The Question of Shipowner's Limitation of Liability in Maritime Collision under Various Jurisdictions

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INTRODUCTION

The Philippines is a seaboard country. It has 7,107 islands bounded by vast bodies of water, attributes that expectedly account for its thrust to establish a large shipping industry. Geographical location alone, however, is not adequately sufficient to boost its shipping industry, unless shipowners are also provided with adequate protection. The most luring protection is the maritime law doctrine of "limitation of shipowner's liability" in collision.

Some authorities opine that maritime law limits the shipowner's liability for collision or for other claims for damages to the value of the ship and freight.[1] This, they say, is the law in most foreign countries where shipping is found to be most progressive. Whether such uniform rule in maritime law really exists

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1. 3 KENT'S COMM. 218 (14d ed. 1896); 4 PHILLIMORE'S INTERNATIONAL LAW 628 (2d ed. 1894); VALIN, SUR L'ORDONNANCE DE LA MARINE, 1.2 Tit. 3, art. 2 (1681); 1 BOULAY-PARTY, COURS DE DROIT COMMERCIAL MARITIME, 263-98 (1998); PARDESSUS, DROIT COMMERCIAL, Part 4, Tit. 2, Ch. 3, § 2; BALTHAZARO-MARIE EMERIGON, DES CONTRATS A.LA GROSSE, Ch. 4 § 11 (1811).

uniformly among countries is a matter of re-examining the laws of various jurisdictions.

Broadly speaking, it is logical to propose that when collisions result in damages to property, loss of life or personal injury to passengers, the shipowners are not *per se* obligated in law to compensate fully those who have suffered, unless the act that caused the collision was intentionally or maliciously done. In most cases of collision, the shipowners would claim limitation of their liability in proportion to the size of their ships or up to the extent of the ship's value and freight at the time of maritime disaster. This system of limitation of liability has received massive support from many shipping states.

I. THE MEANING AND SCOPE OF COLLISION

Ordinarily, the word "collision" in an "off hire clause" of a bill of lading will be construed to mean collision only between ships and other navigable objects. In line with this restrictive meaning, if the keel of the vessel had been damaged when it struck something with her bottom during the voyage, the charterers would not be entitled to refuse paying the freight since the cause of loss of time was not a "collision" within the clause.[2] According to Roscoe, in order to give rise to an action for damages, the "collision" need not contemplate cases of actual contact between ships or between a ship and some object other than a ship.[3] It is sufficient that there is negligence on the part of those in charge of the wrongdoing vessel within the scope of their duty in navigating her, *e.g.* negligently allowing their vessel to drag down towards another, thereby compelling that other to slip her anchor and chain in order to avoid collision;[4] or going too fast in narrow waters, thereby causing a swell whereby a barge was sunk.[5] Albeit comprehensive, this definition is, on the whole, quite practical and realistic in application.

Justice Grove, on the other hand, in *Hough v. Head* opined that "[c]ollision appears to contemplate the case of a vessel striking another ship or boat, or floating buoy, or other navigable matter — something navigated, and coming into contact with."[6]

Generally, the term may cover two meanings. In one sense, it may involve one object that is active, with the other, passive. But in another sense, both objects must strike each other. The latter sense always contemplates physical contact between two objects. The United States authorities on the meaning and scope of collision seemed to have favored Justice Grove's interpretation in

2. Hough v. Head, 54 L.J. Q. B. 294 (1885).
3. GEOFFREY HUTCHINSON, ROSCOE'S ADMIRALTY PRACTICE (5d ed. 1931).
4. The Port Victoria 25 (1902).
5. The Batavier 9 Moo. P.C. 286, 297 (1854); Smith v. Dobson, 3 Man. & Gr. 59 (1841).
6. 52 L.T. 861, 864 (1885).

