge of the operations performed by the independent contractor; c) that the principal has failed in its tasks of supervising or monitoring the works by the contractor, thus effectively constituting negligence liability on the principal's own part (through some kind of omission, although the damage itself has been caused by the contractor).[325]

As part of this discussion,[326] Selvig uses the earlier discussed Supreme Court case, *Asfaltklump*[327] as illustration. The case concerned refurbishment of an old building, owned by a municipality, and where the tasks of refurbishing were left to an independent contractor. The municipality (principal) was in that case *not* held vicariously liable for the negligence

323 Witting (2018) pp. 606–608.

324 This approach is very much in line with modern English law presentation of the tendency of the UK Supreme Court to impose vicarious liability in relationships 'akin to employment' – see Witting (2018) p. 613.

325 Selvig (1968) p. 9–10.

326 I.e. as part of a more nuanced discussion concerning the role of the distribution of functions contained in the contract which serves the basis of the principal's (oppdragsgivers) delegation of tasks to the contractor – and what role such contractual distribution of functions may have for the question of imposition of vicarious enterprose liability (driftsherreansvar) on the principal – a discussion which is too nuanced to be accounted for in this article.

327 Rt. 1967.597.

of the contractor[328] but instead liable through a finding of negligence on its own part, i.e. on the part of its alter-ego, the head of the construction department (bygningssjefen).

To the same category belongs the decision in Rt. 1967.697, which concerned a contractor's negligent contamination of drinking water, by disposing of sewage water from private housing at the insufficient instructions of a municipality, as principal, and with the principal being held liable in negligence for such insufficient instructions.[329]

Commenting on these types of cases, Selvig states:

> "The principal (virksomhetslederen) is in these cases made subject to liability jointly with the contractor (oppdragstageren) for damage caused by servants of the contractor in negligent performance of its work. In effect (reelt sett) one could argue that *to the same extent vicarious liability is imposed for independent contractors*. Legally, such a proposition is however hardly tenable."[330] (author's translation)

This latter statement: that liability is not imposed through vicarious liability for independent contractors, is of some importance, as it seems to have been misconceived in recent legal commentary.[331] As Selvig points out, in this type of cases the independent contractor had failed to follow various safety requirements applicable to its work, hence *someone* was acting negligently on the contractor's part, but this was not in itself a sufficient basis for imposing vicarious liability on the principal:

> "These circumstances [that someone is at fault] are however in themselves not sufficient for the imposition of liability [on the principal, oppdragsgiver]. The true basis for liability was the fact that *lack of or insufficient supervision or safety measures on the part*

328 A result which could be explained by Selvig's schemata of liability criteria, above, in that there was an ad-hoc type of activity to be performed by the contractor; it did not belong to the principal's typical nature of activity.

329 Selvig (1968) p. 46.

330 Selvig (1968) p. 47.

331 Røsæg (2021) p. 136.

> *of the principal (virksomhetslederen) could be attributed to him or his servants (hans folk) as negligent acts or omissions*, which would have to lead to liability for such damage as would likely have been avoided by prudent supervision or safety measures. Legally one is therefore faced with liability based on negligence for privity (egen culpa) or negligence within the scope of employer-liability (arbeidsherreansvar) in its traditional form."[332] (author's translation)

It is worth making a detour to English law where the thinking is essentially the same and with, incidentally, parallel sets of facts in some of the cases. In the above mentioned case, Rt. 1967.697, a municipality was held liable in negligence for not having sufficiently ensured that independent contractors retained to clean out sewage water from private housing, did not empty the water in an insecure way. The case is almost a blueprint of the English case *Robinson v Beaconsfield RDC*,[333] which Witting presents under the same systemic heading as Selvig, and where Witting's summary of that case reads:

> "D[efendants] employed contractors to clean out cesspools in their district. No arrangements were made for the removal of the deposits of sewage upon their removal from the cesspools by the contractors. The contractors deposited sewage on C's land. D[efendants] were held liable for their failure to take proper precautions to dispose of the sewage."[334]

Another English case of interest is *Padbury v Holiday and Greenwood Ltd*,[335] here quoted from Witting:

> "A employed B to fit casement windows into certain premises. B's employee negligently placed a tool on the window sill on which he was working. The wind blew the casement open and the tool was knocked off the sill on to a passer-by. Holding the employer A not liable, the Court stated:

[332] Selvig (1968) p. 47.
[333] [1911] 2 Ch 188.
[334] Witting (2018) p. 607.
[335] [1912] 28 TLR 494.

