

# SALVAGE

## ***Introduction:***

The ancient law of salvage aims to reduce the perils of the sea by providing a financial incentive to those who rescue vessels in distress , or which have been abandoned. This is a complex area and each claim will depend on its own facts, but a general outline is set out below:

Salvage has been defined as:

*“Service which saves or helps to save a recognised subject of salvage when in danger, if the rendering of such a service is voluntary in the sense of being solely attributable neither to pre-existing contractual or official duty owed to the owner of the salvaged property, nor to the interest of self-preservation”.*

Accordingly the essential elements which must exist before a claim in salvage can succeed are:

1. That it concerns a recognised subject of salvage;
2. That the property was in danger;
3. That the services were voluntary; and
4. That the services were successful.

These elements can be summarised as follows:

## ***Recognised subjects of salvage:***

In most circumstances the only objects which can be the subject of a salvage claim are a vessel, its apparel, or its cargo.

## ***Danger:***

The vessel must be in danger of loss or damage. This requirement has led to disputes with vessel owners who sometimes claim, from the safety of dry land

and with the benefit of hindsight, that the vessel was never in any real danger. However the Courts have granted some leeway to the salvors in enforcing this provision and a salvor will be justified in taking salvage action if, at the time assistance is rendered, the salvor believes, on reasonable grounds, there is a real danger to the vessel.

***Must be voluntary:***

The salvor must render the salvage services on a voluntary basis. This means that the salvor must not be under any pre-existing duty to provide the salvage service. The master and crew of the vessel salvaged would not normally be entitled to claim salvage as it will be a term of their employment that they use best endeavours to protect the vessel. A pilot would not normally be entitled to claim salvage for the same reasons. However if any of these parties take steps in saving the vessel which are outside of what they could be required to do under their terms of employment, then they can claim salvage. This normally involves the master or crew undertaking particularly dangerous or arduous activities to save the vessel.

For the same reason tugs would not normally be entitled to a salvage claim for providing towage services pursuant to a towage contract which was entered into before the vessel got into difficulty. However situations can arise during the course of towage contracts whereby it ceases to become a contract for towage and becomes salvage.

Where more professional salvors are involved, the salvors will often enter into a contract with the owners, or master, of the vessel in distress to provide salvage services. Obviously time will usually be at a premium in a salvage situation and accordingly the use of standard form agreements, primarily the Lloyds Open Form (LOF) agreements, has evolved.

The fact that a salvor provides salvage services pursuant to a contract agreed with the distressed vessel's owner does not mean that it is not a volunteer. To lose its status as a volunteer, it would have to be acting under agreements

made before the vessel got into difficulty which bound it to provide rescue services.

However, it is important to know that there is no requirement for a contractual agreement to be in place with the vessel owner before a salvor can take steps to salvage a vessel or its cargo. Most situations in New Zealand waters have involved “amateur” salvors who have salvaged vessels without waiting to enter into formal contracts with the vessel owners.

### ***Success:***

Success, even if only partial, is necessary for a salvage reward. This is often referred to the “no cure – no pay” principle. Even those that only make contributions along the way to a successful salvage by others may be entitled to a salvage claim.

### ***Life Salvage:***

The salvors cannot claim a salvage award for saving life unless they save property at the same time. The policy reasons for this are that no-one should need any financial encouragement to save lives. However if the salvage of a vessel also leads to saving lives, then the ultimate salvage award will be increased to reflect this fact. This is known as life salvage.

### ***Who is entitled to claim salvage?:***

The owners, masters and crew of the salving vessel will often all have separate and independent rights to claim salvage. Shares in the salvage fund are normally worked out by agreement and there are no binding rules in this regard. However, as a rough guide the vessel owner would normally take about three-quarters, the master one-third of what remains and the balance split between the crew and shared according to their rating. This apportionment always depends on the particular circumstances. For example, if the crew or master have shown particular courage and/or skill out of the

ordinary in effecting the salvage, then their share will be increased accordingly.

