The Role of the Liability of the Shipowner

Phyu Phyu Thin*

Abstract

The liability of shipowner is important for shipping industry. In most countries including Myanmar domestic legislation and international conventions ordinary limit and exclude the liability of the shipowner. The shipowner excludes from the liability to the loss or damage of goods due to the fire and the loss or damage to undeclared valuable without fault and privity of the shipowner. Similarly, the shipowner limits from liability of the loss of life and personal injury without fault and privity of shipowner. And also, it protects the shipowner under the Merchant Shipping Act, 1894 and the Carriage of Goods by Sea Act, 1971. In Myanmar, the provisions of the Nairobi International Convention on the Removal of Wreck, 2015 should be enacted into national legislation.

Introduction

Liability is the result of a violation of the law. Liability may be either civil or criminal and either remedial or penal. The liability of shipowner is important for the shipping industry. A shipowner or carrier or charterer is not only exposed to the perils of the sea but also liable to be damaged to negligence of master and crew members.The shipowner is liable not only to the negligence of his servants but also the unseaworthy of the ship. But, the liability of the shipowner may be excluded or limited under the International Convention and Merchant Shipping Act, 1894. In most countries including Myanmar domestic legislation and international conventions ordinary limits the liability of certain carriers to a specified amount per weight, package, or unit of the goods carried.

Terms of the Owner

The term 'owner' must be taken to include the shipowner, a charterer, an operator of the ship, any person interested in or in possession of the ship, the master, any member of the crew, a servant and crown[1].

The term "shipowner" means the owner, any part owner, charterer, master or manager and operator of a seagoing ship.[2]

Under the Part VII of Merchant Shipping Act, 1894, "shipowner" includes the master of the ship and every other person authorized to act as agent for the owner or entitled to receive the freight, demurrage, or other charges payable in respect of the ship.

Under the Hague/Visby rules focus the liability of the carrier which may be either a shipowner or a charterer.

Kinds of Shipowner's Liability

The Shipowner's liability for a passenger's death or injury and for lost or damaged luggage depends on any of those evens being 'due to the fault or neglect' of the carrier or his servants or agents in course of their employment.[3]

Criminal Liability

Maritime offences have been deal with in the MSA 1995 as well as in regulations. Under Section 85 of the MSA 1995, state has power to make regulations relating to safety and health on ships, which may provide that a contravention of those regulation shall be an

* Lecturer, Department of Law, Yadanabon University

[1]Part VII of the Merchant Shipping Act, 1894and Liability of Shipowners and Others Act, 1958.

[2]Article(2) of the Convention in limitation of liability for Maritime Claims, 1976.

[3]Article I (4) of the Athens Convention relating to the carriage of Passengers and their Luggage by Sea, 1974.

offence punishable on summary conviction by a fine or on indictment by imprisonment for a term not exceeding two years and a fine.

Intentional or reckless damage to property of another, without lawful excuse, is covered by the Criminal Damage Act (CDA) 1971, which also includes endangering or threatening the life of another. Where a collision between ships or between a ship and a fixed or floating object is caused deliberately or recklessly, this criminal behavior will now fall to be dealt with the offences applicable generally to willful damage of property. The general principles of criminal law would apply in cases of loss of life by criminal gross negligence.

According to Section 419 of the MSA, 1894 provides that the infringement of a collision regulation a criminal offence if the infringement was caused by wilful default of the master or owner of the ship. If any damage occurred from non observance, there was a deeming provision that the damage was caused by the wilful fault of the person in charge of the deck of the ship at the time, unless it was shown that a departure from the regulation was necessary by the circumstances.

In the case of "The Glady and The Prome" [4] which resulted in the sinking of the ' The Prome' with her crew, poor lookout due to simple negligence of master did not amount to criminal offence.(not amount to criminal offence).

It was held that, the capsize was caused by the negligence of the assistant bosun, the chief officer, the master, the superintendent and the director of the company who did not appreciate their responsibilities for the safe management of the ship.