> '[B]efore a superior employer could be held liable for the negligent act of a servant of a sub-contractor it must be shown that the work which the subcontractor was employed to do was work the nature of which, and not merely the performance of which, cast on the superior employer the duty of taking precautions.'"[336]

This shows a parallel to the Norwegian case *Asfaltklump,* in the sense that if it had been a one-off event of negligence on the contractor's part in that case, there would have been no basis for imposing liability on the principal/municipality (oppdragsgiver) based on negligence. Rather, it was the nature of the work and the foreseeable risks involved in the work – the contractor being allowed to throw chunks of tarmac out the windows of the building's fourth floor – which was decisive in giving incentive to the principal to take extra precaution to ensure that its safety instructions were complied with. Compared to the English case: a singular event of negligence on the part of a worker of the contractor in knocking a tool onto the street, would not be something for which the principal (oppdragsgiver) would have an incentive to take extra precautions.[337]

4.4.6 The flexibility inherent in the concept of negligence

After these general remarks concerning a principal's negligence, we reach the topic of flexibility of the negligence standard itself. With the above premise of independent contractors *not* falling within the scope of a principal's (oppdragsgivers) vicarious liability, there are legal 'techniques' available to the courts for reaching the result of imposing liability on the principal, by 'stretching' the flexibility inherent in the concept of negligence.

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[336] Witting (2018) p. 610.

[337] See the general discussion in Selvig (1968), p. 50 concerning whether inherent dangers in the nature of tasks delegated to a contractor may lead to liability (driftsherreansvar) being imposed on the principal, essentially based on conceptions of *culpa in eligendo*, and with increased requirement of care being imposed on the principal (oppdragsgiver) in that respect.

Selvig again discusses the case, *Asfaltklump*,[338] in connection with the general point that negligence in this way may be 'stretched'. Selvig states:

> "It is however self-evident that the degree of care and preventive steps (aktsomhet og aktivitet) which the courts find it convenient to demand on the part of the principal (virksomhetsleder), will be of decisive importance for the extent to which he [the principal] will be held liable for the negligent acts or omissions by the independent contractor or its servants. It is presumably clear that the stated court decisions prescribe a legal technique – in the extreme cases it may be close to mere fictitious negligence – which in and of itself provides the courts with close to limitless means of imposing liability for independent contractors without departing from or eclipsing the hitherto prevailing main rule that in tort law such liability is not imposed. In practice it may therefore be so that there is a very short way from situations where the principal (virksomhetslederen) can be blamed for insufficient supervision or safety measures, to situations where the principal is *not at all* to blame in this respect."[339] (author's translation)

Such an observation of the flexibility inherent in the concept of negligence is perhaps in itself trite. On a principled level it is however clear that this 'technique' of imposing a heightened degree of care on the part of the principal (virksomhetsleder), is not tantamount to the principal (virksomhetsleder) being made subject to some kind of strict enterprise liability (objektivt virksomhetsansvar) – despite views to the contrary seemingly being advanced in recent legal commentary.[340]

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338 Rt. 1967.597, earlier discussed.

339 Selvig (1968) p. 47. See also p. 83 where distinctions are made between vicarious liability in contract and in tort and where in tort, as opposed in contract, "… there is normally a requirement for employers' liability (arbeidsherreansvar) according to ordinary liability rules, that is, he must have committed ordinary culpa." Although what is there discussed concerns employers' vicarious liability (arbeidsherreansvar) and not enterprise vicarious liability (driftsherreansvar), there is no principled difference between the two, de lege lata, as also shown by the above discussion in chapter 4.3 concerning the relationship between the Maritime Code and the Torts Act.