If more than one party is involved in the salvage, there will need to be an apportionment between the parties. Again this apportionment would normally be worked out by agreement. Usually the first salvor in time would be treated more generously than later salvors, but payment would also depend on the degree and expertise of services rendered.

Where the salvor vessel is under a demise charter at the time of salvage, the charterer can usually claim the salvage award in place of the owner.

### ***Who has to pay?***

The basic rule is that all the owners of property which has benefited from salvage must contribute to the salvage award. Accordingly cargo owners, and sometimes charterers, can be required to contribute to the salvage award, in addition to the vessel owner.

### ***Can Salvors be liable in negligence?***

This is a highly contentious area, but in some circumstances salvors can be liable to the vessel owner, or others, for damage caused by their negligence during salvage operations. In this regard professional salvors must exercise a greater degree of care than an amateur salvor.

### ***How is the salvage award assessed?:***

The amount of salvage payable is often negotiated by agreement between the parties, particularly where insurers are involved. However Courts, or arbitrators, have occasionally become involved and have provided guidelines on how the award is to be assessed. A number of factors are to be taken into account and each award is to be assessed on its own particular circumstances. A major factor is the value of the property salvaged, but it is

not as simple as simply assessing an appropriate percentage of the value as an award. New Zealand Courts have indicated that they will look at:

- (i) The degree of danger, if any, to human life;
- (ii) The degree of danger to the property salvaged;
- (iii) The value of the property salvaged;
- (iv) Skill and expertise shown by the salvor;
- (v) The degree of danger to, and hardship suffered by, property and personnel employed in the salvage;
- (vi) The time taken up in the salvage;
- (vii) The value of equipment used in salvage work;
- (viii) Responsibilities incurred;
- (ix) Losses and other out of pocket expenses incurred as a result of the performance of the salvage.

Salvage awards made through the New Zealand Courts have amounted to 10 to 20% of the value of the property salvaged, but the Courts have insisted that the amounts are fixed after taking into account all relevant factors and the percentage calculation is really used as a final rough guide to ensure that the award is set at an appropriate level.

### ***Maritime Transport Act:***

Many of the statutory salvage provisions are (or were) found in the Maritime Transport Act 1994. However, following amendments to the Act in 1999 there are now significant holes in the legislation relating to salvage. Many of the salvage provisions, and particularly the provisions relating to a Receiver of Wrecks, were deleted in anticipation that the International Convention on Salvage (1989) would be adopted into New Zealand law. Unfortunately the Convention has not yet been adopted.

If a salvor salvages a derelict or wreck (ie an unmanned vessel), then they are required to notify the MSA and hand the vessel over to the police as soon as possible. If the parties cannot agree on a salvage award then, in theory, the

vessel should go into the possession of the Receiver of Wrecks and be held by him until any disputes as to salvage have been resolved. This would be a useful device in preserving a vessel after it has been salvaged, pending the resolution of any dispute. However, the problem is that the office of Receiver of Wrecks has been disestablished and no receiver exists. The MSA have indicated that either the police or one of their MSI's can act as a de-facto Receiver of Wrecks to take possession of the vessel. In my experience this is an unsatisfactory arrangement, particularly where the vessel is handed over at one of the smaller ports where there is no MSA presence. In practice the police have proved to be particularly reluctant to accept that they have the powers or obligations to act as receiver. This reluctance is perhaps understandable, given that it can require them to undertake the care and protection of valuable property, often against the wishes of the actual owner, without any express statutory power to do so as a Receiver of Wrecks. The MSA can be reluctant to become involved on an urgent basis.

Accordingly if the salvor has any concerns about the owner dealing with the vessel before the salvage award is paid then it is left with little practical option but to exercise its right to arrest the vessel through the High Court. The arrest powers and procedure were discussed in a previous edition of this magazine. In summary, a salvage claim gives rise to what is known as a maritime lien in favour of the salvor and this lien remains over the vessel even if ownership changes. The salvor is entitled to have a warrant to arrest issued through the High Court which involves the Court Registrar taking possession of the vessel until the salvage award is set and paid. Ultimately the salvor can have the vessel sold to fund payment of the salvage award.