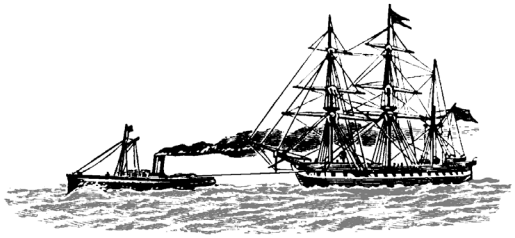
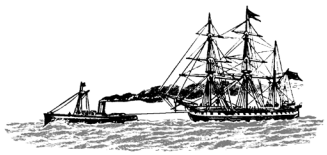


# TOWAGE

Towage was a bye-product of the advent of steam
in the early 19th century.
Did *Homer*, writing in the 8th century BC,
prophesy the era of the steam tug
which so revolutionised shipping?

*So shalt thou instant reach the realm assigned*
*In wondrous ships, self-moved, instinct with mind*
*Though tempests rage, though rolls the swelling main,*
*The seas may roll, the tempests swell in vain;*
*E'en the stern god that o'er the waves presides,*
*Safe as they pass and safe repass the tide,*
*With fury burn, while, careless they convey,*
*Promiscuous every guest to every bay.*

*[The Odyssey]*



CHAPTER 8:

# TOWAGE

## §8-1 The history of towage and its law[1]

Today we take towage for granted. But it is a service which, in its modern guise at least, is little more than 180 years old. Modern towage was born with the advent of the purpose built steam tug in the 1820s.[2] Until that time, sailing ships had to fend for themselves, with occasional assistance given each other within the limitations of manoeuvrability with which they were burdened. They sailed up estuaries, down straits, and came alongside quays with the minimum of help from anything other than a fair wind and an easy tide.

The first steam tugs, ponderously driven by paddlewheels, were limited by the quantity of coal they could carry, and they thus busied themselves mainly in the Clyde, the Thames and other European river ports.[3] But they brought a new-found independence from the elements. No longer had ships to wait for a favourable wind or the ebb and flow of the tide. For now they could 'take steam to the Downs' safely, albeit submissively, at the end of the towing hawser of a steam tug.[4]



1 For general reference see Kovats *The Law of Tugs and Towage* (1980); Parks and Cattell (United States law) *The Law of Tug, Towage and Pilotage* 3rd ed (1994); Davison and Snelson *The Law of Towage(*1990); Rainey *The Law of Tug and Tow* 2nd ed (2002); Bamford *The Law of Shipping and Carriage in South Africa* 3rd ed (1983) at 71 *et seq*; Van Niekerk *An Introduction to the SA Law of Salvage, Towage and General Average* [UNISA Special Publication, April 1985]. Farley Mowat's *The Grey Seas Under* published by Pan Books (out of print but available through <www.amazon.com>) gives a masterly account of blue water towage and salvage.

2 The first documented boat driven by steam was probably that of Denis Papin, a French engineer, who in 1707 sailed a boat rowed by steam-powered paddles on the river Fulda in Hanover. Chatterton in his splendid history Steamships and their Story (1910) recounts how jealous oarsmen attacked the craft en route down-river towards London and destroyed it, injuring the inventive M Papin. For a fascinating contemporaneous account of the development of steam power in ships up to 1878, see Chapter V of Thurston A History of the Growth of the Steam Engine (1878), published at <www.history.rochester.edu/steam/thurston/1878>. The first truly successful steam engine was built by Newcomen in 1712. By 1781, James Watt had perfected the double expansion steam engine, which was used on the early steam tugs. In 1791, an American engineer, John Fitch, was issued a United States patent for a screw-driven steam-powered vessel. The first British patent for a steam vessel was taken out in 1736 by Jonathan Hulls for an invention 'for carrying vessels or ships out of or into any Harbour, Port, or River, against Wind and Tide, or in a Calm'. Hull appears not to have taken his invention further, though in 1788 Patrick Miller fitted a steam engine to a 20m vessel on the Forth and Clyde Canal with 'satisfactory results'.

3 The first 'practical steamboat' was the *Charlotte Dundas* built in 1801, and subjected to trials on the Forth and Clyde Canal in 1802. The doughty little steamboat, which is illustrated in Thurston's article *supra*, was reported then to have towed two 70 ton vessels down to Port Glasgow, covering about 20 miles against a strong headwind in six hours. The earliest purpose-built steam tugs were employed on the Clyde from 1819, followed by the *Lady Dundas* and the *Wear* on the Thames a few years later. See also Bowing *A Hundred Years of Towing: a History*. The steamships were, however, the subject of some mistrust: in 1817, the House of Commons was called upon to debate 'the means of preventing the mischief arising from explosions on board steamboats'. As a result of this debate, regulations were passed requiring the compulsory registration of all steam vessels. The first steamship to be entered on the register at Lloyd's was the *James Watt* in 1822. By 1827 there were 81 and by 1832, 100. See *Annals of Lloyd's Register,* Lloyd's Register of Shipping, 1934 at 30–1.

4 The steam-driven tug also revolutionised the practice and the law of salvage. See §7–1.

The demands of the Crimean War[5] in the 1850s gave great impetus to the technical development of the tug. Britain was fighting a distant war which required victualling of her armies entirely by sea. Frequent and urgent sailings of supply ships from the army depots at Woolwich and Deptford were a necessity. Time was too short to wait for tides, and the steam tugs facilitated speedy river passages for the supply ships. Technological development was the tug industry's *quid pro quo* for its significant contribution to the war effort. And the propeller was one of the spin-offs.[6] With the gradual disappearance of sailing vessels, hastened by the First World War, the river port work of the tugs diminished, and they came to be used more for berthing and harbour duties – apart from those used for towing river barges and the more adventurous tug operators who branched out from towing ships up and down river, and ventured into the deep to seek more remunerative salvage casualties.

But it was during the heyday of the estuarine steam tug, from the mid 1840s until the early years of the 20th century, that the common law of towage developed.[7] That common law established principles which, to a very large extent, apply in most parts of the world today. Traditional towage law, like that of salvage, is part of international customary maritime law.



## §8-2 APPLICABLE LAW

A claim for towage is a 'maritime claim' and is accordingly amenable to the jurisdiction of the South African High Court in Admiralty.[8] The law which the High Court will apply will be that chosen by the parties, failing which choice, English law as it was in November 1983. This is the conclusion to which s 6 of the Admiralty Jurisdiction Regulation Act leads, when read with s 6 of the English Admiralty Court Act, 1840:

> '[T]he High Court of Admiralty shall have jurisdiction to determine all claims and demands whatsoever, in the nature of salvage for services rendered, or damage received, by any ship or sea-going vessel, or in the nature of towage, or for necessaries supplied to any foreign ship or sea-going vessel; and to enforce payment thereof, whether such ship or vessel may have been within the body of a county or upon the

5 1854 to 1856.

6 Previous designs (such as Fitch's 1791 patent) employed a spiral screw. The propeller, with blades rather than a continuous spiral, was far more efficient.

