The pro rata liability and collisions at sea – is there a rationale?

Particular on pro rata liability for multiple tort tortfeasors: a functionalistic approach.

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1 Introduction

1.1 Problem background

It is within the framework of the discipline called tort law that the rules of compensation for damages are to be found. The Swedish general tort law is subsidiary, which means that laws that – in the light of the question at hand – seem more adequate shall be applied instead of the ordinary tort law.\(^1\) Within the framework of what is colloquially called maritime tort law (“sjöskaderätt”) , one may – for example – sort legal rules concerning compensation for damages occurred under transport, by escape of oil from ships or damages occurred by collision of ships.

There are differences between the ordinary material law of torts and the material law of maritime tort law. Insofar one argues that legal, formal, coherency is the proper yardstick of legal legitimacy either the ordinary tort law or the marine tort law has to be wrong. Of course, one could argue that the correct yardstick is consequential coherence and that only the result matters – independent of what kind of instrument (the joint and several- or the pro rata liability) that is used.

Another argument would be that there are differences as well in theory as in practice, but that those differences are justified in the light of that the political motives may differ between those the systems of law. In other words: the political instruments are set to achieve different political goals.

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\(^1\) Skadeståndslagen (1972:207) chap. 1 § 1.
1.2 Problem description

This thesis is to answer the following three questions:

1) Do the formal differences with a comparison between the Brussels convention and the general tort law mean that also the consequences differ depending on if the Brussels convention or the general tort law is applicable?

2) If the question under (1) above is affirmative, are there any motives for the different legal treatment?

3) If there are any motives (as under (2)), are they sufficient to motivate consequential differences, de lege ferenda?

1.2.1 Demarcations

When answering the questions above, I will limit myself to the primary liability towards a primary victim. I will only consider the recourse claim very brief.

1.3 Method

1.3.1 Source collection and source interpretation

As the reader probably will notice, I only exceptionally use legal literature to answer the asked questions. The literature is primary used to find relevant case law. To find relevant literature, I primary use maritime law bibliographies and secondary I study the list of references in literature relating to the law of collision at sea. Finally, I search the

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2 I have been using Nordisk sjørettsbibliografi 1880-1998, Bibliographie Des Deutschen Schrifttums Zum Internationalen Und Öffentlichen Seerecht 1982-2007 and Bibliographie des deutschen Schrifttums zum Internationalen Seerecht 1945 – 1981. Regarding British and American law, there is no published bibliographie (at least neither the librarians at the Institute of Maritime Law in Southampton nor at the Tulane law School did knew of any). The digital bibliographie on the webpage http://maritimelawdigital.com/uploads/PDFs/Bibliography.pdf has been to some help.

major law databases for keywords that I find relevant.\textsuperscript{4} Regarding the preparatory works, if have used each Nordic countries bibliographies to find the relevant sources. Regarding the “treavaux preparatories” I only have had access to the ones who are published by the IMO.\textsuperscript{5}

I interpret the text I read literary. The literarily interpretation shall be made as to understand the ordinary meaning in the relevant legal context. If legal terms are not understood, I use Norstedts juridiska ordbok (2008) and if old language brings interpretation problems I use contemporary, official dictionaries. If different languages cause interpretation problems I will use *Norstedts ordböcker* or *Libers fyrspråkiga juridiska ordbok* (1995).

1.3.2 Method when answering the thesis questions

The questions that this thesis shall answer have to be answered by applying different methods.

The first question assumes that there are *formal differences* between general tort law and the law implemented by the Brussels collision convention. To answer the first question, I will simulate a collision between three vessels (by conditions given in the following) and on the one hand see how general tort law would divide losses and on the other hand see how the Brussels convention (1910) would divide the damages. In the simulation I will use material mentioned above pursuant to conventional Swedish source- and method doctrine.\textsuperscript{6}

The second question will be answered from partly a thoroughly study of preparatory works where I mainly will search for *political motives*, partly on how the courts are judging those questions.

\textsuperscript{4} I-Law, Westlaw, Heinonline.

\textsuperscript{5} IMO (1997), see for the protocols (Myers, 1922) p. 556 – neither the librarians in Oslo, Stockholm nor Hamburg have been able to find the original protocols for me, even though they are to be found in the library of the maritime law department in Hamburg.

\textsuperscript{6} Peczenik (1995).
When answering the third question I presuppose that tort law – as a part in the legal system – is working to achieve certain predetermined goals. I assume that the joint and several – as well as the pro rata liability – are instruments in a legal framework that can achieve certain goals. So, the question is – put in other words – which of those instruments are most efficient to achieve this “political goal”. I – for myself – suppose that the “goal” is a *liberal economic* one. That is because I – for myself – think that the philosophy of liberal economy is the one that best promotes collective interests in the context of transportation.
2 The law of ship collisions compared to general tort law

2.1 Brief background to the convention

At the beginning of the nineteenth century, France had recently adopted a new commercial code (“Code de commerce”, 1807) which inter alia regulated maritime matters. The code influenced other codes around Europe, such as Código de comercio (Spain, 1829), Código commercial Portuguez (Portugal, 1833), Wetboeck van koophandel (Holland, 1838) and Merchant Shipping Act (Great Brittain, 1854). Norway enacted a new maritime code shortly afterwards (1860), followed by Swedens new maritime code (1864) and Finland (1873). The unification of the Scandinavian codes took place as Denmark proposed to enact new codes in the 1890 (Sweden 1891, Denmark 1892 and Norway 1893).

The CMI had, however, already in 1860 begun the work with the so called York-Rules and there was an ambition to unify the whole european maritime law. Since collisions amongst vessels in its very nature is international and the applicable law opened for a quite extensive “forum shopping”, the work of unification begun (inter alia) with those rules in the conference at 1897 – a work that was finished at 1910. The convention was adopted by the vast majority of maritime states, but not the US.

Denmark, Norway and Sweden ratified the convention to enter into force in 1913. Finland ratified the convention in 1923. The convention is transformed into the Swedish maritime code of 1891 by law (1912:326).

2.2 General tort law versus the maritime tort law: characteristics

It is occasionally argued, that the rules on division of loss in the maritime code regarding collisions at sea are so similar to the general law of torts on division of loss,

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7 Sienknecht (1912) p. 6.

8 The convention was adopted by Sweden and published in SÖ (1912) nr. 12

9 Sienknecht (1912) p. 2.

that it, considering the result, does not matter which rules are applied. That statement, however, has mainly to be limited to the basis of liability, since for example the procedural rules, the rules on time limitation as well as the rules on division of loss differ to a large extent. It is one of those differences – the so called pro rata liability – that I shall discus in this thesis.

As a collision has occurred, the cause may be either negligence on each or both sides or an inscrutable accident.\textsuperscript{11} If the loss is to be divided amongst the vessels in fault (and the cargo owners, the passengers and the crew for the moment is left to their fate), the applicable rules are quite similar to the rules of general tort law.

1) If the damage is caused by an inscrutable accident, each side will cover its own loss. That principle follows the ancient roman, general principle of “casum sentit dominus” and is explicitly mentioned in the maritime code and the 1910 Brussels convention.\textsuperscript{12} Even though the principle is not explicitly mentioned in the general tort law, it will apply.

The general rule on negligence (The Swedish Tort law (“Skadeståndslag (1972:207)” chapter 2 § 1) is, in this aspect, quite mysterious. On the one hand, an “innocent victim” has to bear his loss irrespective of if his actions where causative or negligent to the damage that he has suffered, but on the other hand it forces the victim to show both negligence and causation on part of a tortfeasor to be able to recover his damages. As I will argue in the following, this rule is an epistemological, not a normative, one: it is “natural” that the victim initially has to cover his loss since he has the legal interest in his possessions.

What has been said, does however not presuppose that the victim also is the one that has to bear the loss finally. As already indicated, the victim may pass on the damage to a negligent tortfeasor. The principle is interesting, since it returns within other frameworks of law; within insurance law, for example, the insurer is only liable for loss resulting without guilt by the policy holder.\textsuperscript{13}

However, within Swedish tort law and there may be taken certain considerations to personal injury. The case “MKA Guld & Klockor” (NJA 1995 p. 661) may illustrate this. The

\textsuperscript{11} Prop. nr 81 (1863) p. 100.