340 Røsæg (2020) seems to take such a view, by e.g. referring to Selvig, but the passage referred to by Røsæg is incomplete. Røsæg (2021), p. 136 footnote 32, merely quotes the following abbreviated passage: "'[ ] gir domstolene en nesten ubegrenset adgang til å

Moreover, also on this topic there are strong parallels between the account given by Selvig and that given under English law. In English law, in situations where there are foreseeable risks of safety related harm, a heightened degree of care may generally be required on the part of the principal. This does however not mean that there is legally speaking a question of strict enterprise liability being imposed on the principal; there is all the time a requirement of fault being committed on the part of the tortfeasor-servant.[341]

Furthermore, it should be noted that strictly speaking the cases discussed under this sub-chapter – such as the case *Asfaltklump*[342] – pertains to a slightly different topic than what is our main inquiry relating to the Maritime Code. The cases here relate – within Selvig's schemata – to the question of whether there are grounds for moving away from the starting point (as embedded in the Torts Act) that a principal (employer) is liable only for the faults of its employees, not the faults of independent contractors. In other words: whether the flexibility inherent in the concept of negligence could, or would, be utilized to reach the result of imposing liability on a principal (for his own fault) when there is no basis for holding him/her vicariously liable for the fault of an independent contractor. That question is essentially resolved under the Maritime Code section 151; here the shipowner is – subject to certain requirements – also vicariously liable for the faults of independent contractors. We are within Selvig's concept of vicarious enterprise liability (driftsherreansvar) proper.

pålegge ansvar for selvstendige oppdragstakere [ ]'" – in translation: «'[ ] provides the courts with close to limitless means of imposing liability for independent contractors […].'" In the context of the wider quote given in the main text above, Røsæg's abbreviated passage yields a different meaning. Selvig does himself state that such a model based on strict enterprise liability "is hardly tenable" – Selvig (1968) p. 47, as quoted in the main text of the previous chapter.

341 Witting (2018) p. 608 where he advocates the use of the term 'strict liability' on the principal's part in situations of vicarious liability and breach of non-delegable duties. However, that is a different topic from what is here being discussed. That type of 'strict liability', signifying the fact that a principal may be held vicariously liable for a tortfeasor-servant's fault without the principal being to blame, is trite also under Norwegian law, see e.g. Hagstrøm/Stenvik (2019) p. 233 and with reference to English law on p. 234.

342 Rt. 1967.597. See also the similar constellation in Rt. 1967.697, discussed above.

On the other hand, questions involving negligence on the part of a principal, and questions involving the flexibility inherent in the concept of negligence, pertain so to speak to universal and timeless aspects underlying all tort law, including that of the Maritime Code section 151. In that respect, the present discussion of 'stretching' the concept of negligence on the part of the principal (shipowner), may be transposed to situations where the relevant tortfeasor would fall outside of the class of servants for whom the principal (shipowner) would be held vicariously responsible under section 151. This is illustrated e.g. by the earlier discussed Danish case, ND 1966.45,[343] despite that case concerning liability in contract, not in tort. The case illustrates how the courts may look for ways of finding a basis for holding a shipowner liable in negligence for not having detected a prior existing defect to the ship, when there is no basis for holding the shipowner vicariously liable for those who have created the defect (the shipyards personnel through faulty welding during the building process).[344]

This possible tendency by the courts of 'stretching' the concept of negligence within the otherwise parameters of vicarious liability in order – for policy reasons – to reach a result of imposing liability on a defendant (principal), may in turn have knock-on effects on the standard of duty of care applicable to those acting on behalf of a principal. In other words, if on a general basis the standard of care is heightened for these policy reasons, it may lead to a corresponding increase in a finding of fault by the relevant tortfeasor-servant for whom the principal is vicariously responsible.

Selvig is conscious about this phenomenon, which he generally considers will be remedied through the practical fact that – at least in the

[343] Chapter 3.2.2 above.

[344] The case could, possibly, be contrasted with the *Hopestar* in English tort law, see chapter 2.3, with no similar 'stretching' of the concept of negligence, bot with the concurrent finding under the two cases that a shipowner is not held vicariously liable for the faults of the building yard and/or the classification society. This type of tentative comparison on questions of negligence is however futile because of the inevitable variation of facts intrinsic to the application of negligence tests. See Witting (2018) p. 140–141 with, to a Norwegian lawyer, some surprising examples of English courts having given effect of legal precedent to factual findings in earlier cases relating to findings of negligence.

maritime industry – most such tortfeasor-servants would be covered by the liability insurance of their principal (employer), and, if being made subject to such direct claims of liability, would be assisted by general tort law provisions for abatement of damages claims.[345] Such considerations do however involve complex aspect, not only about practical realities, but also about the more conceptual-oriented structure of vicarious liability as a fault based system. The phenomenon of 'stretching' the concept of negligence in this respect has its limitations – be it in the context of a defendant's own negligence[346] or in the context of the fault by those for whom a defendant (principal) is held vicariously liable.[347]

In the author's view, the better way to resolve these policy questions is, under Norwegian law, to look to the well-developed jurisprudential doctrine of strict liability, and apply that to maritime law, possibly through revised liability legislation.[348] In any event, this type of policy considerations lie at the periphery of the present article, aimed at circling in the class of servants for whom a shipowner would be held vicariously liable under the current state of the law.