7 It is scarcely surprising therefore to find that many of the foundations upon which today's towage law rests were formulated by Dr Lushington during his term as President of the Admiralty Court from 1838 to 1868. See Waddams *Dr Lushington's Contribution to the Law of Salvage* [1989] LMCLQ 59–80 referred to in §7-1 in relation to the history of the development of salvage law. The earliest recorded decision on towage appears to be *The Betsy* [1843] Wm Rob 167. (Two earlier cases, *Pierse v Lord Fauconberg* [1757] 97 ER 320 and *Ball v Herbert* [1789] 100 ER 560 dealt with the right to tow along 'ancient navigable rivercourses'.)

8 *Per* s 1(1)*(l)* of the Admiralty Jurisdiction Regulation Act 105 of 1983.

high sea at the time when the services were rendered, or the damage received, or the necessaries furnished, in respect of which such claim is made.'

As has been seen in relation to salvage,[9] this section of the 1840 Act was interpreted by Dr Lushington in *The Ocean*.[10] The effect of the section was to include all towage of all vessels wherever conducted, in the jurisdiction of the Admiralty Court.[11] In relation therefore to all towage matters (unless the chosen law is otherwise) the South African courts would apply English law as it was 1983.[12]

## §8-3 THE NATURE OF TOWAGE – DAILY HIRE, LUMP SUM OR FAIR RATE

In *The Princess Alice,*[13] Dr Lushington described towage thus:

'Without attempting any definition which may be universally applied, a towage service may be described as the employment of one vessel to expedite the voyage of another, when nothing more is required than accelerating her progress.'



9 See §7-2.

10 *The Ocean* [1845] 166 ER 793. Dr Lushington ruled that this section extended the then admiralty jurisdiction to all ships, British or foreign, but only in relation to salvage, damages and towage (thereby distinguishing the effect of the section in relation to necessaries claims):

> 'From these words it would seem, that the former portion of this section is intended to refer generally to all "ships or sea-going vessels", whilst the latter is to receive a more limited construction, and is to be confined exclusively to foreign vessels. The intention of the Legislature in thus framing the section is, I conceive, obvious upon the face of it. Before the statute was passed, all claims for salvage, and all questions of damage, as also all demands for towage services, when the transaction took place within the body of a county, were cognisable in the Courts of Common Law alone: if this Court had proceeded to adjudicate in the matter, it would have been subjected to a prohibition. For the convenience of parties who might so render services or receive a damage, it was deemed expedient to restore the ancient jurisdiction of the Court of Admiralty, and in so doing to give the option of proceeding by the more summary process of this Court instead of compelling an action at law.'

Dr Lushington's comments rule out a more restrictive interpretation of the section which would regard the proviso 'to any foreign ship or sea-going vessel' as applicable not only to necessaries claims, but also to claims for towage.

11 In the United States, towage is regarded as being an admiralty matter. Even inland river towage has been subject to American Admiralty law since 1851. See Parks and Cattell, *op cit* at 7.

12 For a further discussion of s 6, see §1-7. There are very few towage cases in South African law. Only six are reported. See *East London Landing and Shipping Co v Birmingham* (1882) 2 EDC 394; *The Harry Escombe* (1920) AD 187 (dealing with salvage and towage); *SAR&H v Lyle Shipping Co Ltd* 1958 (3) SA 416 (SCA); and *The Kijo Maru No 2: Yorigami Maritime Construction Co Ltd v Nissho Iwai* 1977 (4) SA 682 (C). The two cases post 1983 are *The St Padarn and the Lunaplate* 1986 (4) SA 875 (C), which dealt with limitation of liability in a tug and tow situation, and *The Tigr No 1* 1995 (4) SA 49 (C) at 69, dealing with a towage contract of charterparty, and the limitation and jurisdictional aspects thereof (upon both of which see §11-1.1).

13 *The Princess Alice* [1849] 166 ER 914 at 915.

The towage contract may be written or verbal,[14] and, unlike salvage, the contract may predate the circumstances which give rise to the necessity of the tow. Towage usually involves a tug, though the same principles apply to any vessel towing another. The vessel towed (referred to as 'the tow') may have her master and crew on board, may be manned by only a 'runner crew' supplied by the tug, and may even be unmanned altogether. In the latter instance, she is referred to as a 'deadship'.

### *§8-3.1 Daily hire, lump sum or fair rate*

Towage contracts are negotiated upon the basis of daily hire being payable for the duration of the tow, a lump sum rate for an agreed towage operation, or fair rate for the job at hand. In the latter instance, the parties may agree beforehand to submit the assessment of the towage fee to an arbitrator after the event.[15]

### *§8-3.2 Ordinary and extraordinary towage*

In *The Kingalock*[16] Dr Lushington drew a distinction between ordinary and extraordinary towage. The main reason for such a distinction is that only ordinary towage may be converted, in appropriate circumstances, to salvage:

> 'Ordinary towage is that which takes place for the purpose of expediting a vessel on her voyage, either homeward or outward. … Where a service has been commenced as an ordinary towage service, the vessel being in no distress, for the mere purpose of expediting the voyage, if it happens that a salvage service, unexpectedly becomes engrafted upon it, the towing-vessel may not be bound to take the ordinary reward for a towing service.'

## §8-4 TOWAGE OR SALVAGE?

In contrast, no engraft of a salvage reward over and above the agreed towage rate is normally allowed in extraordinary towage, regardless of what circumstances intervene:

> 'Where a master of a towing-vessel, with his eyes open, sees another ship in any way disabled, and makes a bargain, cognisant of all the facts necessary to be known, he must be bound by that bargain; and any accident that may happen afterwards, any difficulty that may arise, any delay that may be interposed in the performance of that service, he,

14 *The Christina* [1848] 133 ER 726.

15 *The Raisby* [1885] 10 PD 114.

16 *The Kingalock* [1854] 164 ER 153. The *Kingalock* was a brig which was found drifting in distress in the mouth of the Thames. The steam tug *Friend of All Nations* agreed a towage contract, and put a line across. When the hawser parted, the master of the tug discovered that the brig had previously sustained considerable storm damage. He immediately declared the agreement at an end, but 'continued to tow the vessel as though no agreement had been made, and after great exertion and difficulty, brought her safely to the London Docks'.

of course, must put up with, because he takes the chances, and makes a bargain to cover all such risks as these. I therefore repeat, that wherever a bargain is made in good faith for the towing of a vessel, I will not engraft upon it, whatever may be the circumstances that subsequently occur, any additional reward beyond that compensation which is stipulated to be paid by the mutual agreement between the parties.'[17]

In *The Liverpool*[18] this principle was confirmed:

'Whilst it is the duty of the court to remunerate all salvors for salvage services, the court has an equal duty to see that a little departure from the exact mode in which that contract is to be performed is not magnified so as to convert towage to salvage.'