Hough v. Head. The courts in *Hough* considered "collision" to imply the impact of two vessels which are both moving. It is contradistinguished from "allision" which designates the striking of a moving vessel against one that is stationary. But collision is usually used in a broad sense to include allision, and perhaps is another species of encounters between vessels.[7]

II. The Effect of Collision

When a collision happens and causes damage to both or either vessels, or to the cargo on board of either vessel, the claimants for damages include not only shipowners but cargo owners as well. In part, the cargo claimants have the option of proceeding against the vessel which carried the damaged cargo, or against the non-carrying vessel, or against both. If the contract of carriage is governed by the Hague Rules, the chances of success against the carrying vessel are normally small, as the carrier, if negligent, can invoke the protection of Art. 4 (2) (a) of the Rules, which exempts it from liability for error in the navigation of the ship. Of course, the cargo claimant may attempt to prove, if warranted by evidence, that the resulting loss in collision arose from lack of due diligence to make the vessel seaworthy. But the quantum of proof in this case is normally difficult to establish. On the other hand, a proceeding in delict or tort against the non-carrying vessel is normally easier as the Hague Rules do not apply in such cases. The most prudent course of action, however, is to proceed against both vessels as alternative party defendants. Thus, the question of "who to sue" in collision damage is the first legal problem of the cargo claimant. The second is the question on "recovery of the losses" against the offending vessel.

In maritime law, the doctrine of "damage done by a ship" in collision is one of the recognized maritime liens.[8] This lien is essential because the effect of collision between ships may be too extensive as to reduce both ships to a state of total loss with their respective cargoes sustaining remediable losses or damages. In either case, the query of cargo owners is: Will the claimants have a viable security for recoupment against the owners of the offending ship? Recoupment is a perennial problem especially taken in the light of the peculiar characteristics of a ship: it usually comprises a large proportion of the owner's

7. Wright v. Brown, 4 Ind.95, 58 Am. Dec. 622 (1835); London Assur. v. Compania de Moagens, 167 US 149 (1897); Towing Co. v. Aetna Ins. Co., 23 App. Div. 152, 48 N.W. Supp. 997 (1900).

8. A maritime lien is a claim against a ship or other maritime property that can be made effective by the seizure of the property in question. The principal *maritime liens* recognized by English law are those in respect of disbursements of the master, salvage, wages, including arrears of National Insurance Contributors; The Gee-Whiz, 1 All E.R. 876 (1951); contributions to a pension fund; The Halcyon Skies 1 Lloyd's Rep. 461, Q.B.D. (1976); and damage done by the ship to another ship or property resulting from want of skill or from negligent navigation; The Rene, 38 T.L.R. 790 (1922).

assets and is constantly exposed to uncertain events in the course of her voyage. Apart from these considerations is the reality that a ship is an elusive sort of property which can easily slip out of the hands of an injured party to escape from being held answerable for any wrongdoings. Moreover, it is possible that the shipowner may reside and hold business in a foreign country where his financial capacity is unknown or where the ship's court of registry may be inefficient or too expensive to approach. Under these circumstances, a personal action for damages against the shipowner may be a futile exercise.

In order to provide relief to parties prejudiced by collision, the principle of "maritime lien" was purposely devised to enable the injured party to hold the offending ship as security for his claim. This lien constitutes a legal claim against a ship, or any other maritime property, and is made effective by way of seizure. It exists independently from the possession of the object over which it is claimed, but is attached to it in the sense that it is unaffected by the change of ownership. It is legally referred to as a right *in rem*, a right enforceable against the world at large or, in other words, against the thing itself, regardless of the possessor.[9] The "maritime lien" as a right *in rem* should be distinguished from a right *in personam*, which is a right against a particular person like the shipowner.

A lien founded on damage done by collision attaches to the offending vessel upon bringing the action. In some civil law countries where the principle of right *in rem* as applied against vessels is not in force, the proper action for collision damage is one with a prayer for writ of preliminary attachment. This action is enforceable when the vessel is actually attached. The rule in common law countries, however, is a contrast: at the time the action is brought, a ship may be made liable in an action *in rem* although the maritime lien on the vessel may have been established when the vessel was already in the hands of subsequent owners. However, the foundation of that lien is the negligence of the owners or their servants at the time of the collision. If that is not proven, no lien arises, and the ship is no more liable than any other property which the owners, at the time of the collision, may have possessed.[10] The latter case is not an action *in rem*.