4.4.7 Some remarks on joint and several liability

The above topics give occasion to some reflections on the phenomenon of joint liability. The constellations can in this respect be multiple.

There can, as we have seen, be a question of imposing liability through negligence on the part of the principal (oppdragstaker) in cases where

345 Selvig (1968) p. 83. Concerning abatement, see the Maritime Code section 151 second paragraph, second sentence, and Torts Act section 2-3.

346 See e.g. the account given of negligence based on privity (Norwegian: organansvar) in Hagstrøm/Stenvik (2019) p. 274 et seq.

347 See also the discussion in chapter 4.3.3 above concerning how to discern the relevant duty of care (Norwegian: aktsomhetsplikt) applicable to the servant for whom the principal may be vicariously responsible. As shown in that chapter, the question about the standard of care to be applied to a tortfeasor-servant, may also shift in the 'opposite' direction, as illustrated in the case, *Ulmebrann*: despite negligence having been committed by employees, the so-called lenient standard of care applicable to certain public services, led to the principal (municipality responsible for the fire brigade) not being held liable.

348 Solvang (2021) pp. 116–119.

the principal is *not* vicariously liable for the contractor's fault – due to the prima facie rule under the Torts Act that a principal (employer) is vicariously liable only for its employees, not that of its independent contractors. This was illustrated by the case *Asfaltklump*[349] where the contractor was not financially sound to cover a damages claim, which gave the claimant incentive to instead claim against the principal (oppdragsgiver) – although, in principle, the two companies, the principal (oppdragsgiver) and the contractor (oppdragstaker), would in these circumstances be jointly and severally liable.

In cases where the principal would be vicariously liable also for the fault of its independent contractors (such as under Maritime Code section 151), the constellations can be more complex.

First, there is the plain situation where the contractor (through its employee) causes harm through negligence, and where the principal (shipowner as 'driftsherre') would be vicariously liable, on a par with the other principal (contractor as 'arbeidsherre'), and possibly also on a par with the tortfeasor-servant being held personally liable.

Second, it could well be that in given circumstances the contractor retains a sub-contractor to do the relevant work, and where such sub-contractor's employee were to cause harm. If so, the shipowner would still be vicariously liable (as 'driftsherre') and the sub-contractor liable as principal for the tortfeasor-servant (as 'arbeidsherre').[350] Whether also the (main) contractor could be held vicariously liable in such circumstances could be open for discussion. As a starting point, it probably would not, as generally there would be no more than one 'head-principal' (the shipowner as 'driftsherre').[351]

Third, there could be situations where two or more 'head-principals' (driftsherrer) are deemed liable as 'head-principals' on the basis that it may be hard to discern which of several companies is vested with that role, e.g. in the context of land-based construction work.[352] Similar

[349] Rt. 1967.597, discussed above.

[350] Selvig (1968) pp. 12–13, and in the maritime sector, p. 64.

[351] Selvig (1968) p. 20.

[352] Selvig (1968) pp. 41–42.

difficulties may arise in identifying who is the proper employing company (arbeidsherre).[353]

A further constellation could be that one company is held liable pursuant to specific legislation, while another is held liable as the business enterprise (driftsherre) in charge of the operation causing harm. This could e.g. be the case under Norwegian law concerning real estate and construction work: the land owner might be held liable pursuant to the Neighbor Act for harm stemming from the land, while a construction company causing the harm in the course of its operation might be held jointly liable on the basis of vicarious enterprise liability.[354] Or the same type of joint liability constellation could stem from the Norwegian jurisprudential doctrine of strict liability for 'dangerous activity': the landowner being held liable under the Neighbour Act while the operator (construction company – 'driftsherre') being held liable under the said doctrine.