\textsuperscript{12} Sjölag (1994:1009) chap. 8 § 2. Skadeståndslag (1972:207) does not regulate the specific situation, but compare its chap. 2 § 1.

\textsuperscript{13} Försäkringsavtalslag (2005:104) chap. 4 § 5.
background to the case was that a robber was shot by two shots at the crime scene, but even though he had participated in the robbery, he was allowed a reconciled compensation. The case can be compared to the Skandia-case (NJA 1981 s. 920) where the relatives to a man who had committed suicide were compensated to the full insured value.

2) If either tortfeasor alone negligently has caused the damage, he is liable to the whole damage, as well under maritime law as under general tort law. 14

3) Insofar there is mutual fault; the division of loss is slightly different. The starting point in general tort law is that the one that has suffered most severe damage has a claim for compensation after set off. 15 Within the maritime law framework, both tortfeasors are liable for the whole damage and the division of loss will be done in relation to the measurement of negligence on each part. 16

This thesis shall put some light on the main differences between the general tort law and the maritime tort law; some closer defined, I will highlight how the pro rata liability treats a third party that – in some way – is involved in the collision between the two vessels.

This limitation may, perhaps, seem quite broad since a third party may be whoever suffers damage as a result of the collision, for example someone who suffers damage as a result of escaped oil, or another ship owner that cannot cross a fairway since a vessel is blocking etcetera. However, in this thesis I follow the categories of third party who are covered by the 1910 Brussels convention, namely a cargo owner, a passenger and the crew. 17

To summarize, I will analyze the primary liability that a ship owner carries vis-à-vis those categories of victims. The ship owners’ right of limitation or his right of recourse actions towards those categories of victims shall therefore only be discussed very brief.

Of particular interest in this context is the crews right to claim for losses. Insofar – for example – the crew (normally a captain or a first mate) has contributed to the collision and therefore –


15 Skadeståndslag (1972:207) chap. 2 § 1 together with chap. 6 § 1.

16 Sjölag (1994:1009) chap. 8 § 1 (2).

17 Brussels convention (1910) art. 1.
indirect – contributed to their own loss, it may be argued that they have no right, or a limited right, to claim compensation.

In comparison with joint and several liability, is the consequence of a liability in relation to the degree of negligence that the liability - towards the victim - appears to be limited. The victim may only claim each part on their respectively portion.

Within the framework of law, the discrepancy among general tort law and maritime tort law has been frugally investigated. Even less, the motives of the discrepancy have been clarified. Within maritime law literature, the dominant standpoint has been that the pro rata liability must be given a limited scope – but, again, within giving any further reasons than that it differs from the “traditional” system of several liability.\(^\text{18}\) The – in a maritime law context – almost legendary professor Kurt Grönfors has briefly stated that he “prefers the several liability”, but also without any motivation.\(^\text{19}\) Occasionally, the joint and several liability has been considered so obvious that it does not need any expressed justification.\(^\text{20}\)

In my opinion, such an approach must be improper. The balance between applying joint and several- or pro rata liability towards two tortfeasors are undoubtedly of a normative nature. A normative regulation should be able to be justified on normative grounds, and by normative reasons. I will – in this paper – try to highlight those grounds of justification.

2.3 General tort law and maritime tort law: division of loss

As have been shortly said above, the general principle is easy: the tortfeasor has to compensate the victim to such extent he would have been, had the accident never

\(^{18}\) The – in a maritime context – almost legendary professor Kurt Grönfors, who – party because of his doctoral thesis (Grönfors, 1952) – should have had comprehensive knowledge of the topic, is just shortly noting that he ”prefers the joint and several liability” without giving any reasons for ((Grönfors, 1975) p. 366 and (Grönfors, 1952) p. 183))

\(^{19}\) Grönfors, 1975 p. 366.

\(^{20}\) Askeland, 2006 p. 188f.
occurred.\textsuperscript{21} In this context, the question \textit{which} loss is to be divided arises. If several tortfeasors have caused \textit{one damage} the question is quite clear, but if several tortfeasors have caused more than “one damage”, the question arises how those damages should be divided amongst the tortfeasors. Two mutual tortfeasor may bear their own damage, bear the other’s damage or bear the joint damage in proportions.

The general tort law does not have any prescribed solution of damage divisions. The courts are left with the regulation on \textit{adjustment} together with the principle that each \textit{stands his own loss}.

In the case \textit{Eos C Hotell} (NJA 1994 p. 48) a trespasser was seriously injured after he had tried to beat a lessee. The trespassers compensation was dismissed, since the lessee had the right to self-defence.

Within the framework of maritime law, the main rule is another. In this context the aggregate (total) loss is divided amongst the tortfeasors. The rationale has been said to be, that all parties than gain to minimise the collective loss.

Insofar the first or the second alternative is chosen, there is no need for \textit{division} of the loss. In the first alternative, the whole loss stays where it has fallen and in the second alternative the question simply is \textit{who} – after set off – has a net claim towards the other. If the third alternative is chosen, however, it has to be decided which yardstick is to be used to divide the loss. The Brussels (1910) convention on collision has chosen the third alternative.

The authors of the Brussels convention did chose that \textit{blame} was the relevant yardstick to divide losses amongst vessels.\textsuperscript{23} By adhering to this basic principle, a vessel which is largely to blame has to pay the major part of the damages, even though the consequences of its fault may be slight. In practice, however, there is room to apply \textit{objective-} as well as \textit{subjective-} blame by division of loss.\textsuperscript{24}

\begin{itemize}
\item \textsuperscript{21} Skadeståndslag (1972:207) chap. 2 § 1.
\item \textsuperscript{22} Skadeståndslag (1972:207) chap. 6 § 1 (2).
\item \textsuperscript{23} Brussels convention art. 4 (1).
\item \textsuperscript{24} Ot. Prp. (1912) nr. 9, p. 23 and Prop. (1912) nr 26, p. 23.
\end{itemize}
Even though this, quite categorical, statement is formally correct it is necessary to say that even adequacy may be of large importance. A gross negligence that, in itself, is a limited cause to the occurred damage maybe not fulfils the requirement of causation.

It is to be noted, that this is another important difference when comparing the general tort law and the maritime tort law. As I already have said, the instrument of adjustment is the main instrument in general tort law, when comparing fault of mutual tortfeasors. However, since the maritime rule of division of loss only considers fault (or portion of blame) the general rule will also permit to influence “all other circumstances”. 25

Needless to say, apportionment may be done by reference to the parties’ economical prerequisites. Those kinds of “distributive justice”- arguments will be hard to find in the maritime law context. 26

From what has been said above, we have again approached the legal problem that shall be analysed in this paper, namely how the liability of multiple tortfeasors shall be divided. As we have seen, the instrument of division of loss may vary depending on various circumstances. We have also seen that the starting point for who that shall bear the damage may vary. One thing is however still left to be answered; what is the limitation of “the same damage”?

In the context of the maritime law dealing with ship collisions, the question of “the same damage” is to be answered from the perspective of causation: in other words, in what extent negligence has caused the damage. In a decision from the district court of Jærren, Gardway (ND 2000 p. 306) there was initially a collision between M/S Gardway and M/S Corona and – in immediate connection – M/S Gardway collided with the moored vessel M/S Fjordshell. M/S

25 Skadeståndslag (1972:207) chap. 6 § 1 (3).

26 Skadeståndslag (1972:207) chap. 6 § 2.

Since the famous case from the Supreme Court of Sweden (NJA 1978 s. 14) was judged, when the Supreme Court stated that there was no legal support for adjustments on other legal basis than the limitation rights, the maritime committé proposed a expressed provision, so that liability could be adjusted (see SOU 1981:8 s. 151, where it is expressly reffered to the 1978- case). The proposal was accepted without any debate (Prop 1982/83:159 s. 128) and was later stated in the maritime code, Sjölagen (1994:1009) chap 9 § 11 (2).
Corona and M/S Gardway where both partly to blame for the collision with M/S Fjordshell. M/S Corona therefore had to contribute to the compensation payable to M/S Fjordshell.