And from a plethora of similar decisions,[19] it is clear that the Admiralty Court, and later the High Court in Admiralty in England, allowed conversion of extraordinary towage to salvage only on rare occasions which were characterised by exceptional circumstances.[20] But the hard line of *The Kingalock* in relation to extraordinary towage (where the tow is disabled or in other known extraordinary circumstances) should be tempered by the clear principle that, where a towage contract (whether ordinary or extraordinary) is interrupted by a supervening impossibility, the tug is thereby released from its towage contract and it is then free to render salvage services to the tow, for which it may earn a salvage reward. In *The Minnehaha*,[21] the House of Lords set the parameters thus:

'When a steam-boat engages to tow a vessel for a certain remuneration from one point to another, she does not warrant that she will be able to do so and will do so under all circumstances and at all hazards; but she does engage that she will use her best endeavours for that purpose, and will bring to the task competent skill, and such a crew, tackle, and equipments as are reasonably to be expected in a vessel of her class. She may be prevented from fulfilling her contract by *vis maior*, or by accidents which were not contemplated and which may render the fulfilment of her contract impossible; and in such case, by the general rule of law, she is relieved from her obligations. But she does not become relieved from her obligations because unforeseen difficulties occur in the completion of her task; because the performance of the task is interrupted, or cannot be completed in the mode in which it was originally intended, as by the breaking of the



17 *The Homewood* [1928] 31 Lloyd's List Rep 336 (Adm); *The Maréchal Suchet* [1911] P 1 and *The Liverpool* [1893] P 154.

18 *The Liverpool, supra.*

19 For a comprehensive list and a summary of English cases concerning the conversion of towage to salvage, see Kovats, *op cit* at 134–145.

20 The antipathy of the court was never more apparent than in the remarks of Lord Kingsdown in *The Edward Hawkins* [1862] 15 ER 578, where a steamer contracted to tow a disabled vessel, but 'left the vessel in considerable danger' after the hawser broke during a storm, and then claimed salvage:

'In these circumstances, their Lordships are of the opinion that the [tug operators] are utterly destitute of any right to salvage. There never was a case so destitute of foundation. Neither have they any claim for towage, because they abandoned the vessel they agreed to tow, and did not fulfil their contract.'

21 *The Minnehaha* [1861] 15 ER 444, *per* Lord Kingsdown.

ship's hawser. But if in the discharge of this task, by sudden violence of wind or waves, or other accidents, the ship in tow is placed in danger, and the towing-vessel incurs risks and performs duties which were not within the scope of her original engagement, she is entitled to additional remuneration for additional services if the ship be saved, and may claim as a salvor, instead of being restricted to the sum stipulated to be paid for mere towage. Whether this larger remuneration is to be considered in addition to, or in substitution for; the price of towage, is of little consequence practically. The measure of the sum to be allowed as salvage would, of course, be increased or diminished according as the price of towage was or was not included in it. In the cases on this subject, the towage contract is generally spoken of as superseded by the right to salvage.

It is not disputed that these are the rules which are acted upon in the Court of Admiralty, and they appear to their Lordships to be founded in reason and in public policy, and to be not inconsistent with legal principles. The tug is relieved from the performance of her contract by the impossibility of performing it, but if the performance of it be possible, but in the course of it the ship in her charge is exposed, by unavoidable accident, to dangers which require from the tug services of a different class and bearing a higher rate of payment, it is held to be implied in the contract that she shall be paid at such higher rate.

To hold, on the one hand, that a tug, having contracted to tow, is bound, whatever happens after the contract, though not in the contemplation of the parties, and at all hazards to herself, to take the ship to her destination; or, on the other, that the moment the performance of the contract is interrupted, or its completion in the mode originally intended becomes impossible, the tug is relieved from all further duty, and at liberty to abandon the ship in her charge to her fate, would be alike inconsistent with the public interests.'



Lord Kingsdown reiterated this approach in relation to a towing hawser parting in *The Annapolis, The Golden Light and The Hayes*:[22]

'A steamer engaged to tow is bound, notwithstanding a merely temporary accident interrupting the service and endangering the vessel towed, to complete the stipulated service with all reasonable skill and promptitude, and for so doing the steamer, if incurring no risk, is not entitled to salvage reward.'

The decision of the Cape High Court in *The Manchester*[23] thus elicits some surprise: The *Manchester* suffered an engine breakdown off the port of Walvis Bay (now in Namibia). Her port agents negotiated a towage contract with the Walvis Bay port authorities to despatch the port tug *A M Campbell* to go to the aid to the *Manchester* 'for the purpose of rendering any assistance the vessel may require'. The contract made no mention of towing. The port was fully apprised of the disabled condition of the vessel. The tug duly went out to the *Manchester*, put a line across to her,

22 *The Annapolis, The Golden Light and The Hayes* [1861] 167 ER 150.

23 *The Manchester: SAR&H v Johnson Navigation Co* 1981 (2) SA 798 (C).

and towed her to the safety of port. The towage contract contained a clause which entitled the port authority to claim salvage. It read:

> 'The Administration shall, notwithstanding anything contained herein or any rule of law to the contrary, have the right to claim a reward for salvage, if the services rendered to the said vessel should be such as to warrant a salvage award.'

Section 301 of the Merchant Shipping Act then provided:

> 'When any ship is … in distress … within the territorial waters of or on or near the coasts of the Republic, and services are rendered by any person … in saving such a ship or wreck, there shall, … be paid to that person by the owner of the ship or wreck … a reasonable amount of salvage.'

The court found that the *Manchester* was in danger, and that danger equated with distress; as she was in distress, the tug was entitled to be paid a reasonable amount of salvage in terms of s 301. There can be no doubt that the vessel was in danger. She had a fractured tailshaft which was not reparable at sea. The court correctly analysed the notion of danger, referring to many of the judgments of the Admiralty Court. What was perhaps surprising, however, is that the court did not regard the contract as one for extraordinary towage or other extraordinary service short of salvage. Had it done so, and in the absence of any supervening impossibility, conversion to salvage would have been inappropriate, and no statutory entitlement to salvage would have arisen. The court should have taken into account that hourly hire was to be paid whether the *Manchester* was 'lost or not lost', a situation which militates against finding that the contractual services were salvage.[24] There was no question of 'no cure – no pay'; payment was guaranteed. The claim for salvage in *The Manchester* was clearly not 'watched by the court with the closest attention and jealousy' as was the exhortation of the House of Lords in *The Minnehaha.*[25]



Although s 301 of the Merchant Shipping Act was repealed by the Wreck and Salvage Act, the decision of *The Manchester* remains not entirely academic. For the same (with respect, misguided) reasoning could be applied to art 12 of the Salvage Convention, 1989, which now gives statutory entitlement to salvage in similar, though slightly different, terms:

> 'Salvage operations which have had a useful result give right to a reward.'

24 The decision in *The Manchester* has been commented upon and criticised as neither fair nor just by Professor Staniland in *Towage or Salvage? The Manchester* [1988] LMCLQ at 16, and is analysed by Doucas *Towage Contracts – When does conversion from a towage to a salvage contract take place? The Manchester Revisited* LLM dissertation, UCT, 1993. Both conclude that the case was wrongly decided.

25 *The Minnehaha, supra, per* Lord Kingsdown in upholding the refusal of the Admiralty Court to allow the conversion of towage to salvage.