Civil Liability

Civil Liability resulting from a collision between ships or ship and another object, the burden of proof is upon the claimant to prove the fact have given rise to liability incurred dude to negligence or want of good seamanship.

According to Section 74 of the Harbors, Docks and Piers Clauses Act (HDPCA) 1874, this creates strict liability for damage to a harbor's property by a vessel. The claimant must establish that there was a duty of care, breach of that duty by the defendant, which caused the collision, and also that the breach caused the damage claimed which is subject to the remoteness rule.

Whether there is a duty of care in negligence cases, a three-stage test was developed in 1990. These are: reasonable to foreseeability of damage, a relationship of proximity between the parties, and that in all circumstances , it was fair, just and reasonable to impose a duty of care upon the defendant.

In the case of 'Hua Lien'[5],in which proof of foresight and proximately were not enough in a physical damage case where the claim was for economic loss. Instead, the third stage test, namely whether it would be fair, just and reasonable to impose such a duty, restricted and the possibility of recovery by cargo-owners who sued the classification society of the ship, which was allowed to sail before permanent repairs to some defect had been carried out. The cargo on board was lost when the ship sank due to unseaworthiness.

Since a duty of care exists in determining civil liability of a defendant in collision cases for physical loss and consequential economic loss.

The employers of those on board whose negligent act caused the collision will be vicarious liable for the collision. The act or omission, giving rise to negligence must be that of the servant acting within the scope of his employment. In collision cases, it will be the negligence act in navigation.Vicarious Liability is whether an employer or principal can be held liable to

[4] 1911 1 KB 571

[5]1991, 1 Lloyd's Rep 30 (PC)

an innocent party when damage is caused due to malicious, or criminal act of the employee or agent.

Cause of Shipowner's Liability

The Shipowner is liable not only to the negligence of his servants but also the unseaworthy of the ship. And also, he will be liable in respect of the occurrence of collision, the salvage services, the towage contract and compulsory pilotage.

Unseaworthiness

In the case of a voyage charter-party, the shipowner impliedly undertakes to provide a seaworthy ship. However, these undertaking may be varied or excluded by clear and unambiguous terms in the contract. The implied undertaking is that the ship shall, when the voyage begins, be seaworthy for that particular voyage and for the cargo carried. The shipowner undertakes not merely that he has taken every precaution, but that, the ship is seaworthy.[6]

In the case of "Vortigen" [7], a vessel sailed on her voyage from the Philippines to Liverpool. The charter-party excluded liability for the negligence of the master and engineers. The voyage did not take on sufficient coal for the next stage to Suez. When she was near a coaling station, the master did not take on any more fuel for he was not warned by the engineer that supplies were running short. Some of the cargo had to be burned as fuel to enable her to get to Suez.

The Court held that the shipowners could not plead the exception clause for they had not made the vessel seaworthy at the commencement of each stage of the voyage.

The shipowner's duty to provide a seaworthy ship comprises a duty to have her loading and discharging tackle available for the ordinary purposes of loading and discharging[8].

Collision

Collision is not more than the use of tort of negligence to cover a situation where damage is caused to one vessel by another in circumstances. Negligence has been described as the absence of such care as it was the duty of the defendant to use. The negligent navigation of one vessel to another vessel is forced to take action. The action in negligence will lie at the suit of the innocent party.

In the case of Owners of S.S. Orduna V Shipping Controller[9], breach of regulation by one vessel is followed by a breach of the same regulation by the other vessel.The Court held that both vessels to blame, since the action of both had contributed to the incident.

Salvage

There must exist for the right to salvage reward to arise, such as, there should be a recognized subject matter; the object of salvage should be in danger at sea; the salvors must be volunteers without a pre-existing relationship or preserving or contributing to preserving the property in danger.[10]

---

[6]Ivamy, E.R. Hardy, Carriage of Goods by Sea, 11th edition, p.14.
[7]1899, p.140
[8]op.cit, p.16.
[9]1921, 1 A.C.250
[10]AlekaMandaraka-Sheppard, Modern Admiralty Law, 2002, p.662.

