The « fault of the vessel » in the law of collision

Looking for an adaptative interpretation in the digital age

Prof. Dr. Olivier Cachard, Institut François Gény - Me Christian Hubner, Avocat, Barreau de Paris

The « fault of the vessel » in the law of collision

1. Introduction

- An expression used both in International Law (1910 & 1960 Collision Conventions) and in French Law (ex. art. 407 *Code de commerce*, ex. Art. 3, Loi du 5 juillet 1934), although, in Civil Law, the vessel is neither a legal entity nor a « patrimoine d'affectation », i.e. a segregated asset.
- An expression with no defined and uniform legal content ; esp. in the Netherlands, it gave rise to theories (R.P. Cleveringa, *Het Nieuwe Zeerecht*) and even Supreme Court decisions (Hoge Raad, 5th January 1940, 3rd may 1940, and more recently 30 November 2001, Casuele, De Toekomst).
- This expression, which favors a practical in concrete approach, is crucial concept in a fault-based system. Not only it commands the burden of proof on Claimant but it also commands the possibilities of exoneration.
- A concept to be evaluated in the light of the increasing role of IT and IA Technologies on board autonomous inland navigation vessels (From Autonomy levels 0 to 5 according to the CCNR Taxonomy), esp. as regards the issue of the vice of the vessel.
  - IA Technologies on board inland navigation vessels may constitute a high risk system in the meaning of Title III of the *Proposal for a regulation harmonizing rules regulating AI (COM(2021 (206) final),* with special duties for high risk AI providers, esp. art. 16 and 24
  - The *proposal for a revised directive a on liability for defective products* (2022/0302 (COD)) addresses damages caused by an AI incorporated in a vehicle. See Recital 15 : « *It is becoming increasingly common for digital services to be integrated in or inter- connected with a product in such a way that the absence of the service would prevent the product from performing one of its functions, for example the continuous supply of traffic data in a navigation system. While this Directive should not apply to services as such, it is necessary to extend no-fault liability to such digital services as they determine the safety of the product just as much as physical or digital components. Such related services should be considered as components of the product to which they are inter-connected, when they are within the control of the manufacturer of that product, in the sense that they are supplied by the manufacturer itself or that the manufacturer recommends them or otherwise influences their supply by a third party* ».
  - However, it only covers « d*amage suffered by natural persons caused by defective products* » (Art. 1) and not damages suffered by legal entities
  - One should keep in mind that the scope of the future is no larger than that of the present directive. It is a *lex generalis* that is superseded by transport law.

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1. Introduction

- A concept to be interpreted in the light of the International Law methods, and in contemplation of possible recourses of the owner, including the EU proposition of Regulation on AI and the EU proposition of revised Directive on Products liability.
- Focus of the present paper :
  - To consider whether, in French case law, the « fault of the vessel » may include a fault other than that of the crew, that is either a hidden defect of the vessel or a fault of any person providing services to the vessel, for instance classification societies, shipyards or navigation services.
  - Questioning the tests to be met to establish the fault of the vessel, which implies questioning its nature (subjective/objective fault) and its use (as shield or as a sword).

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2. De lege lata

2.1. The fault of the vessels in collisions

2.1.1 Concept

Concept of fault of the vessel not used in French Jurisprudence, where the fault of the vessel is largely and broadly seen as a civil fault including all possibilities (human fault and technical fault..).

In legal doctrine the question has been discussed in the 1960's, but main stream is that it is a general concept endorsing the civil fault in its components, despite its use in the international collision conventions

2.1.2 In concreto iro mechanical failures

Jurisprudence : not accepted as force majeure (non foreseable, not resisitible and external)

- **Mechanical failure mainly linked to a fault of the owner, crew or user of the vessel – research of faults that have contributed to the collision**

- Radar is only an assistance, the default of ot is not prevailing the duties of the captain out of COLREG CA bordeaux 14.01.1966

- Disruption of the stearing system not held as force majeure : not external, owner has the duty to verify that the rudder is fonctionning TGI Paris 17.01.1968 , or held that the crew has other possibilities to stear the vessel (TGI Paris 20.09.1971) or other circumstances were faulty priori to the disruption and the event caus of the damages (CA Rouen 17.01.1974)

- Cass Com 26.02 1991 – the vessel was unseaworthy at beginning of the voyage. No verifcation of the state of the vessel is held as fault of the owner

- -also lack of maintenance CA Douai 12.01.2006 , but recourse action

- **Mechanical failure is not external – traditionnal criteria not met**

Moldavia and « Zulu Sea » in maritime law the inherent vice is not external so it could not be seen as force majeure (CA AIX 08.06.200 –vessel MOLDAVIA) - (CA Aix 05.11.1998 – Zulu Sea – several successing failures are alos to be considered as a lack of maintenance)

But if external element is subject to failure , it could be held as force majeure : disrupture of a mooring boy (CA Aix 09.05.2018 and CANimes 09.01.2020)

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2. De lege lata

2.2. The fault of the vessel in FFO (Contact with fixed or floating object)

- Not falling under the 1960 Convention,
- Application of the common law in respect of liablity in tort , ie article 1242 al 1 Code Civil or if damage to public property of the Contravention de Grande Voirie of the French administative law,

2.2.1 Article 1242 Code Civil:

« one is not only liable for the damage caused due to one's act, but also due to the acts of persons one is responsable for or caused by the objects under one's custody. »,

- Strict liability,
- Liability for goods under custody (Sachhaftung)
- Exoneration of liabilty due to force majeure
- Traditional solution : no exoneration of liability, so no force majeure in case of inherent vice
- Cf criteria of unforseable and not resistible act.