As 'salvage operations' are defined by the convention as 'any act or activity undertaken to assist a vessel … in danger …', the finding of the court in *The Manchester,* specific as it might be to the type of contract proffered by the South African port authorities, might yet be applied to a similar set of circumstances. There is, however, one significant change: *The Manchester* was decided before the Admiralty Jurisdiction Regulation Act came into effect in 1983. Under s 6 of that Act, English law would apply. Under English law, the contract used in *The Manchester* is more likely to be regarded as one for extraordinary towage, or, at best, one for the provision of an extraordinary service in the knowledge of the condition of the vessel, and underwritten by an hourly rate even in the event of failure. Such a contract would require, as ordinary performance contemplated by the parties, the saving of the vessel. And in such a situation, salvage would not be awarded, nor would any 'engraft' to the service contract be appropriate. In the circumstances, *The Manchester* should not be followed.



## §8-5 Master's authority to bind his owners and cargo

Unlike salvage, which requires no contractual *nexus* to give rise to a claim, towage is an entirely contractual engagement. Generally, a master has authority to bind his owners to all necessary and reasonable contracts and obligations in the navigation and management of vessel, cargo and crew, including therefore contracts that the vessel be towed in appropriate circumstances. The benchmark is that of a *diligens paterfamilias*:

> 'A captain cannot bind his owners by every towage contract which he may think fit to make; it is binding upon them only when the surrounding circumstances are such as to render it reasonable to be made, and also when its terms are reasonable.'[26]

Where a vessel is stranded, the master may bind the shipowners by accepting towage (or salvage) services from a suitable tug on a reasonable contract. The master cannot, however, bind the owners of the cargo to a towage contract, not even as an agent of necessity.[27] In contrast to towage is the case of salvage where there may be voluntary salvage of cargo independent of any contract, and where, in terms of art 6(2) of the Salvage Convention, 1989, the master is empowered to bind all 'property on board' to a salvage contract, thus including cargo interests.

26 *Ocean SS Co v Anderson* [1883[ 13 QBD 651 *per* Brett MR at 662. See also *The Unique Mariner* [1978] 1 Lloyd's Rep 438 in which Brandon J adjudged a Lloyd's Open Form Salvage contract to be reasonable in the circumstances in which the master found his vessel. Cf *The Crusader* [1907] P 13 in which a master entered into what was found to be an unreasonable salvage contract to which his owners were therefore not bound.

27 *The Raisby* [1885] 10 PD 114. See also Davison & Snelson, *op cit* at 5–6.

Where a shipowner contracts for towage to save the ship and the cargo from impending loss as a 'general average sacrifice', it may have the right to claim a general average contribution from cargo towards the cost of the tow.[28]

A master may not readily commit his own vessel (if she is not a tug) to tow another vessel. Marine insurance policies often contain a warranty that the vessel shall not tow nor be towed, except for customary towage in entering or leaving harbour, and in cases of emergency.[29] Deviating from a contractual voyage by towing another vessel could have serious consequences both in marine insurance and in the law of carriage of goods by sea, and a master would be well advised to consult with his shipowners before offering a tow in circumstances other than those in which he finds himself under a statutory duty to assist.[30]

## §8-6 Relationship between tug and tow: command and responsibility

Generally, the tug is regarded in law as the servant and agent of the tow:

> 'The authorities clearly establish that the tow has the control over the tug. The tug and tow are engaged in a common undertaking, of which the general management and command belong to the tow. As Dr Lushington has pointed out, it is essential to the safety of vessels being towed that there should not be a divided command, and convenience has established that the undivided authority shall belong to the tow. The pilot, if there be one, takes his station on his tow, and the officers of the tow are usually, as in the present case, of a higher class and better able to direct the navigation than those of the tug.'[31]

But the rule is not absolute, and may be changed either by contract or by circumstance. It is a factual enquiry.[32] The contract may well, and often does, stipulate that the tow shall carry responsibility for



28 *Australian Coastal Shipping Commission v Green and others* [1970] 1 Lloyd's Rep 209. See Chapter 21.

29 See for example the Institute Time Clauses (Hulls) cl 3 which warrants that the vessel shall not be towed, except as is customary or when in need of assistance, or undertake towage or salvage services under a contract previously arranged by owners or managers or charterers.

30 We have seen in §7-2.2 that the South African Wreck and Salvage Act requires the master of a South African ship to render assistance to persons and to other vessels in distress. Towage may well be the most suitable way to render such assistance. This would be a statutory defence to an allegation of deviation.

31 *The Niobe* [1883] 13 P 55 at 59. The class comment is hardly appropriate to today's specialised salvage tug crews.

32 *The Devonshire v The Barge Leslie* [1912] AC 634. This case displaced the previous confusion which sought to identify tug with tow in all circumstances. See also *Halsbury* vol 35 3rd ed §871 quoted with approval in *The Romelia and The Antipolis: The Kiyo Maru No 2* 1977 (4) SA 682 (C) at 688.

> 'The tow is not bound on all occasions to give detailed directions to the tug, and where no directions are given by the tow, it is the duty of the tug to direct the course.'

Friedman J (as he then was) concluded at 689:

the tug.[33] In *The President van Buren*,[34] the court was asked to consider whether it was contrary to public policy for the tugs at Tilbury Dock to be available only upon terms deeming the tugs to be the servants of the vessels they are engaged to tow. The court upheld the contract terms, stating somewhat robustly that although the Port of London Authority was the sole supplier of tugs at Tilbury, 'nobody forces you to use London Docks'. The practice of transferring responsibility for the tug to the tow, said the court, was a universal commercial practice.

In *The Panther and The Ericbank*,[35] the tug *Panther* was assisting astern of the *Ericbank*, outward bound down the Manchester Ship Canal. When another vessel approached inward bound, the *Ericbank* failed to signal the *Panther* that the approaching vessel was improperly about to pass the *Ericbank*. The *Panther* swung out from under the stern quarter of the *Ericbank* and collided with the passing vessel. What was a 'trivial bump' was turned into 'something in the nature of a disaster' by the *Panther* failing to stop her port engine after the collision. The turning of her propeller sank the *Trishna*, with which she had collided. Although the towage contract stipulated that the tug crew were to be the servants of the tow, Willmer J commented:

> 'The detailed manoeuvres of the tug are, and must be, left to the discretion of the tugmaster, and the duty of the pilot being confined to giving general directions such as start or stop towing, or to tow in this or that direction. I do not see how a pilot on the bridge of a large ship can possibly be expected to direct the engine movements of a stern tug … or even to know how the engines of the tug are working at any particular moment.'

The court ruled that those in command of the navigation of the *Ericbank,* as the tow, had not acquired a sufficient degree of control over the tug to be found to have carried responsibility for the resultant actions of the tug. Although contractually the servants of the *Ericbank* for purposes of towing, the tug crew remained the servants of the owner of the *Panther*, who accordingly carried liability for the loss of the *Trishna*.

Where the tow is a deadship or dumb barge, there can be no question of command resting anywhere but with the tug, which will carry full responsibility and liability for mishaps. The South African case of *The Romelia and The Antipolis* concerned the loss of two scrap tankers bound for the breakers'

> 'It follows that the control which normally vests in the tow does not arise as a matter of law, but is derived from the practice whereby, as between the tug and the tow; the general management of the operation is usually in the hands of the tow. Whether the usual practice applies in any particular instance, however, depends, in my view, on the facts and on the construction of the particular charter.'

