Mercante's *Sea Trials*

Admiralty Law: Salvage from Shinola

If you are a boater and not familiar with the term 'salvage', you could be in for an enlightening experience, as one case we recently handled demonstrates.

The U.S. Coast Guard divested itself of vessel assistance in 1983 when it determined that its resources would best be used to rescue pleasure boaters only when lives were in danger. This opened the door for resourceful recreational vessel towing companies to enter the business of assistance when property (i.e., the vessel) was in some form of marine peril. Except the fee for such service was not covered by a towing membership or even calculated on a dollar per vessel-foot basis. Rather, the tower would demand a handsome reward under admiralty law based upon a percentage of the value of the vessel saved. Typically, the salvor asks the boater to sign a 'salvage contract' with a plethora of fine print and say they will deal with your marine insurance company from that point on.

Purpose of salvage award

The reasoning behind the salvage 'reward' or 'award' is that it encourages seaman and others to embark in undertakings to save life and property (as articulated by the U.S. Supreme Court in 1869 in *The Blackwall*, 77 U.S. 1), and thereby save the vessel owner and marine insurer from paying for a greater loss or even a total loss under the insurance policy.

Marine salvage has existed as long as ships have and is one of the oldest concepts of maritime law "predating the Christian era by 900 years" as described by a federal judge in New York in the Staten Island Ferry crash salvage case, 2008 WL 391237 (E.D.N.Y. 2008). As a natural consequence of the reward-based system, whether a tower's service qualifies as 'salvage' rather than a simple 'tow,' and whether the vessel was truly in 'peril' is often hotly debated and the subject of vigorous admiralty litigation or arbitration, with facts sometimes exaggerated.

In recreational salvage, a dispute will sometimes arise calling upon the courts or arbitrators to determine '*salvage*' from '*shinola*' for lack of a better term.

Good night ILENE!

One yacht owner recently came face to face with marine salvage, and despite his wealth of seafaring experience, the night rescue of his 43-foot Saga sailing yacht (ILENE) from its grounded position became a heated battle in a subsequent marine salvage arbitration before the Society of Maritime Arbitrators (SMA) in New York.

Vastly different were the salvor's and vessel owner's presentations to the panel of three experienced marine arbitrators from the prevailing weather conditions that night to the seriousness of the stranding situation and the extent of the rescue efforts. Depending on whose version of events was accurate, it could have been a Tom Clancy-type thriller, described by the salvor as having occurred on a dark and stormy night with the yacht ILENE hard aground and harshly pounding up and down onto rocks in shallow waters with a falling ebb tide in complete darkness, violent winds, threatening to carry the ILENE into a shore-side rock wall, posing disastrous consequences to the vessel and her crew of three men, all over 60 years old. Indeed, the salvor likened the area of the rescue (near Point Judith, Rhode Island) to the "Cape Horn of the North," with gale force winds, high choppy seas and extremely dangerous conditions, as noted in the arbitrators' written decision.

The vessel owner (and his crew) described the circumstances drastically different, as an unfortunate soft grounding on a sandy bottom requiring a simple tow. Not feeling threatened, the owner had even taken the time to launch his small inflatable dingy to deploy the anchor and attempt to 'kedge' the vessel into deeper water to refloat. The owner did not feel his vessel was exposed to any imminent danger, describing the location as a well sheltered "pond" (Point Judith Pond) far removed from the strong winds and bad weather and to where they had purposely taken refuge from the conditions then raging in Block Island Sound, and that ILENE could never have reached or come close to the rock wall even with the returning high tide the next morning due to insufficient water depth. Indeed, the owner, not feeling in danger, did not radio a Mayday, but after his attempt to deploy the anchor with the rubber dinghy failed due to the swift current, he then decided to call the towing company with which he was a member and had unlimited towing service.