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2.2.1Contravention de Grande Voirie

A/ Mechanism of sanction and indemnity action for damages to public property (artiucle L 2132-2 Code de la propriété des personnes publiques)

- **Strict liability , except force majeure and fault of the administration,**
- **Laying on the person who has acted and created the damage to public property, on whose behalf the damage has been caused or who was in custody of the object having caused the damage.**

B/ Iro Inland navigation

Article L 2132-8 Code Général des personnes publiques

No one may

1/ cause damage destroy, take away the installations buitl for the safety or easing the navigation on inland waterways and canals or along these dependencies,

Cause damages to temporary installations

Nul ne peut :

- 1° Dégrader, détruire ou enlever les ouvrages construits pour la sûreté et la facilité de la navigation et du halage sur les cours d'eau et canaux domaniaux ou le long de ces dépendances ;
- 2° Causer de dommages aux ouvrages provisoires établis en vue de la construction ou de l'entretien des ouvrages mentionnés au 1° ;
- 3° Naviguer sous les arches des ponts qui seraient fermés à la navigation du fait de tels travaux.
- Le contrevenant est passible d'une amende de 150 à 12 000 euros. Il doit supporter les frais de réparations et, en outre, dédommager les entrepreneurs chargés des travaux à dire d'experts nommés par les parties ou d'office.

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3. De lege ferenda

3.1. The extension of the « fault of the vessel »

- Use of existing solutions as tools and analogia..
- A scholarly temptation to promote a « large interpretation » of the fault of the vessel for reasons in equity (finding a liable person, see Cleveringa ; Garron, *la faute du navire dans le droit de l'abordage*, DMF 1964, p. 517) ; This temptation renewed by the new risks generated bu automated vessels.
- The use of sophisticated technologies should not create « *a safe harbour* » for the shipowners (and their agents) who still have duties. See the old case law about collisions despite the use of the then modern radar (e.g. Trib. Maritime commercial de Bordeaux, 26 oct. 1962, DMF, 1962, p. 488, : « *Le radar n'est qu'une aide supplémentaire à la navigation et un moyen de détection, dont l'emploi ne peut affranchir le capitaine du navire qui en est fourni de la stricte observation du RIPAM* » ; C. App. Rouen, 14 janvier 1966, DMF, 1966, p. 287)
- However a fully objective approach to civil liability under the Geneva regime would amount to a misinterpretation of an unequivocal provision : as a result, it is necessary but not sufficient to establish the implication of the vessel in the collision. This is not a vicarious liability regime.
- The standard of personal fault remains central, although it may, to a certain extent, be considered in an extensive perspective : the fault lays in the operation of a vessel that is not seaworthy. What if the lack of seaworthiness occurs suddenly, without a reasonable possibility for the owner to detect it earlier ? (Hidden defect issue). Is it proper law to offer an exemption to the owner of the vessel on the base of a hidden defect ?
- Moreover a Convention may be interpreted in the light of new circumstances and new technologies. However a specific approach in relation with a given technology would not meet the UNCITRAL requirements in terms of digital regulation (E-commerce Model Law, 1996). The provisions of conventions should be read in a manner that is technologically neutral.

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3. De lege ferenda

3.2. The regime of « fault of the vessel » in the digital age

- The 1960 Geneva Convention Regime (and national implementation legislations) have to be considered in the light of recourse actions of vessel owners against third parties. For autonomous vessels, it seems that recourses could be possible against the shipyard on the basis of the *revised defective product liability regime* and against providers of IA on the basis of the *new IA Regulation.*

    - *Article 24 of the draft EU AI Regulation : Obligations of product manufacturers*
        - Where a high-risk AI system related to products to which the legal acts listed in Annex II, section A, apply, is placed on the market or put into service together with the product manufactured in accordance with those legal acts and under the name of the product manufacturer, the manufacturer of the product shall take the responsibility of the compliance of the AI system with this Regulation and, as far as the AI system is concerned, have the same obligations imposed by the present Regulation on the provider.

- The correct articulation of recourses requires to consider procedural and evidentiary issues, mainly *the question of the burden of proof.* It is very specific in the digital age as many data bout the course of navigation and circumstances of the collision are permanently collected and stored (Art. 12 and 20 of the draft *EU AI regulation* on record keeping/logs). Is the hidden defect really hidden for the service providers in charge of the maintenance of the vessel ? Is a possible hidden defect external or at least even unforseeable??

- Still, the issue is to know who may access these geolocalization data and the journal of operations/logs. Is it the owner of the vessel or an external service provider ? Is the AI system transparent, in terms of deep learning and in terms of choices ?
- Regime specific to contraventions de grande voirie. First question : who is subject to the contravention de grande voirie? Esp in level 4 or 5 of autonomy as defined by CCNR?? Here it seems that the liability still lays on the owner or operator of the autonomous vessel??