33 See the discussion of wording to this effect in the standard contracts referred to in §8-9.

34 *The President van Buren* (1924) 16 Asp MLC 444.

35 *The Panther & The Ericbank* (1957) P 143. For a discussion of the master-servant relationship between tug and tow see *Mersey Docks & Harbour Board v Coggins & Griffiths* [1947] AC 1 (HL).

yards in the East. They were unmanned, and under tow by a Japanese tug, *The Kiyo Maru*, which was intending to enter Table Bay to hand over its tows to the temporary charge of a local tug, so that it could bunker and take stores and water. While manoeuvring in the bay in adverse weather, the tug turned too tightly, and the aftermost of the tankers being towed in tandem began to over-reach the first of the tankers. The tow rope sagged, forming a catenary which snagged the seabed, and parted. The same fate awaited the first tanker and both became total losses on the rocks within a mile or two of each other. The owners of the tankers sued the tug, which was found liable.

In finding that the tug had sole physical, factual and legal control of the operation, Friedman J (as he then was) concluded:

> 'It follows that the control which normally vests in the tow does not arise as a matter of law, but is derived from the practice whereby, as between the tug and the tow, the general management of the operation is usually in the hands of the tow. Whether the usual practice applies in any particular instance, however, depends, in my view, on the facts and on the construction of the particular charter.'[36]

The court held that on the facts and on the terms of the towing charterparty, the relationship between the parties was one in which the tows were under the control of the tug, and that while he was in charge of the towage operation, the master of the tug remained a servant of the tug owners. Accordingly, in so far as the master might have been negligent, liability for such negligence would rest with the tug's owners.



## §8-7 Commencement and conclusion of tow:

To determine the liabilities of tug and tow, and to calculate towage monies earned, it is necessary to determine precisely when a towage service has legally commenced and when it terminates.[37] This may be defined in the contractual terms,[38] or it may be left to the law to define. At common law, the towage service commences when lines are actually passed from the tug (or tugs) to the tow.[39] The tow continues until the tow is cast off, whether the tow is by then at the place to which she was to have been towed or not. Most standard contracts, however, vary the common law to make the towage operation commence when a line is passed or when the tug is in position to take on a line, whichever is the earlier.

36 *The Kiyu Maru No 2 supra* at 689.

37 Contracts often determine liabilities between the parties 'whilst towing': see *The Ledaal: Great Western Railway Co v Royal Norwegian Government* [1945] 1 All ER 324 (KB); *The Impetus: Owners of the Blenheim v MT Impetus* [1959] 2 All ER 354.

38 See the discussion of the standard conditions of towage in §8-11.

39 *The Clan Colquhoun* (1936) P 153.

The tug is not permitted to release the tow during the towing operation, and if she does so without justification, she will lose the protection of her contract with the tow.[40]

## §8-8 DUTIES OF THE TUG

### *§8-8.1 Warranty of seaworthiness of tug and ability to perform the towage*

There is an implied warranty of seaworthiness of the tug akin to that of a shipowner as carrier. In *The West Cock*[41] the towing hooks of the tug *West Cock* carried away while she and a sister tug had the SS *Araby* in tow. The *Araby* struck the quay and was damaged. The Court of Appeal (*per* Kennedy LJ) held that the tug owners were either obliged by an implied warranty to provide a tug fit for the service or had a duty to supply a tug which was 'as reasonably fit for service as care and skill could make it'. In either event they were liable for the damage to the *Araby.*

The onus of establishing seaworthiness rests on the tug owner who is required to show that it supplied a tug efficient for the contemplated purpose.[42] In *The Marechal Suchet*[43] the court found that:

> 'The very fact that the tug was unable to tow the vessel is evidence that she was inefficient or that there was inefficiency or want of skill or care or diligence of the master or crew.'

But, unlike the warranty of seaworthiness in the common law of carriage, the warranty to produce a seaworthy tug is probably (though the point has not been categorically decided in English law) not absolute, and only covers defects which the tug owners could reasonably have foreseen or forestalled by reasonable care and skill.[44] Of American law, Parks and Cattell write:

> 'The duty of the [tug] to provide a tug of sufficient power that has proper and efficient equipment and tackle is relatively absolute, yet it must be qualified by the underlying premise that this duty is to be interpreted in the light of conditions reasonably to be anticipated.'[45]



40 *The Refrigerant* (1925) P 130 (Adm) in which a tug left her tow to put into Falmouth to collect a new tow wire.

41 *The West Cock* (1911) P 208 (CA). See also *The Undaunted* (1886) 11 PD 46.

42 *The Ratata* (1898) AC 513.

43 *The Maréchal Suchet* (1911) P 1.

44 English law has changed somewhat with the Supply of Goods and Services Act, 1982 which would require a tug to 'carry out the service with reasonable care and skill'. See Rainey *op cit* at 27. As the English Act came into force before the South African Admiralty Jurisdiction Regulation Act, it could, in terms of s 6, be regarded as part of the present South African law of towage. The English common law prior to 1983 would also be applicable.

45 Parks and Cattell, *op cit* at 129.

In South African law, a breach of the warranty would need to go to the root of the contract as a breach of a material and major term of the contract to deprive the tugowner from relying upon its contractual indemnities or exclusions.[46] The Cape High Court has had reason to examine the nature of the undertaking by a towage contractor to provide a tug suitable for the purpose of the contract, in litigation relating to the loss of the derrick barge *BOS 400.*[47] The *BOS 400* was entering Table Bay under tow by the tug *Tigr*. In storm conditions, the tow hawser parted, and the *BOS 400* drifted onto the rocks to become a total loss (only a few hundred metres from where the rusting remains of the *Romelia* and the *Antipolis* still lie). It was alleged in attachment proceedings that the tug's actual bollard pull was far short of her normal power because of a defective port engine and turbocharger. Farlam J 'in the construction of the particular charter' found that there was a *prima facie* case for attachment of the tug. The approach taken by Farlam J to determining whether or not there was a *prima facie* cause of action mirrored the factual conclusion in *The Maréchal Suchet* quoted above. Farlam J commented:

> '[H]ad the tug's engines been working at their proper efficiency, it is likely she would have been able to put sufficient distance between herself and the coast, alternatively that she would have been able to hold the tow off the coastline in the severe storm conditions that were prevailing immediately prior to the grounding. In my view [the applicant's] evidence establishes *prima facie* that the reduced pulling capacity of the tug was causally connected to the grounding.'[48]

The merits of *The Bos 400* were never decided upon by the court because the claims were settled, but in the earlier Cape case of *The St Padarn and the Lunaplate,*[49] the actions of the tug owner and its servant superintendents were closely examined in assessing whether the owners had been in actual fault or privity, thereby depriving them of their right to limit their liability.[50]



46 South African law defers to English law in terms of s 6 of the Admiralty Jurisdiction Regulation Act. In *The Maréchal Suchet, supra* the owners of the *Maréchal Suchet* counter-claimed from the owners of the salvaging tug *Guiana* for damage sustained when the tug and tow drifted onto a sandbank, there to remain for several days. Although the loss was caused by the fact that the tug was 'inefficient for the purpose', the tug owners were able to rely upon the exception clause in the towage contract, and the counterclaim was dismissed. The comments offered in §16-3 on the survival of contractual terms upon breach of contract in relation to the carriage of goods are equally apposite in relation to towage contracts. In *The West Cock, supra,* the tug owner's attempt to rely upon an exception in the towage contract to absolve them from liability for the towing hook's rivets failing, did not avail, because the exception contractually only applied 'whilst towing', and not to the condition of the tug before the contract commenced.