To enforce a maritime lien, it is imperative that the following requisites are considered:

(i) The damage must be caused by the ship. If, therefore, the master of ship *A* ordered the cutting of the cable that towed ship *B* and, thereafter, ship *B* foundered owing to strong waves, the owners of ship *B* cannot claim a lien on ship *A*. If ship *A*, however, had negligently collided with ship *B* and caused damage to her, the owners of ship *B* may have a maritime lien on ship *A*;

9. Harmer v. Bell, The Bold Buccleugh 7 Moo. P.C.C. 267 (1850).

10. The Utopia, A.C. 492 (1893).

(ii) Although the damage must be caused by the ship, the lien does not arise unless it is supported by a personal action. This means that if a lien is claimed, the liability of the owners for their own acts or omissions or those of their servants' must first be proved. Here, not only is there reference to the ship's registered owner—any other person in control of the ship with the registered owner's concurrence, such as the charterer under a charter party, may be included. If a collision occurs through the negligence of the charterer's servants, the charterers, as owners within the meaning of the contract, are liable and a lien thus arises;[11]

(iii) Such action to enforce the lien can only be exercised within the period allowed by the law of the forum. Thus, if instituted within Philippine jurisdiction, it must be filed within thirty (30) days from accrual of the right of action.[12]

III. The Protectionist Policy

Authorities say that the system of limitation of the shipowner's liability dates back to the 17th century and originated in the Netherlands. It is said to be one of the first instances of state support for its shipping industry.[13] In fact, Hugo Grotius, the great 17th century international lawyer, defended this protectionist policy by pleading public policy. The same view was openly shared by Dr. Lushington, the great English Admiralty judge.[14] In affirmation of this policy in modern times, Lord Denning, M.R. confessed in one case "[t]hat the shipowner's right to limit his liability 'is not a matter of justice' but has its justification in convenience."[15]

An examination of the municipal laws of Holland, France and other continental states shows that the liability of shipowners, not only for the tortious acts but also for breach of contracts committed by the masters of their ships has, for more than two centuries, been limited to the value of the ship and freight.[16] The consensus among maritime law authorities that the system of limited liability is basically a principle of general maritime law gave rise to this uniformity in municipal law.

IV. The U.S. Rule

In the United States, property claims against a vessel are limited to the value of the ship after the disaster.[17] Therefore, if the vessel is totally lost, the owner is liable only to the extent of his interest in the "freight then pending," passenger

11. Maritime Conventions Act § 9(4) (1911).
12. An Act to Ordain and Institute the Civil Code of the Philippines [Civil Code], art 2241(9).
13. Cyril Miller, Brussels Conference of International Association 627 (1962).
14. The Amalia 3 F. 652, 653 (D. Me. 1880).
15. Alexander Towing Co. v. Millet, The Bramley Moore 200, 220 (1964).
16. Emerigon, *supra* note 1, ch. 4, § 11; 1 Ponlay-Party, *supra* note 1, at 263-98.
17. Gustavus H. Robinson, Admiralty 879-80 (1939).

fares, and cargo income.[18] It has been observed however, that the failure of the United States to adhere to the law of "collision liability," a rule observed by many European countries, has had continuing consequences. In fact, the disparity in the collision laws combined with varying limitation rules has encouraged interested parties in collision cases to resort to the courts of the nation offering them the best bargain.[19] For example, where the non-carrying vessel retains a substantial value after the collision, cargo owners generally prefer to bring suit in an American court and take advantage of the one hundred percent recovery provided by U.S. case law.[20] On the other hand, where the ship is a total loss, cargo owners will profit more by suing in an English court and benefit from the per ton fund.[21] Similarly, a shipowner whose vessel is a total loss will always attempt to localize litigation in an American court, because no matter how great the proportion of his fault is, his liability is limited to the pending freight.[22]

V. The Philippine Rule

In the Philippines, the shipowner's liability is likewise limited to the value of his ship and her earned freight during the voyage when the shipowner's liability accrued. Under Art. 587 of the Philippine Code of Commerce, "the ship agent shall also be civilly liable for the indemnities due the third parties which arose from the conduct of the master in the exercise of his vigilance over the goods which the vessel carried; but, he may exempt himself therefrom by abandoning the vessel with all her equipment and the freight she may have earned during the voyage." It is evident, therefore, that under Philippine law, the shipowner's liability is coextensive with his interest in the ship and her earned freight, and such liability ceases by his abandonment and surrender of these to the parties sustaining loss.[23] However, if abandonment is not exercised, the liability of the owner and ship agent is not limited or extinguished.[24] Moreover, the total destruction of the vessel extinguishes a maritime lien thereon as there is no longer any *res* to which it can be attached.[25]