In an earlier court case Tullupsyningsmannen (NJA 1961 p. 425) a person been beaten by a group of perpetrators in the year of 1947 and was seriously injured. Five years later (1952) he was hit by a car and was, again, injured. His injuries were quite alike those he had got 1947. The Supreme Court stated that it was impossible to determine what influence each action had had on his injuries and concluded that each tortfeasor – to the protection of the victim – had to pay whole of the loss he had caused. The driver (and his insurance company) was imposed to joint and several liability with the group of perpetrators.

To summarize, we have to conclude that there are major formal differences between the general tort law and the maritime law. Whether those formal differences also bring different results is to be answered in the following.

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27 For a extensive comparison between the British general tort law and the Brussels convention, see Williams (1951) p. 344ff.
3  A collision case – the following division of loss

3.1  Prerequisites

In the following three cases are to be presented. The cases have been chosen to examine whether the formal differences also have practical significance. The cases are to be solved on the one hand within the framework of general tort law and on the other hand within the framework of the Brussels convention. The loss consist of damage to the vessels, the crew and the passengers onboard the vessels. Additionally, the cargo has been damaged.

1) Three vessels collide, whereby all three are to blame. The portion of blame however cannot be determined.

2) This example is the same as the one above, however with the difference that only two of the vessels are to blame; the degree of blame cannot be determined.

3) The last example is – again – the same, although with the difference that the one vessel is to blame for 90 % whereas the other is to blame for 10 % (the third vessel is without any blame).

3.2  Introductory remarks

Initially I have to point out that there may be various reasons to let multiple parties pay for the same damage. Usually multiple tortfeasors are to blame for the damage, but there may also be a question of liability if there is negligence on one part and causation on another. For example, where three vessels collide and there is damage caused on one vessel because of actions on the two other vessels, but only one ship is to blame for her actions.

Insofar multiple tortfeasors have caused damage, there is initially to decide if there is any causation between an action and the damage and how the tortfeasors have cooperated to the occurred damage.

The legal literature present a few different factors to take in account for division of liability. Multiple tortfeasors may have caused the damage with “interacting causal factors” – for example, one person is giving 2 grams of poison and another is giving 2 grams of poison, as 4 grams is
enough to kill the victim. The two parties may have cooperated or given 2 grams each without knowing of each other: either case would have made them joint and several liable. 

The joint and several liability may – however – also be upheld as there is lack of evidence, in some certain cases. This may be best illustrated by a case, where two hunters irrespectively of each other fire a shot towards a third person (who they probably think is an animal). Here it would be impossible to determine whose shot did hit the third person. Each of the hunters has – however – acted negligently and therefore they will be held joint and several liable.

In this context, it has been discussed whether blame is the relevant factor for liability. I think it most often is. I may illustrate my view with a case of negotorium gestio.

Assume a neighbour watches a pyromaniac set fire in a neighbour house. Assume also, that the neighbour is spraying water to extinguish the fire. The neighbour thereby saves the house from total destruction, but he causes extensive water damage to the house. On the part of the pyromaniac is primarily blame and causation for the damage caused by the fire, though on the part of the neighbour is primary only causation to the water damage.

Shall the neighbour be joint and several liable together with the pyromaniac? Most of us would probably say “no”. That is, because the neighbour is not to blame for the damage – even though he has caused part of the damage. Is then the pyromania to be liable for the damage caused by the neighbour? On the one hand, the water damage is not caused by fault of the pyromaniac, but it is possible to argue that the water damage would not have occurred but for the fault by the pyromaniac. On the other hand, the saving of the house perhaps lead to more expensive repair costs then if the house was entirely destroyed. Seen from the point of view of the pyromaniac the neighbour has aggravated the damages. Shall the tortfeasor to blame bear also those costs, or should they instead fall by the owner of the house?

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To compare the situation, where water damage is caused without the involvement of the tortfeasor, it will be able to show another example. Assume a water conduit begun to leak in a house because it has broke. The leak has caused severe water damage just before the pyromaniac set fire to the house. Since the worth of the house was lowered by the water damage the pyromaniac would just have to compensate that worth. He has neither caused the water damage, nor is he to blame for the damage.

The dividing line between the two examples are that in the first cause a third party acts because of the faulty acts of the pyromaniac. There is a direct causation between the spraying of water and the fire in the house. In the second case, the damage already exists.

There is a principal argument. To allow compensation, there needs to be negligence and causation. Insofar a tortuous act indeed shows causation, but lacks negligence the victim is to bear his damage by customary rules.

3.3 Normative division of loss by the rules of general tort law

3.3.1 Damages to the vessels

In the example I have stated, there are three mutual tortfeasors. The primary rule is that the one who has caused the damage has to compensate the loss he has caused. The victim has to start by finding the one (or the ones) that is/are to blame for the loss. If the victim succeeds to show that the tortfeasor has caused the damage while performing his duty as employee, the victim may be able to sue the tortfeasors employer.

In this connection, one must assume that the victim is allowed a relief in his burden of proof to the extent that he only needs to prove adequate causation between his damage and faulty operation by the employer – so called “anonymous culpa”. That was allowed in the case “Diamanttjuven” (NJA 1998 p. 390) where diamonds had disappeared as they were sent with the postal service. The Supreme Court stated that, “regarding to the circumstances in the case at

31 Skadeståndslag (1972:207) chap. 2 § 1.
32 Skadeståndslag (1972:207) chap. 3 § 1.
33 See Prop. (1972:207) p. 185ff.
hand [...] there are no reason to believe that the diamonds where stolen of someone for whom the postal service is not responsible” (the case at page 396).

Insofar the victim knows who the “real tortfeasor” is – the victim may also sue him. Thereby the “real tortfeasor” may – however – escape liability by showing that there are no “exceptional circumstances” for him to be liable.34

If both the employer and the employee are sued, they are joint and several liable for the whole loss.35 In the court case Korsnäs 1 (SvJT 1916 ref. 64) the tow Necken, whilst towing a barge (Lucia), collided with Korsnäs 1. The owner of Korsnäs 1 sued the owner of Necken and the owner of Lucia jointly. The district court found that they were joint and several liable.

Simultaneously, Lucias owners claimed compensation from the owner of Necken for the damages occurred on Lucia. Whilst the district court dismissed its action the court of appeal apportioned the liability in half parts on Lucia and on half part on Necken.

The case can be compared to M/S Sandnes (ND 1958 p. 562) where a lighter (“läktare”) was laying next to a workshop for loading, but in heavy weather had begun to drift and thereby damaged M/S Sandnes. The lighter was owned by a third person and the work shop could not be seen as the owner of the lighter. Towards M/S Sandnes, however, both the owner of the lighter and the workshop were considered liable for the loss, joint and several.

Insofar three vessels have collided and all of them are to blame for the damage, they are all primary liable for their own damage and that part of the counterparties damage that they have caused by fault and other circumstances. That follows from the general law of tort applied together with the rules on apportionment.36

In the example with the collision, the starting point is that all vessels have caused different damages and that the apportionment results in a limitation in that sense that each vessel only has to carry its part of the total loss. A more recent court case may illustrate this point:

34 Skadeståndslag (1972:207) chap. 4 § 1.
35 Skadeståndslag (1972:207) chap. 6 § 4.
36 Skadeståndslag (1972:207) chap. 6 § 1.
In the case Söraskolan (NJA 1993 p. 737) three youths had lit fire in a school and the dispersion of the smoke had made a costly cleanup necessary. None of the youths were able to pay for the cleanup and since their liability was adjusted, each of them only had to pay their (adjusted) part of the loss.

When three vessels have contributed to, on the one hand their own damages, and on the other hand damages to the other vessels, the “principle view” is that the tortfeasors have to carry the loss by “distribution grounds that considers the degree of blame on each side”. If the circumstances do not give support for any division at all, probably all vessels will share the liability in equal shares under analogous application of Lag (1936:81) om skuldebrev chap. 1 § 2.

If one vessel is innocent, the owners may – regarding to general tort law – have to decide of whom they require compensation, since the liability is joint and several for the two vessels at fault. If one ship owner has to pay more than he should have by considering his portion of blame, then he will have the possibility of a recourse action towards the other vessel at blame.

Insofar a victim chooses to sue both tortfeasors, they are joint and several liable for the whole damage. Their portion of blame does therefore not matter, as long as their liability is within the rules of limitation.