47 *The Tigr No 1* 1995 (4) SA 49 (C); confirmed on appeal in *The Tigr No 1 (Full Bench)* 1996 (1) SA 487 (C). See also *The Tigr No 2 (Appeal)*1998 (3) SA 861 (SCA).

48 *The Tigr No 1* 1995 (4) SA 49 (C) at 65–6..

49 *The St Padarn and The Luneplate: Atlantic Harvesters of Namibia v Unterweser Reederei GMBH* 1986 (4) SA 875 (C).

50 This case will be further discussed in §8-10.3. It does not take the matter of seaworthiness any further, as the decision was based on the statutory requirements of the applicable German law.

It should be remembered that while most ordinary towage is conducted on simple towage contracts (which may however be for routine harbour movements or for long-distance ocean tows), certain towage, particularly the more specialised and difficult operations, is conducted on towage charterparties. In such event, the law of seaworthiness with regard to charterparties would be applicable to the obligations of the tug owner to make use of a seaworthy tug.[51]

### *§8-8.2 Supply a particular named tug or tug of particular capacity*

It may be that the owner of the tow requires a tug of particular characteristics suited to the purpose. In such event the tow owners could stipulate that a particular named tug be employed to carry out the contract.[52]

It is generally the case that the tow owner stipulates the towing power of the tug required for the tow or other service contemplated by the contract. The pulling power of a tug is measured by a combination of the (brake) horsepower (bhp) of its engines and by its 'bollard pull'. This is the static pull, expressed in tonnes or Newton metres, which the tug's towing gear is able to exert against fixed resistance. It may be measured by attaching a tow line to a bollard on the quay, and exerting full power through a load meter.[53]



### *§8-8.3 Skill of performance*

In performing what is essentially a service contract, the tug, as contractor, is obliged to 'use her best endeavours … and bring to the task competent skill, and such a crew, tackle and equipment as are reasonably to be expected from a vessel of her class'.[54] Proper performance by the tug owner is a matter of fact, assessed objectively, but against what might reasonably have been expected of the tug owner and its servants in the circumstances of the particular tow. It is an obligation implied into the contract by law, even where there are no written terms.[55]

51 On seaworthiness in charterparties, see §15-4.

52 See Rainey, *op cit* at 37 *et seq.*

53 It was the bollard pull of the towing tug that was at issue in *The Tigr*, *supra*.

54 *The Minnehaha* (1861) 15 ER 444. See also *The Julia* [1861] Lush 224. Rainey, *op cit* at 29 concludes that the 'best endeavours' requirement of Lord Kingsdown in *The Julia* is probably nothing more than a paraphrase of an 'obligation to use reasonable care and skill' – which is now enacted as the minimum standard of the service contractor in the UK's Supply of Goods and Services Act, 1982.

55 In *The Ratata* (1898) AC 513 (HL), Lord Halsbury found that where a tug had in fact towed a vessel up-river to Preston, a contract of towage may be inferred from 'the ordinary course pursued between shipowners and the contractors for towage.' The *Ratata* was unable to tow at reasonable power, and 'it was the tug of the corporation, and its efficiency or lack thereof was an inefficiency for which the corporation, as contractors for towage with reasonable care and skill, were responsible.' The basis for damages being awarded was not that of a common law warranty, but rather a breach of an implied duty. Cf *The West Cock* (1911) P 208 (CA).

Thus the tug owner, through the actions of competent servants, would generally be required to perform the following duties, *inter alia*:[56]

- The tug owner must inspect towlines and other towing gear prior to and during the towage. Failure to carry out proper inspection may result in the tug owner being found negligent, and thereby in dereliction of its duty. In South African law, this dereliction may extend to amount to actual fault or privity, defeating the tug owner's right to limit its liability under s 261 of the Merchant Shipping Act.[57]
- The tug owner must make up the tow, by which is meant that the tug should prepare all towing bridles, springs, tow wires and ropes and all gear reasonably required for the task.[58] The tug should ensure at all times that the tow lines are neither too long nor too short.[59]
- The tug should not expose the tow to unnecessary danger.[60] Where the negligence of the tug servants lands the tow in difficulty, even by allowing the tow to run aground, the tow will be liable in damages, and may forfeit the right to claim payment for towage.[61] The tug is obliged to 'do their utmost for the safety of the tow', and would in these circumstances be denied conversion to salvage.[62] Particularly, the tug should exercise particular care to stay clear of the tow during the operation, thereby avoiding contact with the tow.[63] Where the conduct of the tug causes collision with the tow, both the Collision Avoidance Rules,[64] and the seamanship of the tug as a towing contractor are assessed to determine fault and/or breach of contract. The tug must anticipate and be on



56 See generally, Rainey, *op cit* Chap 2 at 27 *et seq.*

57 See *The St Padarn and The Luneplate, supra* and §8-10.3.

58 Parks and Cattell, *op cit* at 133. A vessel is usually towed by a combination of a towing bridle, for which chain or wire is used, and which is secured to bits or other firm securing points on the fo'c'sle of the tow. The chain of the bridle is passed through fairleads port and starboard, forming a loop which is then shackled to a length of polypropylene rope, used as a 'spring' to absorb jerks on the tow wire. The spring is then shackled to the tug's main tow wire, which may be as thick as 900 mm and as long as a kilometer. The wire is led onto the main towing winch drum of the tug, first passing through a large shackle secured to a gobrope which in turn is fastened to the centre of the afterdeck of the tug, and which prevents the tow rope from passing much further than the afterquarters of the tug should the tow yaw from side to side and even overreach the tug during towing.

59 The loss of the *Romelia* and the *Antipolis* referred to above was attributed to the tug having allowed too much slack in the tow wires, forming a catenary.

60 *The Julia* [1860] 15 ER 284.

61 *The Christina* [1848] 13 ER 726.

62 *The Duke of Manchester* [1847] 13 ER 618. See also *The Robert Dixon* [1879] 5 PD 54.

63 *The Lagarto* [1923]17 Lloyd's L Rep 264.

