

DRIFTING WITHOUT A CREW: SALVAGE OR EMERGENCY TOWING?

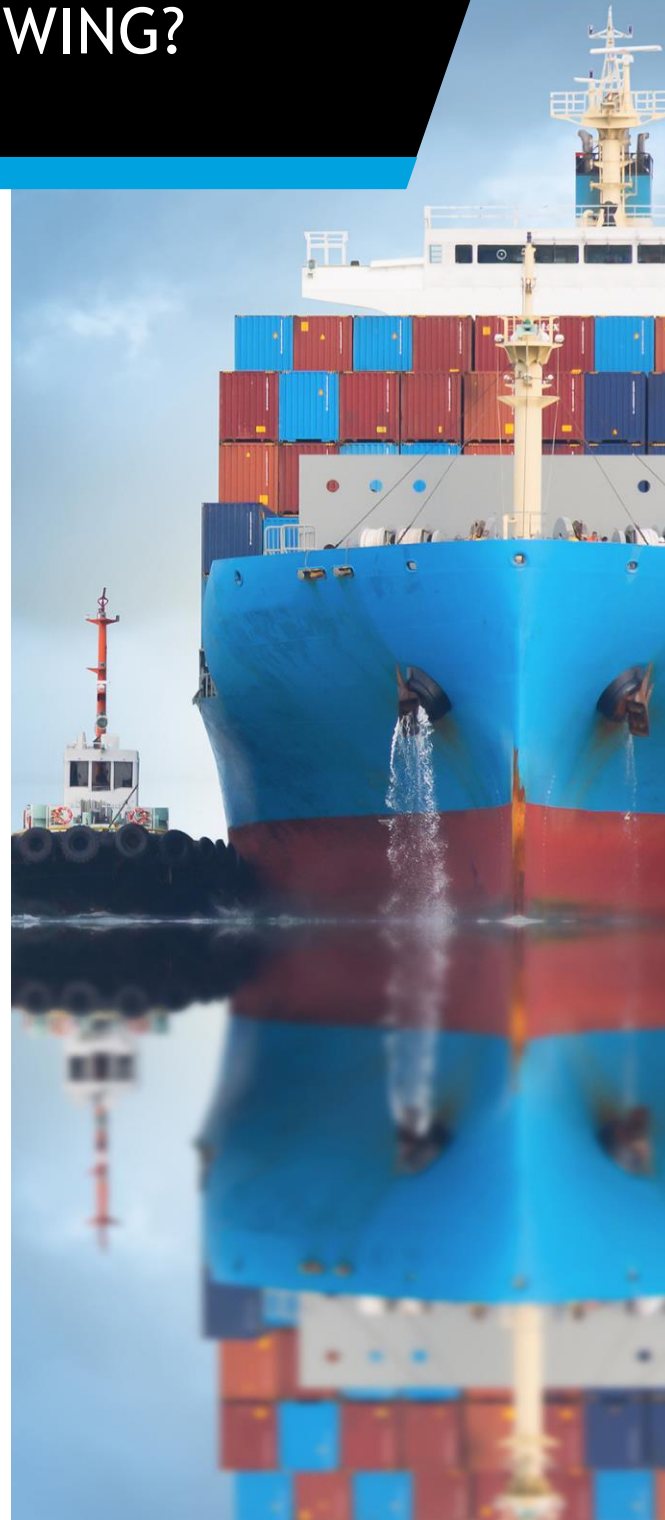
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When a vessel is drifting without control and its crew abandons it after making a mayday call, there is an intuitive judicial presumption that the vessel is in danger. Nevertheless, this presumption is rebuttable, allowing for evidence to the contrary to be presented. For the contrary (counter-intuitive) evidence to be accepted, it is necessary to evaluate the entire circumstances of the case to accurately assess the point at which the situation can be classified as “salvage” (s358 Maritime Navigation Act 2013) rather than “emergency towing” (s305 Maritime Navigation Act 2013).