If two vessels by joint negligence cause damage to other objects then vessels (for example a pier or a quay) they are joint and several liable. This principle was adhered to by the court in the case Anne Marie Grenius (ND 1984 p. 85).

In the case, the tow Helmer should tow the vessel Anne-Marie Grenius out of a harbour. The towline broke and Anne-Marie Grenius bumped towards a groyne. Even Anne-Marie Grenius herself suffered damages. Vestre Landsret concluded that – since as well Helmer as Anne-Marie

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37 Prop. 1972 nr. 5 p. 119.


Grenius were to blame, they should be held joint and severally liable towards the owner of the harbour.

The right of limitation was however kept, so that each vessel could limit his liability. Since Anne-Marie Grenius had agreed by contract to keep Helmer free of any liability, she had – in their inside relation – to cover the whole damage.\footnote{The rules on limitation, seem to be maintained (see especially, Erling Selvig ND 1995 s. XIVff).}

3.3.2 Damage to cargo and passengers

Within the framework of \textit{general tort law} is the owner of cargo a third person. He may perhaps closest be compared to someone who leave his goods to some one\'s custody.

The starting point in Swedish law is that the liability for goods in custody is a \textit{fault based} liability, however with presumption of causation. In the case \textit{Travtränaren} (NJA 1999 p. 197) the owner of a horse contracted with a coachman that he should train the horse. The horse was injured, but the injuries were not due to the training of the horse and since the coachman could show that there were no causation between his actions and the damages to the horse, he was freed from any liability. It follows, however, from an older case \textit{Attachéväskan} (NJA 1978 p. 618) that if the victim will try to establish liability; he will need to show \textit{causation and negligence}.

It is uncertain if it – in general – is possible to maintain a rule of presumption (either presumption of fault- or of causation) in those cases. The cargo owner needs generally to identify the guilty tortfeasor and show how the tortfeasor has caused damage to his goods. In terms of general tort law, it is perhaps possible to maintain a presumption of causation, but the cargo owner would still have to prove fault. It would be even harder for the cargo owner to identify the non-carrying vessel and show \textit{fault and causation} on his side. That is probably why the cargo owner would have the possibility of sue the carrying vessel for payment of the whole damage.

The cargo owner that owns cargo onboard an \textquote{innocent vessel} will however not be able to recover against the carrier, since it is a fault based liability. The cargo owner is in such a case compelled to identify the vessel at fault, establish his fault and prove the causation, to get compensated.\footnote{Skadeståndslag (1972:207) chap. 2 § 1.}
3.3.3 Personal injuries

The compensation regime for personal injuries is mainly the same as the one for damage to cargo. A difference is, however, that compensation for personal injury seldom is adjusted. Usually, intent or gross negligence is required for adjustment.\(^{43}\) If a crew member (for example the captain or a first mate) has contributed to the collision, it would be possible to argue that damage or loss to their personal effects would not be compensated since the crew member might get identified with the ship owner as “tortfeasor”. However, compensation for personal injury is seldom adjusted (cf. the two already cited cases “MKA Guld & Klockor” and “Skandia”). Speaking in terms of general tort law, I would assume that Swedish courts would apply the concept of joint and several liability generously as long as there is proven fault on each tortfeasor (cf. the already cited case “Tulluppsyningsmannen”).

That would bring that the passengers on the vessel without blame had to stick to the two vessels in fault. They would need to prove guilt as well as negligence to apply the joint and several liability.

3.4 Normative division of loss by the rules of the Brussels convention

3.4.1 Introductory remarks

The starting point of the convention is that all tort liability shall be divided pro rata.\(^{44}\) From the wording, it follows that the pro rata liability is applied as between the vessels and towards all owners of goods, such as personal effects regardless of who the owner is.\(^{45}\) Even towards a third person, the ship owner is not liable for more than his part of the damage.\(^{46}\)

\(^{43}\) Skadeståndslag (1972:207) chap. 6 § 1.

\(^{44}\) Brussels convention (1910) art. 4.

\(^{45}\) Brussels convention (1910) art. 4.

\(^{46}\) Brussels convention (1910) art. 4 (1) in fine.
According to the Brussels convention itself, its provisions are not limiting the possibility for national law – or parties to a contract – to either limit or extent the liability further than the convention itself does. That would primarily go for application within national law, where it would be possible to agree on another method of dividing liability.

In practice, the carrying vessels liability is limited by the rules of the Haag/Haag-Visby convention, or by certain terms in the bill of lading. In the US, who not are part to the Brussels convention, the Harter Act will be applied so that the cargo owner can claim full compensation from the non-carrying vessel.

The convention does not either prohibit states to reach agreements of transportations of goods owned by them. Earlier the US and England agreed on the “knock-for-knock” principle: that the damage shall lie where it has fallen. The agreement was, however, terminated just shortly after it had entered into force.

3.4.1.1 Pro rata – to what?

Pro rata liability means primarily a liability in proportion to degree of negligence – in other words, if two vessels are at fault, a set off for the negligence on each side. The degree of blame is measured by objective- as well as subjective fault.

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48 Brussels convention (1910) art. 10.


50 Brussels convention (1910) art. 4 (1).

51 See regarding Sweden Prop. nr. 26 (1912) p. 23: ”Konventionen åter ställer [sic!] en hvars ersättningsskyldighet i förhållande till de å hvardera sidan begågna felens beskaffenhet […] om omständigheterna är sådana, att någon jämförelse mellan storleken af de olika felen icke låter sig verkställas, hvardera af de skyldiga skall ersätta hälften af skadan”, cf. ”1887 års betänkande och lagförslag. Motiv”, p. 159, where it is stated ”[d]et är således endast till felens beskaffenhet, domstolen har att […] taga hänsyn till alla de subjektiva eller objektiva omständigheter, som äro afgörande för frågan”. 

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The damages shall primary result from the negligence and the primary need for causation is as between the negligence and the damage (not necessarily the collision). The convention covers also a so called "indirect collision" when damages have occurred without a direct collision.\textsuperscript{52} However, the question at hand is perhaps more a question of causation: if damages are caused at a collision, but not by the collision it will not be compensated as a matter of absence of causation.\textsuperscript{53} In the preparatory works, it is stated that the judges shall be free to determine which faults that have caused the collision.\textsuperscript{54}

In a court case between the Norwegian vessel Buccinum and the British vessel Cerinthus, Lord Justice Scott stated that the appreciation should be done by “comparative appreciation of the degree in which the respective faults of the vessels in fault have contributed to the result”.\textsuperscript{55}

In case there is damage on both vessels and each vessel is at fault, the damages will be pooled together and apportioned to each liable vessel in relation of guilt.\textsuperscript{56}

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\textsuperscript{52} Brussels convention (1910) art. 13.

\textsuperscript{53} It was expressely stated in the trevaux preparatories : "Le principe qu’il doit exister entre la faute et l’abordage un rapport de causalité est consacrée par l’article 1 et par les autres dispositions de la convention, notamment les articles 3 et 4 qui, en om ployant l’expression "cause", confirment évidemment cette règle de droit commun” (IMO, 1997, s. 75)

\textsuperscript{54} ”Celui-ci laisse aux juges, pour la répartition du dommage proportionnellement a la gravité des fautes, une pleine et entière liberté d appréciation dans chaque affaire et le droit de s’inspirer de tous les éléments de la cause” (IMO, 1997, s. 75)

\textsuperscript{55} The Buccinum (1936) 55 L.I. L Rep. 205 on page 218.

\textsuperscript{56} Brussels convention (1910) art 4 (1-2).
3.4.1.2 Rules of evidence

Within general tort law, there will sometimes by room for relief of the ordinary burden of proof. The relief is primary on the way of proving the extent of the damages.\textsuperscript{57} As already mentioned, it will be possible to relief the burden of proof when there are two (or more) tortfeasors and both are to blame, but it would be impossible to show causation.\textsuperscript{58}

There is another rule of evidence in the maritime law of collisions. If it is impossible to prove the degree of blame, but as well blame as causation is proved – then each vessel is liable for half of the damage.\textsuperscript{59}

3.4.2 Damages to the vessels

Insofar every involved vessel is to blame; the damage shall be divided amongst them due to their respective degree of fault. As far as all vessels are to blame, this goes also for collisions where more than two vessels are involved, cf. art. 4 \textit{in inceptum: }"If two or more vessels are in fault […]" (underlined by me). It is to assume, that if causation and negligence can be proven, but the degree of negligence is uncertain the whole damage shall be divided amongst all vessels in equal shares.