Danger

There must be real danger which is likely to expose the property to destruction or damage. An apprehension of danger will suffice as long as it is not a fanciful danger and it does not need to be immediate or absolute.[11]

The Court held that it was undisputed that the vessel's mast and all her sails had been cut away; and that in her dismasted state, she was towed into Long Island Channel, and that, prima facie, salvage service had been rendered.

Voluntary service

'Voluntary' means that the services are not rendered under a pre-existing agreement or under official duty, or purely for the interests of self- preservation. As long as the persons are recognized in law as volunteers and they render salvage services, they are entitled to salvage remuneration.[12]

In the case of "The Neptune"[13], the court held that a salvor is a person who, without any particular relation to a ship in distress, confers useful service and gives it as a volunteer adventure without any pre-existing convenant connected with the duty of employing himself for the preservation of the ship.

Success

Without Success or meritorious services, there will no award. The cause of action of salvage, which is available in the Admiralty court, is quite distinct from a ***quantummeruit*** available in the common law courts.[14]

In the case of "The Melanie V. The San Onofre[15], the defendant claimed that the plaintiffs had left the 'M' in a position of a greater comparative danger than she was in before the 'S' began to tow her, and, therefore, no salvage was due. The Court held that services which rescue a vessel from one danger, but end by leaving her in a position of as great, or nearly, as great danger, though of another kind, do not contribute to the ultimate success and do not amount to salvage.

So, the owner of the tow may be liable for success of the salvage service. There is no successful salvage service, there is no salvage award.

Towage

The obligations and liabilities between the tug and tow are governed by express or implied terms of the contract. According to standard form contract provided that the crew of the tug are deemed to be the servants of the tow[16].

In the case of "The President Van Buren "[17], the Court held that the owners of the tow undertook to pay for any damage caused to property belonging to the tug owner.

According to the towage contract, the crews of the tug are deemed to be the servants of the tow. Therefore, the act of the servants of the tug-owner may be liable to the tow- owner.

Pilotage

Under the common law, owners of the vessels were always held liable whenever they took on a pilot in a non-compulsory pilotage area. But where pilotage was compulsory, the

---

[11]Ibid, p.662.
[12]AlekaMandaraka-Sheppard, Modern Admiralty Law, 2002, p.698.
[13] 1824, 1 Hagg . 227.
[14]op.cit, p.683.
[15] 1925. A.C.246.
[16]AlekaMandaraka-Sheppard, Modern Admiralty Law, 2002, p.784
[17]1924, 19 LIL. Rep 185

owner was not liable because the pilot could not be regarded as the owner's servant or someone for whose acts and omissions, the owners should be liable[18].
In the case of "The Towerfield"[19] The House of Lord held that the shipowner 's responsible, not only for damage which his ship on the basis of Section 15 of the Pilotage Act,1913.
Therefore, in the case of the towage contract, the tug owner places his servants under the control of the tow owner, the later will be liable. In the case of the collision, the vessel charters voyage charter-party or time charter-party, the shipowner will be liable for negligence of the master and crew. In non compulsory pilotage area, the liability of the shipowner for negligence of the pilot was applicable to claim in tort. So, the owner of the vessel is not liable as the pilot could not be regarded as the owner's servant.

Nature of Shipowner Liability

The liability of Shipowner is important for the shipping industry. A shipowner or carrier or charterer is not only exposed to the perils of the sea but also liable to be damaged to negligence of master and crew members. But, the liability of the shipowner may be exclude or limit under the International Convention and Merchant Shipping Act, 1894. The Shipowner will be liable to the cargo owner for the goods have been become mixed and unjustificable on the voyage , the delivery of cargo has been delayed due to contractual or geographical deviation and the cargo has been delivered at a port other than that mentioned in the bill of lading.