Interestingly, the framers of Philippine law advance the following argument: in order to offset against the innumerable hazards and perils in sea voyages and

18. *Id.* at 930-34.
19. Arnold W. Knauth, The American Law of Ocean Bills of Lading 211 (4d ed. 1953).
20. The Alabama and The Gamecock, 92 U.S. 695 (1875); and The Atlas, 93 U.S. 302 (1876) (establishing the one hundred percent recovery rule).
21. 3 Benedict, Admiralty 638 (6d ed. 1940).
22. Robinson, *supra* note 17, at 879-80.
23. Yangco v. Laserna, 73 Phil 330 (1941).
24. Obta Dev. Co. v. Steamship "Pompey," 49 Phil. 177 (1926).
25. Government of the Philippine Islands v. Insular Maritime Co., 45 Phil. 805 (1924).

to encourage ship building and marine commerce, it is more expedient to confine the liability of the owner or agent arising from the operation of his ship to the vessel, her equipment, and freight or insurance, if any, so that if a shipowner or agent abandons the ship, including her equipment and freight, his liability is fully extinguished.[26] By abandonment, the shipowner or shipagent, exempts himself from liability, hence avoiding the possibility of losing his whole fortune in the business. This privilege, the author submits, is proof of the real and hypothecary nature of maritime law.[27]

The above rule, however, will not apply to liabilities and expenses incurred by the shipowner based essentially on contracts such as repairs, maintenance, equipping and provisioning of the vessel - all of which are necessary for navigation.[28] This is because the total destruction of a vessel in collision does not legally affect the liability of owners for repairs or provisioning of vessels completed before the loss. These types of repairs and other expenses, not being maritime liens, are not extinguishable by the total loss of the vessel.

VI. The English Rule

The English law, either in common law or in admiralty,[29] has yet to recognize that there ever existed among nations a uniform rule on "limitation of liability." For indeed, the limitation of liability of a shipowner – as a defendant in English law — to an amount calculated in the tonnage of his ship, is solely dependent on statutes.[30] These English statutes, by their origin, were based neither on any uniform rule nor on Roman law or any medieval sea code which either imply or expressly state that the wrongdoer in every collision shall make full compensation.[31] This is not the quantum of liability adopted in English statutes. What appears similar, however, in both English statutes and laws of other states is that these laws were enacted in the light of the protectionist policy[32] that Hugo Grotius advocated in 1625, which expressed

26. Abueg et al. v. San Diego, 77 Phil.736 (1946).

27. Philippine Shipping Co. v. Garcia, 6 Phil. 281 (1906).

28. Code of Commerce, art. 588A; Manila Steamship Co. v. Inar Abdulhaman, 100 Phil 32 (1956); Home Insurance Co. v. American Steamship Agencies, Inc., 23 SCRA 25 (1968).

29. The Dundee,1 Hag. Ad. 109, 120 (1823); The Carl Johann, 3 Hag. Ad. 186 (1819); The Alive, 1 W. Rob. 111 (1840); The Volant, 1 W. Rob. 383 (1840); The Meltona, 3 W. Rob. 16, 20 (1849).

30. Enactments now in force are the Merchant Shipping Acts of 1894, 1898, 1900, 1906, 1921, 1958 and 1979.

31. *See* Dig. Lib. 4, tit. 9; Dig. Lib. 44, tit. 7, fr. 5; Dig. Lib. 45, tit. 5, fr. I. (describing Roman Law principles governing liability for collision); Laws of Oleron art.15 (assumes that the wrongdoer shall pay full compensation, a principle in medieval codes).

32. *See generally* Petition of English Shipowners in 1733. Similarly, the Commons Journals for year 1933 contain several petitions from shipowners for relief on this matter. Act 1813-53 (Geo. 3, c. 87) was passed for their relief.

the view that "the principle of limitation of liability was in consonance with natural justice and necessary for the encouragement of shipping."[33]

The previous English law on "limitation of liability" was contained in the Merchant Shipping Act of 1894, as amended by the Merchant Shipping (Liability of Shipowners and Others) Act of 1958. These acts gave effect to the International Convention relating to the Limitation of the Liability of Seagoing Ships, signed in Brussels on the 10TH of October, 1957. In 1976, a new convention, to replace that of 1957, was drafted under the auspices of the Inter-Governmental Maritime Consultative Organization (IMCO). It was signed in London in 1976 and was to come into force when twelve signatories have ratified it. Upon coming into effect, the new Convention on the Limitation of Liability For Maritime Claims 1976 replaced the 1957 Convention.