It is uncertain, whether the convention is applicable to a collision where three vessels are involved and one is without blame.\textsuperscript{60} The wording of the convention does not offer much help. On the one hand "two or more vessels" ("a faute commune […] des navires") read in conjunction with art. 4 \textit{(2) in fine }"even to third parties a vessel is not liable for more than such proportion of such liability" may be understood as the convention maintains the pro rata liability towards a vessel without fault, but on the other hand the

\textsuperscript{57} Rättegångsbalken (1942:740) chap. 35 § 5.

\textsuperscript{58} Askeland, 2006 p. 205.

\textsuperscript{59} Brussels convention (1910) art. 4 (1).

\textsuperscript{60} Møller, 1914 p. 352. Compare the case ND 1969 p. 23, where three vessels were involved, but only two were to blame, and the case ND 1965 p. 244 where there was one vessel to blame but damages on two other vessels.
French wording “a faute commune” would be interpreted to the meaning that the vessels to blame carry a pro rata liability towards each other and goods onboard (third persons) the vessels. For third parties outside of the involved vessels, the convention is – normally – not applicable.\textsuperscript{61}

In the “trevaux preparatorien” to the convention, it is stated that "Cette répartition s’appliquera à tous les intéressés qui ont souffert dans leurs intérêts matériels"\textsuperscript{62} followed by “In n’y aura d’exception que pour les cas de mort ou de lésions corporelles. Ici, par un motif d’humanité, une réparation complète sera assurée aux victimes par la maintien du recours solidaire contre les deux navires en faute, là où pareil recours existe actuellement”. I think the aim of the convention is that “all interests” ("tous les intéressés") that have suffered material damages ("souffert dans leurs intérêts matériels"), are limited to claim compensation pro rata. For personal injury, however, the joint and several liability remains insofar the vessels have been negligent ("Solidaire contre les deux navires en faute"). It has to be pointed out, that the “trevaux preparatories” does not take any clear statement on this point.

There are not many court cases regarding this question. From the Nordic countries there are only a few (older) decisions from the lower courts.

In a case from 1829, Leandro (referred by Smith (1961) p. 23-26) the Norwegian supreme court divides liability pro rata toward a ship owner, as a pilot and a customs officer jointly have caused grounding.

In another early decision, Pan (ND 1945 p. 225) the district court of Bergen had to divide liability amongst a tow (“Pan”), the towed vessel (“B.K.1”) and a third – overtaking – vessel (“Thor”). Because of an extinguished stern light on B.K. 1, Thor did not sight B.K.1 in time to avoid a collision. The court stated that B.K.1 was to blame for the collision and stated obiter (page 232) that: "[h]vor et fartøy har lidt skade ved en koilisjon, hvor en selv er uten skyld, og som skyldes feil fra to andre fartøyers side, så blir disse solidarisk ansvarlig ovenfor det førstnevnte” (briefly, that where two vessels are to blame they would be joint and several liable to the third).

\textsuperscript{61} Sjølag (1994:1009) chap. 8 § 2.


\textsuperscript{63} IMO (1997), p. 67.
This *obiter dictum* was however not followed in a later judgement from at Danish court. In the case *M/S Cornelis* (S.H.T. 1955 p. 127/UfR 1955 p. 724) the Danish Sø- og Handelsretten had to decide on the following. M/S Cornelis had waited for an opening bridge to open. After her was the vessel M/S Portland that was travelling way to fast and simultaneously M/S Tjaldur created an enormous water pressure by giving speed ahead. The court stated that it ”*[retten finder det naturligt i så henseende at anvende sølovens § 220 stk. 3 analogt]*” (S.H.T. 1955 p. 142), briefly that ”it was natural to apply the pro rata liability to the situation”.

In a later case from the same court (UfR 1958 p. 1212), however, the earlier decision was not followed up. The vessel M/F Kronoborg had collided with M/S Uranus. While M/S Uranus was moored, M/F Kronoborg had not been able to manoeuvre properly, since a wharf had taken stress tests on the engines of M/S Mexican Reefer and thereby forced water to flow. The court stated that M/F Kronoborg and M/S Mexican Reefer where joint and several liable, but that M/S Mexican Reefer had to pay 2/3 of the damage to M/F Kronoborg.

This solution seem to have been accepted by the district court of Bergen in the case *M/S Soltind* (ND 1965 p. 142) where two vessels were to blame for damages suffered by a third vessel. To undock M/S Midnatsol the longshoreman had to release a mooring line from M/S Sembre. As they did, Sembrea begun drifting and did thereby damage M/S Soltind. Part of the fault was however Sembreas. The court judged that M/S Midnatsol liability for 2/3 and 1/3 to M/S Sembrea. Since the case was between M/S Midnatsol and M/S Sembrea, the court did not conclude anything about joint and several liability. This decision was followed by the already cited case *M/S Gardway*.

The dominating opinion in the Swedish, Norwegian och British legal literature is that a third innocent vessel may claim the negligent vessels joint and severally. Danish and German literature, however, assume the opposite: that the pro rata liability will be maintained.64

### 3.4.3 Cargo damages

Initially, it has to be pointed out that it is up to the victim to prove that there is a loss. If there is, the carrying-vessel will be presumed to be at fault for the damage.65 In this context, the presumption is a double one: as well *causation as negligence* is presumed.

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65 Sjölag (1994:1009) chap 13 § 25 (cf. chap 14 §§ 27 and 63)
It has, however, to be questioned whether such a presumption can be maintained in collision cases. The Brussels convention (art. 6 2 §) states that presumptions of guilt are prohibited. Does that mean, that only a presumption of causation can be maintained? I will return to this question.

If the carrier succeeds to show that also something else then negligence of the carrier has contributed to the loss, the carrier is only liable for the loss he has caused. However, with the exception that he is joint and several liable with a performing carrier – if the performing carrier is to blame.\(^{66}\) However, if the loss is a result of a collision, the liability – pursuant to the Brussels convention – is limited pro rata.\(^{67}\)

Insofar, however, the carrier succeeds to show that the damage has resulted as a consequence of “nautical fault” he is free from any liability.\(^{68}\)

It is this – by the Haag/Haag-Visby prescribed – disclaimer that lead to that the question of whether presumption of fault can be maintained in collision cases, is irrelevant in practice. The Haag-Visby rules may be supposed to fall under the possibility that each country have – pursuant to art. 10 of the Brussels convention – to prescribe rules that limit the liability for a carrier.

The carrier does thus still have to exonerate himself: he has to show that the damage is due to a nautical fault and if he succeeds, he escapes liability. By the wording of 13 chap. 25 § 3 2 sentence, the carrier does not have to prove anything further then that the damage is caused by nautical fault. In other words, the carrier does not have to show to what degree the damage is caused by the other vessel. He can just leave the victim with such an assessment.

The legal solution for a cargo owner onboard an “innocent vessel” may, at a first glance, seem better off because the exception for ”nautical fault” will not be applicable. The carrier has thus to exonerate himself pursuant to the ordinary rules.\(^{69}\)


\(^{67}\) Brussels convention (1910) art. 4 (2).

\(^{68}\) Sjölag (1994:1009) chap. 13 § 26 pkt. 1.

However, to exonerate himself it will – at least in theory – be enough to show that he is without any blame. He does not have to show who is to blame, and the cargo owner is therefore left to find his tortfeasor on his own. It is in this context the question arises what kind of liability the tortfeasors have: does the victim have to find both tortfeasors or may he claim the whole compensation from them joint and severally.

If the argumentation is to be based in maritime transportation regulations, it would be possible to take the following approach. Each vessel is primary liable for negligence. (Sjölag (1994:1009) 8 chap. 1 §). This liability is, however, revised by analogous application of 13 chap. 25 § 3 paragraph, so that the liability is limited to what the carrier can show that he has caused. If the carrier succeeds to show which damage he has caused, he is free from any further claims. Such a solution would – perhaps – also be in conjunction with the normative approach of the Brussels convention that states: “[…] even to third parties a vessel is not liable for more than such proportion of damage.”