According to Article-5 (1) of the United Nations Convention on the Carriage of Goods by Sea, 1978(Hamburg Rule) provides that the carrier is liable for loss resulting from loss of or damage to goods, as well as from delay in delivery, if the carrier does not prove that he, his servants or agents take measures to avoid the occurrences and its consequences.

The name of the vessel , SAM RA TULANGI PD with the flag of Indonesia was found standed in the Bay of Mottama in the Myanmar's territorial Sea on 18 August 2018.In this case, if the owner of the standing vessel does not remove the wreck, it may be peril of the Myanmar's territorial sea and in navigation. The register owner of a ship bears strict liability. The registered owner of the ship is obliged to remove a wreck which constitutes hazard. Therefore, it is needed to remove of the wreck by the effecting method. Moreover, according to Section 283 of the Penal Code,1861, provides that whoever , by doing any act or by omitting to take to order with any property in his possession or under his charge cause danger, obstruction or injury to any person in any public way or public line of navigation shall be published with fine which may extend to two hundred rupees. Fine for that offence is very few. Therefore, it should be amended Section 283 of the Penal Code, 1861 in line with current situations. The Nairobi International Convention on the Removal of Wreck, 2015, states that the standing vessel should be removed by effecting methods and the registered owner of wreck must be expensed for the costs of removal of wreck. And also, Myanmar should enter into the Nairobi International Convention on the Removal of Wreck. 2015 and then, the provisions of the Nairobi International Convention on the Removal of Wreck, 2015 should be enacted into national Legislation.

[18]AlekaMandaraka-Sheppard, Modern Admiralty Law, 2002, p.864.
[19]1951,A.C112

Exclusion of the Liability of the Shipowner

Under Section-502 of the Merchant Shipping Act, 1894, states that the exclusion of the shipowner's liability.

Fire

Where any loss or damage occurs to goods, merchandise or other things e.g., passenger luggage on board a British ship by virtue of a fire on that ship, then the owner may exclude his liability in respect of such loss or damage so long as the fire occurred without his actual fault or privity.

It is loss or damage for the purposes of section-502 if the loss or damage results from the water used to put out the fire or through smoke from the fire itself.

In the case of Louis Dryfus V. Tempus Shipping[20], where the shipowner agrees in a contract that he shall not be liable for any loss or damage caused by fire or unseaworthiness provided all reasonable means have been taken to provide against unseaworthiness, he loses the right to rely on the statutory exclusion of liability. In such a case the shipowner must show that he used all reasonable means as provided in the contract.

Undeclared Valuables

Where any gold, silver, diamonds, watches, jewels or precious stones are taken in or put on board a British ship, the true nature and value of such must be declared at the time of shipment by the owner or shipper to the shipowner or master, either in the bills lading or otherwise in writing. Where the owner of the valuables fails to do this, then the "shipowner" may exclude his liability for any loss or damage to the valuables by reasons of any robbery, embezzlements, making away with or secreting thereof, as long as there is no fault or privity on the part of the shipowner.

In the case of Williams V. African S.S. Co[21], the Court held that the Bill of Lading stating " one box containing about 248 ounces of gold dust" is not a sufficient declaration for the purposes of this provision. Any claim for loss of or damage to goods carried on a ship

Therefore, the shipowner was always liable for the loss of the goods and also liable for any damage to the goods, unless he could prove that the loss or damage has resulted from an expected cause.

Limitation of Liability of the Shipowner

Under Section 502 of the Merchant Shipping Act, 1894 provides that an owner is unable to limit his liability in respect of damage arising from loss of life or personal injury, or from loss or damage to goods, merchandise or other property, or the infringement of rights, as long as the incident complained of arose without the actual fault or privity of the own.