Boaters beware

On this note, pleasure boaters should be aware that a towing service membership does not cover the rescue of your vessel from a marine peril which, if *successful* and *voluntary*, is considered salvage, not towing. The core of a salvage dispute being the nature of the peril the vessel was in at the time (if any), and whether the service provided was a tow, or salvage. In this regard, you can (and should) check what your local towing provider considers as the difference between towing and salvage on their website. The towing company captain will typically decide unilaterally on scene as to whether he or she considers the circumstances as a covered tow calling for a flat fee, or fraught with peril warranting a salvage service and a reward based upon a percentage of your vessel's value. (That is not to say that a judge or panel of arbitrators will agree). Thus, boaters should beware before engaging any service to inquire whether it's a tow or salvage being offered and read whatever you are asked to sign carefully and if left with no choice but to sign, you may want to consider signing '*under protest*.' A salvor may suggest that they will deal with your insurance company about the fee at a later date. However, it is you, the vessel owner, who can be held liable and your vessel may be at stake if the salvor decides to attempt to arrest the vessel pending the outcome of the salvage dispute. (See September and October *Sea Trials* columns discussing 'maritime liens' against a vessel). Most, if not all, marine insurance companies, as an accommodation to their insureds, will provide the salvor with security in the form of a "Letter of Undertaking" (LOU), which 'undertakes' to pay any salvage award up to an amount stated therein, in order to avoid a vessel arrest.

Quite often, it is not until the salvor's written invoice is received, that the vessel owner is awakened to the fact that the tower is demanding a percentage of your vessel value.

Salvage from Shinola

In the ILENE case, the savvy and experienced owner tried valiantly to have the tower agree to just get his vessel and crew out of there because the tide was falling and it was an undesirable place to be overnight, and asked the tower to hold off the discussion as to what the fee would be until the vessel was extracted and safely moored. The salvor suggested that he could not do it under anything other than a salvage agreement. The VHF conversations between the two captains were all recorded by the salvor. Boat owners should be aware that the communications are typically recorded, and the salvage service is often video taped as well.

The owner was left with no choice, as the recorded VHF communications would later confirm, to accept the tower's services, because as the owner stated, he felt he was "*over a barrel*." As such, the signed savage contract potentially could have been deemed a contract signed under coercion or duress. Fortunately, the VHF recordings still existed and were produced in the arbitration. There is certainly no better or more relevant evidence than the actual VHF recordings and video. Here, the recordings reflected facts to confirm a grounding on mud, not rocks, and a casual conversation between the two captains where the crew's safety or vessel condition was not questioned by the tower tending to demonstrate that the situation was not so perilous.

After the owner agreed to the salvage service "*over a barrel*," the tower handed over one tow line and pulled the ILENE off the bottom with one rigid hull inflatable boat for about 36 minutes a distance of about 800 feet. The towing company considered its service to be salvage and demanded $43,750.00 (approximately 20 percent of the value of the ILENE), plus a 10% "Equitable Uplift" for professional services rendered ($2,187.50). The insurer had offered and paid the towing company $27,840.00 to the salvor before the arbitration was commenced as a good faith "interim payment" pursuant to *Article 22* of the International Salvage Convention of 1989.

The panel deliberated and found that the rescue effort was successful but one of "*low value, i.e., minimal skill and efforts on part of the salvor; minimal risk exposure to either salvor or his equipment; minimal time and expenses incurred by the salvor.*" The panel considered it a '*painlessly quick extraction*' from the grounding. In accordance with the panel's unanimous conclusions, the salvor was awarded just 5% of the post-casualty value of the ILENE, $11,600. Inasmuch as the insurer had already paid the towing company an '*interim payment*' of $27,840, before the arbitration commenced, the panel found that the insurer was entitled to a *reimbursement* of $16,240! In addition, the tower was ordered to pay 70% of the arbitrators' fees.

Conclusion

It is important for recreational boaters to have an understanding of the basics of the ancient, but relevant, maritime concept of salvage. This understanding often comes too late, when the recreational vessel owner receives an invoice for salvage when he or she was expecting a bill for towage, or no bill at all if it was understood to be a tow covered by a towing membership. The key then is 'knowledge' and 'understanding' and sometimes a quick call to your marine insurer or admiralty attorney can assist in that process. Of course, if the marine peril is really perilous, there will be no time for that.

Salvage is an important maritime service to help save lives and vessels in time of distress and peril. Every so often, however, like a windshield in windy seas, the vision may get blurred between what is and what is not worthy of 'reward.'

The ILENE case is reported at SMA Award # 4132; 2011 WL 3202309. A copy is available upon e-mail request to the author.

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