The rules on cargo damage caused by collision between vessels are strongly recognized to channelize liability away from the carrier. This would mean that even a recourse claim from the other carrier not would be accepted. With support from such reasoning, I suppose that the pro rata liability would be maintained even against an innocent cargo owner on an innocent third vessel.

3.4.4 Personal injuries

For deaths or personal injuries (“mort ou blessures”) the ship owners to blame are joint and several liable towards a “third person”. The wording is a bit mysterious; but it covers individuals both on the carrying vessel and on the non-carrying vessel.

This solution was not at all obvious to the parties of the convention and was first adopted at the 1909 conference, where the majority voted for that the vessels should be held joint and several

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70 Brussels convention art. 4 (2) in fine.

71 Sjölag (1994:1009) chap. 8 § 1 (4) 2 sentence.

72 Brussels convention (1910) art. 4 (3).
liable. It is in this context to be noted, that the Nordic countries (Denmark, Norway and Sweden) waived their right to vote on the certain question.

Within the context of the Brussels convention, however, each country may decide whether a ship owners liability towards a passenger may be limited and whether a recourse claim is recognized or not. Those questions were left unsolved at the conferences.

In Sweden a solution was proposed, that contracts that limited the liability towards a passenger were void (see Prop. nr 26 (1912), förslag till Lag om vissa ändringar i sjölagen, § 222 2 st.). The solution had been adopted at the Nordic conference amongst the Nordic countries (Prop. nr 26 (1912) p. 20, but the solution was not accepted by the parliament (first chamber reports, 2, nr 23, p. 89; second chamber reports 3, nr 28 p. 63) since the law adopted by the U.K. (16 December 1911, 1 & 2 George V c.57) prescribed that the victim could sue the non-carrying vessel on the whole damage, even if the passenger – by contract – had accepted not to sue the carrying vessel.

It was feared that a ship owner who had exempt himself from liability within a contractual framework, still could be sued in tort in a recourse claim. This solution was adopted by Sweden, Norway and by the U.K. In the early 1970, however, the Nordic countries changed the solution to the first proposed. In Sweden the freedom of contract was limited by law 1973:1202 (in force by law 1974:288) in the way that a contract that stipulated a limited liability was void (cf. § 200 in the law of 1891). Finland had, since their adoption of the convention in 1923, a quite different approach, since they prescribed that a passenger that had accepted a limited liability of the carrying vessel not could claim compensation from the other vessel either (cf. § 4, law 17/2 1923).


76 (Hellström, 1925) p. 43 and (Schmidt, 1944) p. 147.
As already has been pointed out, negligence and causation is crucial for liability. If more than one ship owner is liable for damage, there will be joint and several liability amongst the ship owners.\textsuperscript{77}

The ship owners do have a mutual claim of recourse towards each others, but the recourse claim is only to the part that one ship owner has \textit{paid more than what he finally shall have done}; in other words, a recourse claim for excess liability.\textsuperscript{78}

The rules on passenger liability are based in \textit{fault-liability} for both the carrier and the non-carrier.\textsuperscript{79} In the context of collisions, however, there is an important exception. The main rule here is that personal injuries are presumed to have resulted from fault by the carrier.\textsuperscript{80} It must however be pointed out that this presumption is not extended to the non-carrying vessel(-s).\textsuperscript{81} As already has been said, presumption of fault amongst the colliding vessels is prohibited, as far as the convention is applicable.

The Brussels convention does not regulate the question whether a crew member that is at fault for the collision may be \textit{identified} with the ship owner in the sense that his contribution to the loss deprives him for claiming damages to his own personal effects or his personal injuries. The convention does not either regulate the question if the ship owner has a valid recourse claim towards the faulty crew member.

The masters’ liability towards the ship owner is primary fault based.\textsuperscript{82} The liability is however eased if the master is employed by the ship owner.\textsuperscript{83} The same goes generally for other crew members.\textsuperscript{84}

\textsuperscript{77} Brussels convention art. 4 (3).

\textsuperscript{78} Brussels convention art. 4 (3) together with Brussels convention art. 4 (1).

\textsuperscript{79} Sjölag (1994:1009) chap. 15 § 17.

\textsuperscript{80} Sjölag (1994:1009) chap. 15 kap § 20.

\textsuperscript{81} Brysselkonventionen art. 6 (2).

\textsuperscript{82} Sjölag (1994:1009) chap. 6 § 11.

\textsuperscript{83} Sjölag (1994:1009) chap. 6 § 11 (2) together with Skadeståndslag (1972:207) chap. 4 § 1.
Since Sweden recently changed the rule in the vessels safety act that a master must be employed by the ship owner, a master that works as a consultant is put to a large exposure of risk if the master does not – at least towards the ship owner – disclaims his liability.\textsuperscript{85}

If questions of adjustment – due to contribution to the loss – towards a party onboard the vessel arises, there is a need to apply general rules on tort as far as they may be applicable.\textsuperscript{86} It seems hard to adjust compensation of personal injury (as been shown before), but adjustment of compensation for damage to personal effects of the crew may be possible already if the crew member is to blame for ordinary degree of fault.\textsuperscript{87} In practice, however, I would be surprised if such a claim would be brought to court in other cases then intent or gross negligence.

3.5 Summary: similarities and differences

3.5.1 Introductory remarks

From what has been said previously, it is clear that the general tort law presumes that the loss lies where it falls and that the victim with a major claim (in monetary units) has a net claim of compensation after adjustment. In pure theory, a victim thus gains in worsen his loss at least as far the tortfeasor does not succeed in proving that the victim actually has made his damage worse. Within the framework of maritime law there is another solution: here the parties are liable for the aggravated loss and thus both benefit from hinder further damage. The following apportionment is limited to the blame on each side.

Furthermore, we have seen that the time bars in the framework of maritime law encourages to quick settlements whereas the ordinary time bar for claims in tort are significantly longer. The time factor is undoubtedly of essence in economic structures. The longer the time factor, the bigger is the economic uncertainty.

\textsuperscript{84} Sjömanslag (1973:282) 52 § (2) tillsammans med Skadeståndslag (1972:207) chap. 4 § 1.

\textsuperscript{85} See Fartygssäkerhetslag (2003:364) chap. 3 § 16 together with chap. 7 § 4 pkt. 7 (as read 2010:342, see Prop. 2009/10:161). The questions hall not be further discussed in this paper.

\textsuperscript{86} See Sjömanslag (1973:282) § 52 (2) together with Skadeståndslag (1972:207) chap. 1 § 1.

\textsuperscript{87} Skadeståndslag (1972:207) chap. 6 § 1.
The maritime rule of pro rata liability explicitly ties the cargo owner to the regulation. The cargo owner is thus—as have been shown—leaved to claim compensation *pro rata* from the non-carrying vessel. Within general tort law the solution would have been another: both vessels would have been joint and several liable.

3.5.2 “The risk of proper survey”

As have been pointed out several times, the victim has to carry *his loss* as a starting point. The victim must thus convince the court of who—rather than the victim—shall bear the loss and for what reasons. The victim must therefore initially find the tortfeasor and carries thereby the risk for additional “researching costs” that maybe not will lead to a good result.

The tort liability for ship owners (as well as the general vicarious liability) lightens this risk to a large degree, since the victim only has to find out which vessel is to blame for his loss and who the owner of that vessel is—that is called “anonymous culpa” and is, since the already referred case *Diamantjuven* (NJA 1998 p. 390) assumed to a apply also in general tort law.

The cargo owner may seldom have a claim towards the vessel that carried his cargo. He is thereby left with a claim towards the non-carrying vessel in proportion of the fault committed on his side. That is due to that the carrier—in theory—either may exonerate himself from liability by showing that his servants are not in fault or by showing that his servants have committed *nautical faults*. The carrier (or the ship owner) does not need to point out *who* the actual (or the other) tortfeasor is. The same solution would apply if there was a collision amongst more than two vessels. The cargo owner would still need to identify the tortfeasor.