Stemming from a time after Selvig's work, the Supreme Court case of *Gol Bygg*[355] could here serve as example. In that case – which concerned explosion of a retail center for explosives – both the owning and the operating (retail) company were held liable under the strict liability doctrine of 'dangerous activity'. In other words, both companies were found to be sufficiently proximate to bearing the risk inherent in the dealing with and handling of explosives.[356]

This type of dual, or triple, constellations of joint liability could also be envisaged in the maritime industry. Going back to the doctrine of strict liability for 'dangerous activity' applicable to ships suffering from 'technical failure' and thus causing damage to stationary objects,[357] it is conceivable that both a registered owner and an operator / demise charterer (reder=-driftsherre) might be held liable, despite only the latter being considered the

353 Selvig (1968) p. 36.

354 Selvig (1968) p. 23.

355 Rt. 1983.1052, discussed in chapter 4.2 above.

356 As discussed in chapter 4.2 above, it would here be conceivable with alternative bases of liability: that of vicarious liability by the operation (retail) company for the employee who ignited the explosives, and strict liability for 'dangerous activity' by the owning company.

357 Chapter 4.2 above.

shipowner (reder) under the Maritime Code section 151.[358] The thinking would here be that the nature of an intrinsic (latent) defect to the ship might be just as proximate to the registered owner's ownership of the ship as to a shipowner's (reders) operation of it – similar to the thinking in the *Gol Bygg* case related to land-based activity.

Such constellations are however in the periphery of the main topic of this article, namely vicariously liability for faults of shipowners' employees or servants, acting in the service of the ship, under Maritime Code section 151. Nevertheless, it is worth mentioning some potential complexities encountered in the sphere of maritime law on this point. In maritime law there is a certain symmetry in thinking since, generally, a shipowner's liability under section 151 is intended to be aligned with its right of limitation under the global limitation rules in the Maritime Code chapter 9, and with an aggrieved party's right of maritime lien in the relevant ship, in section 51.[359]

In this respect it is worth noticing that in the *Sokrates* case,[360] the shipowner (reder) was held entitled to invoke limitation rights, despite the claim being based on the doctrine of 'dangerous activity', not on the Maritime Code section 151 proper. Such a result followed from the limitation rules themselves, currently the Maritime Code section 172, based on the LLM Convention, and stipulating that the limitation rules apply (to the type of claims in question) "regardless of the basis of the liability". That means that if in a demise charter situation, the registered shipowner were to be held jointly liable with the shipowner ('reder'), such as in the *Gol Bygg* case (above), difficulties might arise. It would not appear right that the registered owner would not be protected by limitation rules, indeed it would be in violation of section 172. On the other hand, to hold the registered owner liable, on a par with the operator (reder), would mean that there are, suddenly, two companies being considered 'reder' under section 151, which is a novel idea, based on the traditions behind the maritime law provisions.

This type of symmetry may be challenged by a reorganized set-up and allocation of functions in the future of autonomous ships. There will

358 On the relationship to demise chartering, see Selvig (1968) p. 18.

359 See the general account by Selvig (1968) pp. 61–64.

360 See the account of the case in chapter 4.2 above.

be no crew, at least not in the traditional sense, and other traditional nautical functions may change in character as well – and all of this may become reflected in a shift in the organizational set-up of the owners and operators of such vessels.

4.4.8 Summary remarks – the future

Returning to the idea, as developed by Selvig, of vicarious enterprise liability (driftsherreansvar) with the governing criterion consisting in the nature of activity undertaken by the relevant business enterprise (principal) – one could ask: how does that accord with our earlier review of the functional criterion under Norwegian law in connection with Maritime Code section 151 – or, for that matter, as reflected under English law through e.g. the *Muncaster Castle* and the *Hopestar*?

On that point the various perspectives shown at different places in this article, seem to merge. The criterion of the nature of business activity of a principal goes hand in hand with what we have – through analyses of legal sources both under English and Norwegian law – pointed out as a functional criterion of what belongs to the typical tasks of a shipowner *qua* shipowner (driftsherre) in running and operating ships. This criterion would be decisive regardless of whether one takes the overriding view on vicarious enterprise liability (driftsherreansvar) as developed by Selvig, or instead a more shipping-industry specific view of the type of business activity envisaged by, and embedded in, the Maritime Code section 151.

The question then becomes: will the nature of the industry of shipping in the future – in respect of organizing shipowning companies, involvement by shipowners in the building of ships, development of automations systems, etc. – bring changes of a factual and structural nature which will lead to corresponding changes in the governing criteria for delineating the scope of shipowners' vicarious liability? This article does not seek to answer that question.