Under the old provision of the Merchant Shipping Act 1894, the privilege to limit one's liability was enjoyed only by the owner of the ship, if the damage or loss took place without his "actual fault" or "privity."[34] This privilege exclusively enjoyed by shipowners was considered to be manifestly unfair to others who, by reason of contract or employment, have equal interest in the ship during the period when the vessel is in their possession. Thus, upon amendment of Act 1894,[35] the limitation privilege had been extended to anyone in *control of*, or *interested in*, a ship, *i.e.*, its owner, charterer, manager, master and crew. It was observed that normally, it is the negligence of the master or member of the crew which causes the damage – it is only fair that they should, if sued for their negligent act, be allowed to enjoy the same limitation protection. Hence, under the Act of 1958, these parties enjoyed the same limitation protection even if the loss or damage were caused by their negligence, provided that it was not caused by the shipowner's "actual fault" or "privity."[36] The reason for this is that the scope and effect of Section 503 of the Merchant Shipping Act of 1894 is not to excuse or exempt a shipowner from liability for tort or breach of contract, but to limit the amount for which he can be liable for the faults of others than himself.[37] Moreover, the terms "actual fault" or "privity" were meant to protect the shipowner not only against the legal consequences of negligence of his servants or agents, but also in many

33. Hugo Grotius, De Jure Belli ac Pacis Libri Tres, 1, 2, ch. 11, § 13 (1919).

34. Merchant Shipping Act § 503 (1894).

35. Merchant Shipping Act of 1894, as amended by the M.S. (Liability of Shipowners and Others) Act § 3 (1958).

36. The terms "actual fault or privity" infer something personal to the owner, something blameworthy in him, as distinguished from constructive fault or privity, such as the fault or privity of his servants or agents. "Actual fault" negatives that liability which arises solely under the rule of *respondeat superior*. Lennard's Carrying Co. Ltd. v. Asiatic Petroleum Co. LM. 1 K.B. 419 (1914); A.C. 705 (1915).

37. Paterson Steamship Ltd. v. Robin Hood Mills Ltd., 58 Ll. L. Rep. 33 (1937).

cases against the consequences of imperfections in the ship which caused the collision.[38] In short, where the cause of the loss or damage is an act, omission or negligence which is not traceable to something personal to the owner, like "a duty imposed by law on him to exercise due diligence to make the ship sea-worthy," the shipowner is not, in legal contemplation of the Act, in "actual fault or privity" and is, therefore, entitled to the grant of decrees of limitation. In consequence, "the mere fact that a shipowner is liable in law for the failure of his servants to exercise reasonable care does not by itself make him guilty of actual fault or privity so as to deprive him of his right to limitation.[39] Similarly, the master co-owner of a foreign ship who failed to know all the local signals of a foreign port and, as a consequence, could not brief a local pilot on board, was held not in actual fault for the collision. The reason was that the master co-owner was not under duty to know all the local signals.[40] In the case of a ship owned by a company, the Act contemplates of the "fault" or "privity" of somebody who is not merely a servant or agent for whom the company is liable under the doctrine of *respondeat superior,* but somebody for whom the company is liable because his action is the very action of the company itself.[41] Despite all this, however, regardless of whether the shipowner is a natural person or company, the fault or privity of the owner must be the fault or privity in respect of that which causes the loss or damage in question.

Conclusion

A law similar to that previously discussed, which limits the liability of shipowners and other persons who have interests in ships, is vitally important to the shipping industry of every country. Not only would such a law provide adequate protection to existing shipping firms and their owners; in the long run, such law would undoubtedly provide a very encouraging and healthy business opportunity for financially stable enterprises to invest their idle resources in the shipping trade. Countries that have not so far legislated on a law of this nature may have failed to realize the benefits afforded by it. This could be one of the reasons why there is a sluggish development in their shipping industries.

38. The Diamond 282 (1906).

39. Beauchamn v. Turrell, 1 T.L.R. 695 (1952).

40. The Hans Hoth, 2 Lloyds' Rep. 341, 347 (1952).

41. The Truculent 1, 21(1952).

Removing the Restrictions on Public Utilities and Exploration of Natural Resources

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