For a passenger, the risk of a proper survey is reduced since the carrying vessel is presumed to be at fault. Within the framework of general tort law, however, this is not the case: here the passenger carries the ordinary burden of proof. Regarding the conditions of the crew, they are primary to claim compensation from their employer on a contractual basis and secondary to claim compensation by showing *neglect and*
causation. The risk of a proper survey is probably minimized since the contractual part is named in the contract.

All of these parties may be able to pass on the risk of survey to an insurer. If they have done so, it would be enough to show that there is a loss and that the loss falls within the insurance terms. If the insurer later wants to fulfil a recourse claim, he bears the risk of a proper survey.

3.5.3 "The risk of a process"

The one who will take charge of his rights to compensation needs not only, as have been found above, find someone to blame but also to show the court why this party rather should bear his loss, than that he should bear it himself. The victim thus has to stand eventual losses due to the process. The victim does also stand the risk for investigate which right he legally may take advantage off and he stands the risk for all the time that commences until he – eventually – receives compensation.

Whereas the victim – within the framework of general tort law – normally has ten years to investigate which legal rights he may have\(^88\), he is within the field of maritime law limited for one year\(^89\) if he wants to secure his claim with a maritime lien\(^90\) and for two years at longest.\(^91\) In other words, compared to time bars in general, there is a shortage of time in the maritime field, as it comes to time limitations.

3.5.3.1 "The burden of proof"

Insofar the victim has identified the tortfeasor and he think that he has the right of a legal action – he also normally has the burden of proving that those conditions are met. Generally speaking, he has to prove loss, negligence och causation between them. The victim has thus generally to find evidence and save evidence as to the facts.

\(^88\) Preskriptionslag (1981:130) § 2.

\(^89\) Sjölag (1994:1009) chap. 3 § 40.

\(^90\) Sjölag (1994:1009) chap. 3 § 36 pkt. 3-4.

\(^91\) Sjölag (1994:1009) chap. 19 § 1 3 pkt.
In the case of damage to the vessels this is explicitly the case. Presumption of fault (but not — at least not from the wording — presumption of causation) is explicitly prohibited.92

The committee of the Nordic maritime codes from the 1890:is proposed that — by British model93 — include a presumption of fault if a vessel after a collision did not provide assistance.94 The Swedish committee thought that would be a “natural presumption” since there would be “no doubt” that an innocent vessel would stay at the scene to help.95 The Supreme Court did however not like the proposed rule and it was therefore later abolished.96

It may — under certain circumstances — be hard to show exactly what has happened. It may be even more so, if one or both vessels have sunk on deep water. Those situations are solved by applying a relief of the burden of proof. If negligence is shown on both sides, but the degree of blame cannot be decided, there will be an equal division.97

It is natural that the valuation of risk and the burden of proof has to be equal to the vessels. Each vessel is — normally — in just as good position as the other to secure evidence. Perhaps the same argument would be applicable to passengers, since they normally are at the scene when the accident happens and they are in the same position as the ship owner (or, at least his servants) to secure evidence. The same would probably hold for the crew onboard. Within the field of ordinary tort law this would probably have been the solution, but within the framework of maritime tort law, the ship owner is presumed to be at fault for the losses caused to passengers.

It may however be, that the carrier has given the passenger additional rights to claim compensation under the transport-agreement. However, the other vessels do bear a fault

92 Brussels convention art. 6 (2).

93 See Prop. nr 6 (1874).

94 See Betänkande och Lagförslag (1887), chap. 8 § 224 § (2).

95 See Betänkande och Lagförslag (1887), Motiv. p. 162f.

96 Se Prop. nr 2 (1891), p. 54 respectively p. 6 in the protocol of the head of the department.

97 Brussels convention (1910) art. 4 (1).
based liability. If the victim wants to establish a claim towards the other vessel, he needs to prove negligence and causation.

As for the cargo onboard, the carriers’ liability is based on presumption of fault. That would – most likely – also have been the case under rules of ordinary tort law. The rationale for the relief of the ordinary burden of proof is probably because the cargo owner seldom is onboard the vessel and therefore he only hardly may secure evidence for errors committed by the carrier.

However, in practice the cargo owner is left with a claim towards the non-carrying vessel. He is therefore also left with the burden of proving fault and causation. That results in a significant increase of the cargo owners’ burden of proof. The cargo owner may however ensure his interest in the cargo and therefore shift the burden to the insurer – if the insurer wants to fulfil a recourse claim.

3.5.4 Summary – which are the relevant differences in practice?

Damage to the vessels:

1) Insofar it is impossible to find the degree of blame amongst the vessels in a collision; the liability will be apportioned equally. If more than two vessels are to blame, but their liability cannot be determined either their respectively liability will be apportioned equal. Within general tort law, there would have been a relief of the burden of proof, as to the extent of the loss.\footnote{Rättegångsbalk chap. 35 § 5.}

2) Insofar two vessels are to blame and the third is innocent, the general rule is that the two vessels are joint and several liable. In the field of maritime law, it is uncertain if the two vessels to blame can limit their liability to the "equal division"- rule, or if one vessel may escape by showing that he is not more to blame then a portion of the total liability. From the wording of the convention follows no clear answer to that question.
3) *De lege lata* it is uncertain whether the fact that the portion of blame is known alters the answer given under (2) above. Regarding to English case law and case law from the lower courts in mainly Denmark and Norway a third – innocent – vessel may claim compensation from both the other vessels joint and severally.

**Damages to the cargo:**

1) The carrying vessel is primary assumed to be liable: there is a presumption of fault – as well as within the field of general tort law as maritime law. In the framework of maritime law, the carrying vessel is however exempted from liability if the carrier shows that the loss is caused by *navigational fault*. The other involved vessels are liable by ordinary fault liability – to the limit that their fault has contributed to the damage (pro rata liability). If the degree of negligence cannot be divided there will be an equal division of the loss.

2) Insofar two vessels caused damage onboard a third – innocent – vessel, the cargo owner on the innocent vessel is primary compelled to claim compensation from the two vessels at fault. The carrying (and innocent) vessel can on the one hand not rely on the rule on “nautical fault”, but on the other hand he is free from liability, since he is not at fault. Regarding general tort law, the cargo owner may sue the vessels at fault joint and several. However, in the field of maritime law – the solution is more uncertain. If the degree of blame is uncertain, there is the question if the vessels may be allowed to limit their liability to equal division and if the degree of blame is known, there is the question whether they could be allowed to limit their compensation to their respective degree of blame. The dominant standpoint in the literature is that there will be joint and several liability.\(^99\)

3) Insofar the general tort law is concerned; the degree of blame is irrelevant, at least until the recourse claim: the tortfeasors are joint and several liable

\(^{99}\) Falkanger, Bull, & Brautaset, 2004 p. 204f.
towards the innocent vessel. Within the framework of maritime law, the solution is more uncertain *de lege lata.*

**Personal injuries or death:**

1) General tort law applies a fault based liability towards passengers. Maritime law, however, operates with a fault based liability with a reversed burden of proof. Each vessel at fault is liable for the whole damage (joint and severally). The non-carrying vessel (-s) however are liable at an ordinary fault based liability.

2) Since the vessels *at fault* are joint and several liable, the degree of blame is only relevant in the recourse claim.

3) Each vessel at fault is jointly and severally liable for the damage. An “innocent” carrying vessel is however not liable towards its on passengers by mandatory law. However, the vessel may be responsible by contract.

**3.6 An outlook: are there parallel systems?**

**3.6.1 "Concurrent causes for loss"**

In the Scandinavian field of law, the joint and several liability has its footing in “logical causation” that each tortfeasor has – indeed – caused the whole damage and must therefore be liable for the whole damage.\(^\text{100}\) By looking for concurrent causes to a whole damage the picture is somewhat different.

In the court case *Magsåret* (NJA 1950 p. 650) an individual was primary incapacitated because he had been hit by a car. Shortly afterwards, he was affected by a gastric ulcer. In the case the individual was not allowed any compensation as from the drivers’ car insurance, as long as the gastric ulcer was enough to keep the victim away from work.\(^\text{101}\) The case should be compared to a newer court case from the Supreme Court, NJA 2009 p. 104.