A vessel without engine, drifting, making a mayday call, abandoned or evacuated by its crew, constitutes a scenario that many would automatically classify as a classic case of maritime salvage. This article attempts to provide a counter-intuitive vision that questions and refines the automatic assumption and calls for an analysis of the situation of danger of the vessel.

THE SCENARIO

According to the rules of the art of naval engineering, every vessel is constructed to float. Buoyancy implies structural integrity and watertightness. If these elements are lacking, it is reasonable to assume that the boat will be at risk of sinking and it should be classified as a genuine “maritime salvage”.



However, what if there is no loss of buoyancy or structural integrity, nor a watertightness deficit but there is a loss of control, leaving the vessel to drift with the consequent abandoning or evacuation of the crew, after having made a mayday call? This is the scenario we will examine here.

AN UNMANAGEABLE VESSEL ON THE DRIFT

When a vessel loses its engine, it remains without propulsion impeding its manoeuvrability or control, leaving it at the mercy of the wind, waves and marine currents ('drifting').

According to *Rivero Aleman* (Maritime Salvage - the Circumstances of Danger and Case Law) "a vessel with a breakdown in the engines of propulsion or control is, in principle, a boat in danger and, therefore, the assistance provided will constitute a case of maritime salvage."

As such, the rebuttable presumption is that a drifting vessel is in danger. Nevertheless, the same author cites the judgment of the Spanish Supreme Court Contentious Administrative Division of the 5 June 1982, which states:

“ The simple fact that a vessel remains without engines and control as a result of a breakdown cannot be included in the concept of salvage without other concurrent circumstances highlighting an effective risk; otherwise all circumstances of breakdown that impede self-propulsion would be included, which would imply the disappearance of the concept of towing. ”

In effect, the rebuttable presumption allows evidence to contradict the presumption that "a drifting vessel = salvage". Such a strong presumption does not exist in law nor the spirit of the same. It is therefore necessary to analyse the concurrent circumstances to establish that the vessel is actually in a state of genuine danger.

Derelict vessels (such as the famous "Mary Celeste" or the more recent "Queen Bee" that disappeared in 2008 and was found four years later, 6,000 kilometres from its origin) show that a drifting vessel is not necessarily in serious and imminent danger of sinking, overturning or suffering serious damage.

However, having lost the ability of self-propulsion, their recovery does require a third party that can

provide traction or propulsion. This third party is the tugboat.

The mayday call

In this scenario, we will work on the basis that the drifting vessel makes a mayday call. The mayday call also gives rise to the presumption that the vessel is in danger, given that no captain should make the same without good reason.

According to *Rivero Aleman*, "it is undoubtable that when a Captain of a vessel - whose training and experience require skill and serenity - states that their vessel is in danger, such a call, however made, is a presumption that is difficult to destroy". Nevertheless, this presumption is not completely indestructible, allowing evidence to the contrary to be presented.

The Spanish Central Maritime Tribunal has criticised the conduct of those captains that make unfounded mayday calls based on subjective feelings of fear or nerves without having rationally evaluated the status of the vessel and requires "a rational evaluation of the whole situation in which the vessel finds itself".

The subjective perception of danger based on the experience of the captain/crew is distinct to the objective assessment of danger to the vessel, although the two are not mutually exclusive.

Therefore, the danger is real when it is reasonably foreseeable, not when it is based on irrational, imagined or illogical presumptions or predictions. There is no irrefutable presumption that "mayday = salvage".

Abandonment or evacuation of the vessel

The fact that a drifting vessel is abandoned or evacuated following a mayday call, is also not an irrefutable presumption that the vessel is in danger.

The evacuation could be to protect the crew, thereby avoiding injuries, or simply because there is no practical reason for the crew to maintain on-board.

Therefore, the fact that the vessel is drifting, makes a mayday call and is abandoned by its crew does not automatically mean that the vessel is in real danger with an imminent risk of sinking or suffering serious damage. It is still necessary to analyse the surrounding circumstances to form a definitive opinion that is not influenced by intuitive presumptions.

DISTINCTION BETWEEN SALVAGE AND EMERGENCY TOWING

Which legal classification does tugboat assistance deserve when providing assistance in the above described scenario?

