

The 'fault of the vessel' concept in light of the autonomous future

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Introduction.

- Technology is great ...
- but not infallible

- There will be autonomous ships
- and they will collide ...



SpaceX Starship S10

Boeing 737 Max



Introduction.

- Art. 3 Brussels Collision Convention 1910
 - *If the collision is caused by the **fault of one of the vessels**, liability to make good the damages attaches to the one which has committed the fault.*
- Art. 3 Geneva Inland Collision Convention 1960
 - *If the damage is caused by the **fault of one vessel** only, liability to compensate for the damage shall attach to that vessel.*

Introduction.

- not: fault of the Master, fault of a crew member, fault of the owner, ...
- fault of the vessel
- Must be figure of speech, sloppy language
- Vessel = object, and objects cannot be 'at fault'

Vessel = object, and objects cannot be 'at fault'

Is that really true?



Things at fault.

- Code Napoleon
 - Art. 1386 Belgian Civil Code
 - Art. 1244 French Civil Code

"The owner of a building is liable for the damage caused by its collapse, when this is due to a lack of maintenance or to a defect in the building."

- *De eigenaar van een gebouw is aansprakelijk voor de schade door de instorting ervan veroorzaakt, wanneer deze te wijten is aan verzuim van onderhoud of aan een gebrek in de bouw.*
- *Le propriétaire d'un bâtiment est responsable du dommage causé par sa ruine, lorsqu'elle est arrivée par une suite du défaut d'entretien ou par le vice de sa construction.*

Things at fault.

- originally linked to a fault of the owner, but this approach abandoned since early 20th century:
- today:
 - only lack of maintenance / defect of the building to be proven
 - fault/negligence of the owner is irrelevant
 - even *knowledge* of the owner not required
- NB. the fact that a building collapses does not, in and of itself, prove that there was lack of maintenance / defect

Things at fault.

- very similar standard:
 - fault of a person:
 - the person does not behave like a normal, careful person of the same knowledge and experience, in the same circumstances, would have done
 - fault of a thing:
 - the thing does not behave like a normal thing, of the same type, would have done in the same circumstances

Things at fault.

- Art. 1384 Belgian Civil Code
- Art. 1242 French Civil Code
- One is liable not only for the damage caused by his own act, by also for the damage caused by *the act (...) of the things* of which he is the guardian.
- *Men is aansprakelijk niet alleen voor de schade welke men veroorzaakt door zijn eigen daad maar ook voor die welke veroorzaakt wordt door de daad (...) van zaken die men onder zijn bewaring heeft.*
- *On est responsable non seulement du dommage que l'on cause par son propre fait, mais encore de celui qui est causé par le fait (...) des choses que l'on a sous sa garde.*

Things at fault.

- interpreted differently
 - Belgium:
 - defect/abnormal characteristic of the thing required
 - France:
 - only causation required: the thing must have caused the damage
 - Art. 1242 CC cannot be invoked in collision cases

Things at fault.

- clearest example: product liability
 - Directive 85/374/EEC concerning liability for defective products
 - Proposal for an amended Product Liability Directive, COM(2022) 495 final, 28 September 2022
- Art. 6.1
 - *A product is defective when it does not provide the safety which a person is entitled to expect, taking all circumstances into account*
 - *A product shall be considered defective when it does not provide the safety which the public at large is entitled to expect, taking all circumstances into account*

Things at fault.

- in essence a very similar problem:
 - which burden of proof for the victim of an exploding soda bottle?
 - fault/negligence of an identified employee of the manufacturer?
 - very difficult, even impossible burden ...
 - product liability:
 - the product as such can be 'at fault' (defective)
 - victim only needs to prove the 'fault' of the product, and causal link with the damage

Things at fault.

- not:
 - applying product liability in the context of MASS
 - Directive & proposal only protect consumers
 - 'state of the scientific and technological knowledge' defense
 - 'fault' (defectiveness) appreciated when the product is put on the market
- but:
 - accepting the underlying principle of product liability
 - a product / a thing can be 'at fault'

Things at fault.

- two separate (unrelated) questions:
 1. was the thing 'at fault' (defective)?
 2. if so, who is going to pay the compensation?
(a thing doesn't have a bank account/wallet/...)
 - simply a matter of choice
 - there could even be a fund to pay the compensation

MASS at fault.

- product liability principle is perfectly transferable to MASS
 - an autonomous vessel is 'at fault' if it does not provide the safety which the (maritime) public is reasonably entitled to expect, taking all circumstances into account
 - objective standard, courts can be assisted by experts
 - e.g. must a MASS be able to avoid collisions?
 - middle of the ocean, only two ships involved
 - congested waterway, restricted to navigable waterway, 15 ships in immediate vicinity ...

MASS at fault.

- an autonomous vessel is 'at fault' if it does not provide the safety which the (maritime) public is entitled to expect, taking all circumstances into account
 - continuous obligation
 - every time a MASS starts on a voyage, it must provide the safety reasonably expected from it
 - cf. seaworthiness obligation ...
- some legal systems already see hidden defects as a form of 'fault of the vessel'

MASS at fault.

- the second question:
- if a MASS is 'at fault', who pays?
 - in shipping, the answer is easy:
 - the (registered) owner

Conclusions.

- no crystal ball ...
- but a very future-proof convention
- 'fault of the vessel' concept adapts effortlessly to MASS
- not even 'thinking outside the box'
- others have already thought outside the box
- simply accept that from a legal perspective, things can indeed be 'at fault'