Under Article-IV, rule-5 of the Carriage of Goods by Sea Act, 1971, unless the nature and value of such goods have been declared by the shipper before shipment and inserted bill of lading, neither the carrier nor the ship shall any event be or become liable for any loss or damage to or connection with goods in an amount exceeding the equivalent of £100 per package or unit or unit per kilo of gross weight the goods lost or damaged, whichever is the higher.

The Act limits the liability of the carrier for any loss or damage to or in connection with the goods to £100 per package or unit of the goods lost or damaged, whichever is the higher.

[20]1931 A.C, 726
[21] 1856

In the case of CHINA-SIAM LINE BY their local agents CHIP HWAT (APPELLANT) V. NAY YI YI STORES (RESPODENT) 1954 BLR 270 (HC).

Nay Yi Yi Stores, dispatched 8 cases of Promin Solution from Hongkong by S.S. " Hiram" which belonged to China-Siam Line. Bill of Lading, which was made in connection with the dispatch of goods was prepared in Hongkong. S.S.Hiram arrived at Yangon on 24th June 1949; and Nay Yi Yi Stores received 7 out of the 8 cases of Promin Solution sent from Hongkong with the result that they instituted a suit to recover the value of the lost goods and the loss of profits, which would have accrued to them.

The learned Judge U Tun Byu (CJ) held that :Nay Yi Yi Store will not therefore be entitled to recover more than K 1,350, which is the equivalent of £100 at the present, for the non-delivery of one case of Promin Solution, in the absent of the required declaration and endorsement on the bill of lading.

Immunities of the Shipowner's Liability

According to Article-IV, rule.2 of the Carriage of Good by Sea Act, 1971 provides that the Act sets out a list of excepted perils, neither the carrier nor the ship shall be responsible for loss or damage arising or resulting from the list of the expected peril and if loss or damage caused by them, the shipowner will not be liable provided he has fulfilled his duties under the Act.

So, the carrier was entitled to the limitation and immunity of liability given under the Carriage of Goods by Sea Act and Merchant Shipping Act,1894.

Conclusion

Liability is the result of a violation of the law. A person commits a wrong may be liable for it**.** The shipowner undertakes to provide a seaworthy ship. The shipowner was absolutely liable to the cargo owner for any damage or delay occasioned in the transport of the goods. The shipowner shall be liable to compensate damage cause in the service by the fault or negligence of the master, crew, pilot, tug or others performing work the service of the ship. In Myanmar, in respect of the Shipowner liability, according to Section 283 of the Penal Code,1861, whoever , by doing any act or by omitting to take to order with any property in his possession or under his charge cause danger, obstruction or injury to any person in any public way or public line of navigation shall be published with fine. The Nairobi International Convention on the Removal of Wreck, 2015, the standing vessel should be removed by effective methods and the registered owner of wreck must be expensed for the costs of removal of wreck. And also, Myanmar should enter into the Nairobi International Convention on the Removal of Wreck. 2015 and then, the provisions of the Nairobi International Convention on the Removal of Wreck, 2015 should enact into national legislation.

References

Books
3.Ivamy, E.R. Hardy, Carriage of Goods by Sea.
4.AlekaMandaraka-Sheppard, Modern Admiralty Law.

Conventions
1.United Nations Convention on Carriage of Goods by Sea, 1971
2.Convention in Limitation of Liability for Maritime Claims,1978
3.Athens Convention relating to the Carriage of Passengers and their Luggage by Sea, 1974.

Laws and Acts
1. Maritime Convention Act, 1911.
2. Merchant Shipping Act, 1894.
3. Merchant Shipping Act, 1995 Criminal Damage Act, 1971
4. The Pilotage Act,1913.
5. Carriage of Good by Sea Act, 1971
6. The Penal Code,1861.
7. Liability of Shiopowner and other Act,1958.
8.Criminal Damage Act, 1971

wetsites
1.www. businessdictionary.com> definition.