64 See §6-5.3.

the lookout for the tow's engines engaging ahead or astern as required. The tug may not expect that the tow shall maintain her engines on standby.[65]

- The tug must at all times adhere to standards of proper navigation and seamanship.[66] In particular, there should be a proper assessment of weather, so that the tug does not proceed to sea in conditions of avoidable adverse weather;[67] the tug and tow must maintain proper speed, both to comply with the Collision Avoidance Rules, and to ensure safe towing, with a minimum of yawing and over-reaching by the tow; the tug must ensure that it tows in a manner to minimise the effect of swells on the tow; the tug must maintain a proper lookout, even where the responsibility for the towage lies legally with the tow;[68] proper lights and shapes must be displayed.
- The tug should accept assistance where appropriate.
- The tug must remain with the tow and complete the towage. Even where the tow hawser breaks, the tug may not abandon the tow. It must stand by and render whatever assistance is possible in the circumstances. Where it is prudent for the tug to cast off the tow wire, it must re-connect as soon as possible, and may not then claim salvage for doing what is its duty under the towage contract.[69] Where a tug lost her tow wire and then ran for the nearest port to fetch a new wire, leaving the tow unattended, and the tow procured a steam trawler to pull her in as salvage, the tug's claim for payment of the towage money was set off against the tow's counterclaim for the salvage paid by the tow.[70]



65 *The Cape Colony* [1920] 4 LIL Rep 116 at 118.

66 In general, see Parks and Cattell, *op cit* Chapter IV, at 127 *et seq* though most of the cases referred to are American and therefore only of persuasive authority in South Africa.

67 Parks and Cattell, *op cit* at 160.

68 *The Isca* [1886] 12 PD 34 at 35:

> 'It does not follow that the tow is to be constantly interfering with the tug; it must depend on the place and on the circumstances and whether there are numerous small vessels about. Those in charge of the tug must exercise their judgment, and must not be constantly expecting to receive orders from the vessel in tow, which may be a considerable distance astern of them.'

The same principle applies where the tow is under pilot's advice: 'It is not necessary that the pilot should be giving orders perpetually for every movement of the helm of the tug': *The Sinquasi* (1880) P 241.

See also *The Stormcock* [1885] 5 Asp MLC 470.

69 *The Annapolis, The Golden Light and The Hayes* [1861] 167 ER 150.

70 *The Refrigerant* [1925] P 130 (Adm). £2 000 salvage was awarded to the trawler, but allowed against the £400 towage fee payable to the tug *Joffre*. The *Joffre* was thus required to pay *The Refrigerant* £1 600.

## §8-9 Duties of the tow

The owners of the tow are under a similar obligation as the tug owners, each in relation to their own vessels. Thus in *The Julia*[71] Lord Kingsdown confirmed:

> 'When the contract was made, the law would imply an engagement that each vessel would perform its duty in completing it, that proper skill and diligence would be used on board of each; and that neither vessel, by neglect or misconduct, would create unnecessary risk to the other, or increase any risk which might be incidental to the service undertaken. ... But, on the other hand, if the wrongful act of either occasioned any damage to the other, such wrongful act would create a responsibility on the part of the party committing it, if the sufferer had not by any misconduct or unskilfulness on her part contributed to the accident.'

### *§8-9.1 Duty of disclosure: condition of the tow*

The tow owner has a duty to disclose to the tug all material facts relating to the condition of the tow.[72] If a contract is entered into for ordinary towage of an undamaged vessel, and the tug ascertains that the vessel was damaged or disabled, or where material circumstances about the tow are not disclosed, the tug may avoid the towage contract and make itself available for salvage – if all prerequisites for salvage are met.[73]

In American law, the courts have held the tow owner bound by an absolute warranty to supply a tow seaworthy in all respects material to the towage, in a way which enables the tug and tow to withstand the perils of the sea. The warranty includes efficiency of the tow's hull, towing lines supplied by the tow, anchors, lights, steering gear, competent crew and all tow owner's equipment used in the towage.[74]

### *§8-9.2 Tow to be in convenient position*

The tow must be presented in a position reasonably possible for the tug to pass a line across. In *The Venturous*[75] the water around the barge to be towed was too shallow for any tug of the required size to draw near, and the tug could thus avoid the contract.



71 *The Julia* 15 ER 284.

72 *The Kingalock*, *supra* and *Gark v Straits Towing Ltd* [1966] 2 Lloyd's Rep 277.

73 See for example *The Kingalock*, *supra*.

74 See Parks and Cattell, *op cit* at 202–211.

75 *The Venturous: Elliot Steam Tug v New Medway Steam Packet* [1937] 59 Lloyd's Rep 35 (KB). The defendants hired Elliots to tow a large concrete barge from the Medway to Surrey Docks. Aware of the navigational difficulties up the Blackwater, Elliots contacted the barge owners to enquire about draft. They were told the draft was about 15 feet. The *Venturous*'s draft was 12 feet, and she was sent to collect the tow on a contract for ordinary towage. When the barge was located, it was lying in the mud of the estuary (where it had been for some time), and could not be approached by the *Venturous*. Elliots cancelled the contract and were awarded damages.

### §8-9.3 *Payment of towing fee*

As a *locatio conductis operis faciendi*, a contract of service, a towage contract requires performance before payment is due. If there is no agreement upon any stipulated basis of payment, the tug would be able to make a claim against whoever derived benefit from the tow on the basis of unjustified enrichment.

The tow is obliged to pay the tug the agreed fee as, when and where it becomes due and payable in terms of the contract. If the contract provides for payment of the fee at certain predetermined stages of the towing voyage, the fee will be thus payable in stages. If the contract determines that the towage fee will be deemed earned upon commencement of tow, the fee will be payable in advance and regardless of completion of the towage. Where the fee is agreed to be a lump sum, and the completion of the tow contract is prevented by neither party, through factors beyond the control of each, a *quantum meruit* may be awarded. But where non-performance of the tow is due to the fault of the tug,[76] the tug will not be entitled to a *quantum meruit* for part performance.[77] Where, however, the completion of the contract is prevented by the wrongful actions of the tow owners,[78] the tug may claim any unpaid balance of the towage fee as damages.



## §8-10 Liabilities

Where either party is in breach of its contractual or legal obligations, such breach would found a damages claim from the wronged party who has suffered damages in the result. But third parties may also suffer damage, caused by the actions of either or both the tug and the tow.

### §8-10.1 *Damage to tug and tow*

Where the tow is damaged by the tug, the common law allowed the tow to claim from the tug if the tug was negligent.[79] Exception clauses now almost always remove this right from the tow. Furthermore, towage is often done under a charterparty and almost always under standard towage conditions. Both, if properly worded, alter the liabilities of the common law.[80] Where there has been

76 For example in the case of *The Refrigerant, supra.*

77 An example of a case where a *quantum meruit* was denied is *The Edward Hawkins* [1862] 15 ER 578.

78 As, for example, non-disclosure by the tow of material circumstances affecting the towage: *The Kingalock, supra.*

79 *The Hare* [1922] AC 431.

80 Cf *The President van Buren* [1924] 16 Asp MLC 444 where the court held that even though the PLA was the sole supplier of tugs working the port of Tilbury (and thus the claimant vessel had no freedom to chose another) nobody is forced to use the London docks and the shouldering of all liability on the tow is not contrary to public policy, being in universal commercial practice. Exception clauses have been viewed in the light of consumer protection legislation. See for example *The St Padarn and the Lunaplate* 1986 (4) SA 875 (C) in which German unfair trade practice legislation was considered.

a causative breach of warranty of seaworthiness,[81] the tug owner will not be able to recover its own losses from the tow, nor would it be able to claim an indemnity for the claims of third parties.