Although many salvages take place by way of a tugboat, not all tugboats constitute salvage.

The key distinction between the concepts of salvage and tow is the proximity of danger to the towed vessel. If the danger exists, it is a salvage with a right to a reward. If the danger does not exist, it is a tow with an agreed remuneration.

In addition to the salvage and tow options, there is a third situation of “extraordinary tow” (or “towing at sea” or “emergency tow”). This is requested in extraordinary situations that do not constitute maritime salvage.

Applying this directly to our example, the tow provided to a drifting vessel, without crew is not a simple tow. The object of an ordinary tow contract is the supply of traction to a vessel that is not in a dangerous situation in order to achieve its movement over water.

However, when the purpose of the traction force provided by the tug not only pursues aquatic movement but also the elimination of danger for the towed vessel, we can therefore, be faced with a salvage or emergency tow, depending on the intensity of the danger.

It will be salvage when the danger faced by the towed vessel is “real”, “not imaginary”, “serious” and “imminent”. The conclusions of the Spanish Supreme Court have been clear and consistent on this point:

“ It cannot be forgotten that salvage, in its grammatical concept, means the liberation of a risk or danger, which is also characterised by an imminent or proximate contingency of a damaging event, which would result in the loss of the vessel. ”

Therefore, a vessel without an engine, without crew and drifting inevitably (for example) towards the coast, a port or a maritime traffic division, is clearly an imminent and serious danger of being lost or suffering serious damage, with the tugboat being a genuine salvage.

Nevertheless, when the danger to the towed vessel - albeit real - is less intense, less serious, not as imminent nor proximate, the classification is not “salvage” but rather “emergency tow”.

PRESUMPTIONS

The above scenario is laced with presumptions that could influence the intuitive judicial evaluation far from the objective reality.

Every presumption is said to have three elements: the supposed facts, the presumed facts and the logical connection.

The supposed facts

The loss of engine, the mayday call or the abandonment of the vessel, are facts that can serve as a starting point to establish the presumption that the vessel finds itself in a position of imminent, serious and objective danger.

Nevertheless, as stated by *Nieva Fenoll* (Evaluation of Evidence), evaluating evidence is not only to search for what usually occurs but rather consists in searching for elements to corroborate the evidentiary conclusions.

What usually occurs is not what always occurs; it is essential that counter-intuitive circumstances are also considered.

The search for the truth, the ultimate goal of the judicial evaluation of evidence does not consist in searching for “what usually happens” but rather in searching for elements to corroborate evidentiary conclusions that eventually provide a counter-intuitive vision that challenges and questions the automatic evaluative prejudices of the judge.

The presumed facts

When there is no legal presumption, as in this scenario, the presumed facts cannot be taken as given on the basis of establishing the supposed facts. As mentioned above, the fact that a vessel has made a mayday call, is without an engine, is drifting and without a crew is not sufficient to presume that the vessel is in imminent and serious danger. It is necessary to go a step further, and establish the connection between the supposed facts and the presumed facts.

Some judicial decisions have seemingly omitted this step, apparently following instead the intuitive presumptions, resulting in arguably questionable conclusions.

Logical connections

Parties must sometimes be prepared to test the supposed facts and their supposed logical connection with the presumed facts. In this scenario, it is necessary to question that the loss of engine, the unmanageable drifting, the mayday call and the abandonment or evacuation of the crew implies a serious and imminent danger for the vessel. It is necessary to deny the logical link and break the presumption.

However, contrary evidence is “counter-intuitive” which makes it difficult for many judges and lawyers, who prefer to defer to common assumptions, such as “vessel without an engine= salvage”, “mayday = salvage”, “vessel without crew = salvage”.

CONCLUSION

A vessel without engine, drifting, making a mayday call, abandoned or evacuated by its crew, constitutes a scenario that many would automatically classify as a classic case of maritime salvage. By working through the facts in our scenario, we have attempted to demonstrate a counter-intuitive vision that questions and refines the automatic assumption and demands an analysis of the situation of danger of the vessel.

FURTHER INFORMATION

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