### *§8-10.2 Damage to third party property*[82]

At common law, the liabilities generally follow the master/servant relationship and the responsibilities of command. The tow is thus usually liable for damage to itself, the tug, and to third parties. But there are exceptions to this general rule and an apportionment of blame and liability is also possible.[83] Where the tug and tow damage each other, each damage will be treated as a separate claim, apportioned where appropriate. Where the tug damages gear by reason of the towing operation, and without its own fault, the normal situation is that, as the tug is the servant of the tow, the tow would be liable.

Where there is damage to third party property, the simple rule is that the tow is the master, and is thus liable to third parties for the acts of the tug.[84] The claimant may also look directly to the tug for its damages in delict (tort), and the tug would then have to seek an indemnity from the tow. Where damage is caused to a third vessel by the contributory negligence of both tug and tow (and perhaps the third vessel also), the individual fault of each ship must be separately assessed.[85]

### *§8-10.3 Limitation of liability*

Limitation of liabliity is considered in detail in chapter 11. It is a matter for the *lex fori*, and s 261 of the Merchant Shipping Act[86] determines limitation in South Africa. As a prerequiste for limita-



81 Because the warranty is not absolute, the loss must have been caused by the unseaworthiness.

82 See generally, Kovats, *op cit* chapter 6.

83 In the latter event, in South African law, the provisions of the Merchant Shipping Act, 1951 rather than the Apportionment of Damages Act 34 of 1956 would be applicable. Upon apportionment in maritime cases, see §6-5.3.

84 *The Sinquasi* [1880] 5 PD 241.

85 *The Devonshire*. Cf *The Miraflores and The Abadesa* [1967] 1 Lloyd's Rep 191 (HL) where the House of Lords apportioned liability according to the separate fault of three vessels. In English law, the Maritime Conventions Act of 1911 introduced *pro rata* apportionment in the United Kingdom:

> 'The liability to make good the damage and loss shall be in proportion to the degree in which each vessel was at fault'.

On apportionment of fault and damages in collision cases, see §6-5.3.

86 Act 57 of 1951.

tion, the shipowner (whether tug or tow) must establish that it has no actual fault or privity (as it was unable to do in *The Luneplate*) in the navigation and or management of its vessel.[87]

What is significant is that the limitation tonnage is that of the vessel owned by the defendant in a damages action. Thus if the tug owners are sued, the tonnage of the tug only is taken into account in settling the maximum exposure of the tug owner, even where damage was caused by the tug and the tow. Similarly, if the tow owner is sued, it will limit according to the tonnage of the tow. As Lord Denning ruled in *The Bramley Moore*:[88]

> 'A small tug has comparatively small value and it should have a correspondingly low measure of liability, even though it is towing a great liner and does great damage. I agree that there is not much room for justice in this rule; but limitation of liability is not a matter of justice. It is a rule of public policy which has its origin in history and its justification in convenience.'

The *Bramley Moore* was followed, with some apparent reluctance, by Kerr LJ in *The Sir Joseph Rawlinson.*[89] An exception may be made to the single vessel fund theory of *The Bramley Moore* where there is a flotilla of vessels under tow, and some (in common ownership) but not others are at fault. The fund then comprises the aggregate tonnage of the vessels having causative fault. Thus in *The Harlow*[90] five barges were involved in collision. Two of the five, lashed together, were in causative fault, and the fund was calculated with reference to the combined tonnage of the two barges at fault.



87 As is explained in chapter 11, limitation in South African shipping law follows the regime of the 1957 Limitation of Liability of Owners of Seagoing Ships, with limits enacted in s 261 of the Merchant Shipping Act. It is likely that this section will be amended in the near future to bring it into accord with the limits of the 1976 Convention on Liability for Maritime Claims.

88 See *The Bramley Moore* [1963] 2 Lloyd's Rep 429 (CA), decided upon an interpretation of the then British s 503 of the Merchant Shipping Act, 1894. The present South African Act mirrors this wording. The *Bramley Moore* overruled the earlier decision of *The Ran* (1922) P 80.

89 *The Sir Joseph Rawlinson* [1972] 2 Lloyd's Rep 437 QB. But in that case, the court pointed out that it is the causative negligence of the tug owners which gives rise to their right to limit according to the tonnage of the tug. Had there been causative negligence on the part of both the tug and the barge, the situation may have been different:

> 'If one arrives at a conclusion whereby a plaintiff seeking to limit his liabliity cannot do so in respect of the negligent navigation or management of one vessel, viz the tow, it does not matter that he would be able to limit his liability in respect of another vessel, the tug, because once the protection of limitation is pierced at any point, the practical effect is that it goes entirely.'

90 *The Harlow* [1922] P 175. For a full discussion of the calculation of the limitation fund where multiple vessels are at fault, see Rainey, *op cit*, at 294. Rainey (at 303) suggests that the same approach will still apply in the United Kingdom under the new liabliity regime of the 1995 Merchant Shipping Act.

## §8-11 Standard towage contracts

It is beyond the scope of this work to consider the various standard towing contracts in any detail.[91] The most common terms in use in Southern African waters are:

- The United Kingdom Standard Conditions of Towage and Other Services (UKSTC 1986);
- Smit Amandla lump sum and daily hire towage contracts;
- The Netherlands Tug Owners' Conditions (1951);
- BIMCO's TOWCON (lump sum) towing contract;[92]
- BIMCO's TOWHIRE (daily rate) towing contract; and
- BIMCO's SUPPLYTIME 89, time charterparty for offshore supply craft.

Certain terms are common to all standard contracts. Thus the contracts all seek to delimit the time when the contract is to attach and when it is to cease. Most contracts relate this time to the definitions of the commencement and termination of services, and to liabilities and obligations of the parties 'whilst towing'. Under the UKSTC and the Smit terms, for example, the service commences once the tug is in a position to receive orders direct from the tow to commence operations, or when the line has been passed, whichever happens sooner. This is a variation of the common law, which requires a line to be passed, and is most important when damage results at a very early stage of the operation. In that event, the tug may seek an indemnity from the tow only if the contract is already in force. In *The Impetus*,[93] although the tug was not in an immediate position to connect up, she could receive a heaving line and it was held that the contract had commenced. This decision can be contrasted with *The Uranienborg*,[94] where the court found that the tug must be in a position not to receive orders generally, but specifically to receive orders to pick up ropes or lines.



A most important feature of the standard terms concerns the confirmation of the liability of the tow for all damage occurring 'whilst towing', except for claims which result (the onus being on the tow) directly and solely from the personal failure of the tug owner to exercise reasonable care to make the tug seaworthy for navigation at the commencement of the service.[95]

91 Rainey, *op cit.* Chapters 3 to 8 deal extensively with the more common forms.

92 The BIMCO forms are available at www.bimco.org.

93 *The Impetus* [1959] 2 All ER 354, decided in relation to clause 3 of the UKSTC.

94 *The Uranienborg* [1935] All ER Rep 70.

95 See for example clause 4 of the UK Standard Conditions.