\(^{100}\) Askeland, 2006 p. 165ff.

In the already referred case *Tullupsyningsmannen* (NJA 1961 p. 425) the solution was quite different. In that case the whole loss was payable by each tortfeasor, because the loss could not be divided. In was uncertain which tortfeasor had caused which damage. In a later case (NJA 1964 p. 177) an individual was hurt in a car accident but stayed incapacitated much longer than what was considered as “normal”. The compensation was adjusted correspondingly.

A division of loss by adopting this method seem to propose that the loss shall be divided at least as far it is possible in practice to do so. If the loss cannot be divided each cause will be seen as to carry the full liability for the loss. To a certain degree, those principles seem to harmonize with the tort rules of maritime law: if division is possible division shall be done, but if division cannot be done the liability shall be divided in equal parts and is thus *still* divided.

3.6.2 "Short notes from the insurance-law perspective"

If a policy holder has insured the same insurable interest by more than one insurer, each insurer is liable as if he was the only insurer. Afterwards, each insurer may divide the compensation paid amongst each others.\(^{102}\) This solution gives a regulation of *primary joint and several* liability and *secondary pro rata* liability.\(^{103}\) In the following division amongst the insurers, the division is thus done as of how big part of the risk that the particular insurer is standing compared to the others.\(^{104}\)

Nordic marine insurance operates with another main rule. If concurrent causes have caused damage, whereby some risks are covered by the insurance and others not the compensation is divided in proportion of which influence the risk had to the loss and what influence the risk had to the extent of the loss.\(^{105}\) If – however – one risk is

\(^{102}\) Försäkringsavtalslag (2005:104) chap. 6 § 4.

\(^{103}\) Försäkringsavtalslag (2005:104) chap. 6 § 4 3 sentence.

\(^{104}\) Försäkringsavtalslag (2005:104) chap. 6 § 4 3 sentence

covered by the marine insurer- and the other by the war- insurer, the whole loss is to be carried by the insurer of the risk that was the dominant cause of the loss.\textsuperscript{106}

Regarding marine insurance, there is thus a general principle of pro rata division. In the motives to the marine insurance plan from 1930 it is stated that “\textit{det er rimelig at foreta en skjønsmessig fordeling av ansvaret, etter den innflydelse de forskjellige aarsaksfaktorer i hvert enkelt tilfelle har øver}”.\textsuperscript{107}

It seems thus, that just as obvious that the principle of joint and several liability is in tort law – just as obvious is the principle of pro rata liability in insurance law.

3.6.3 "The law of debtors-/creditors"

The main rule if more than one party owes another a duty to pay a debt, is that each debtor is liable to pay whole the debt.\textsuperscript{108} The creditor may, in other words, sue whoever he by his discretion finds the best payer. The debtor that has paid is then leaved with a recourse claim towards the other debtors. However, in the recourse action the paying debtor has only a claim \textit{pro rata} against each of the debtors.\textsuperscript{109} The risk of the creditors for insolvency by a debtor is thus sharply minimized if there is more than one debtor.

If the law on creditors’ right against a debtor could be applied analogously, the claimant would be put much safer position then he ordinary is. If a victim is hurt by several tortfeasors, the victim thus sues one and leaves him with a recourse claim towards the other tortfeasors. In that way, the tortfeasor has to carry the risk that each of the other tortfeasors are insolvent and additionally, he has to carry the risk to sue the other tortfeasors for compensation. Those are two risks that the victim ordinary has to stand.

\textsuperscript{106} NMIP (1996) § 2-14.


\textsuperscript{108} Lag (1936:81) om skuldebrev, chap. 1 § 2.

\textsuperscript{109} Lag (1936:81) om skuldebrev, chap. 1 § 2 (2).
3.6.4 Summarization

As have been shown, the principle of pro rata liability has a strong position in insurance law. The pro rata liability has also a god position in rare cases in ordinary tort law. It has also been shown that the joint and several liability puts the victim in a much better position than he ordinary is, as it seems by coincidence. The paying tortfeasor is correspondingly put in a much worse situation then he ordinary sits in.

In the maritime field, minor errors often results in a risk for major losses. If a ship owner, who is liable for 10 % has to pay for the whole damage he is put to a large liquidly problem and an extension of such a risk is of course not in favour for the victims that need a solid compensation for their losses. If a ship owner does not manage to pay compensation, the victims may be standing without compensation at all.

In that perspective, even the insurance companies’ possibilities of compensation has to be taken into account. On the one hand, the victim may insure his risk to suffer damage and on the other hand, the ship owner may insure his risk of causing liability damage. If an insurance company – however – is forced to pay compensation for a much larger extent than necessary the total access of liquidity on the market will probably rise.
4 Legal policy arguments

4.1 Introductory remarks

Empirical studies of the effects of tort law have – at least from a Scandinavian point of view – never been performed. Only the preparatory investigation carried out by Jan Hellner is available. Jan Hellner especially points out that the effects of tort law mainly are based on “qualified guesses”.\(^{110}\)

In Scandinavia, the main feature of tort law seems to be the *compensational one*. Speaking from the point of tort law, it seems important that the victim receives his compensation. This feature is often called the “repairing feature”.\(^{111}\) The aim is to put the victim in such a position as he would have been if the damage never did occur. As a loss has occurred it is therefore central to find who should bear the risk of the loss and to allocate the cost for the loss to the tortfeasor. As already has been pointed out, damages caused in the field of the shipping industry has adopted a quite different solution, since the ship owner is liable for damages resulted from the management of the ship.

There are several arguments for such a solution. On the one hand, it is mentioned that the ship owner is liable for them he puts in his place and on the other hand it is pointed out that even minor fault can lead to major claims and that a seaman neither could pay those claims nor take out insurance for the claims. The ship owner thus ensures the victim compensation and may insure his liability towards a victim cheaper than the “real tortfeasor”.

The argument is primary aiming towards the *transactional costs* – namely that the costs of execute the compensation are lowered, so that only the costs of the loss remains. The transactional costs are likely to increase if a victim is forced to search the “real” tortfeasor and to spend significantly resources to investigate whether the tortfeasor is liable for the damage or not.

The arguments presented are not impossible to counter argue. If a “cheap” solution is preferred, perhaps the most efficient solution is to let the victim cover his own loss. Alternatively a fund could be constructed that compensates certain losses – a system that inter alia is used for oil

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\(^{111}\) See especially SOU 1969:58, p. 27.
compensation. That would probably eliminate the searching costs and the costs of a legal process. Those arguments basically hold the principle of “knock-for-knock” principle. The principle of knock-for-knock has been tested between the US and the U.K in the mid 1940, but were abandoned just shortly afterwards.\(^{112}\) Coleman proposes that it has to be considered whether direct insurance or liability insurance is the cheapest when considering how to do. Such a study would – however – be quite hard to perform, since the cost of insurance is depending on – for example – how many individuals that have taken out insurance. In my opinion, insurance cannot manoeuvre the tort law. It has to be the other way around. If everyone only takes out liability insurance, there is always a cost for the process, and it is presupposed that the tortfeasor is known. On the other hand does liability insurance cover other kinds of loss than ordinary direct insurance do.

The argument of compensation is, however, not the only one. Another argument is that the loss shall be “pulverized” so that neither tortfeasor has to pay extensive loss alone and so that the victim is compensated for his damages in reality.

The effect of the pulverizing argument is mainly based on the thought that the risk of loss shall be apportioned amongst a big group as possible, so that all representatives for the group do have to pay small amounts each. In practice, the ship owner is primary liable but he will hold his insurer liable and the insurer will be reinsured by some other insurer. This way of spreading risks is thought to minimize the risk of that compensation cannot be paid. By such a solution, the victim may be reasonable safe to get his compensation and the ship owner may be reasonable sure not to risk his profit a certain year because of a major accident.

Sometimes tort liability also claims to have a preventive effect. The idea is that someone who is at risk to pay for the damages will avoid causing damages. A tortfeasor may therefore apply necessary precautions to avoid damage.\(^{113}\)

The preventive effect, however, has been assumed to have a subordinate position in the field of maritime law.\(^{114}\) The arguments for that have been that the ship owner does have strict liability for others fault and that even minor fault may cause major damage that neither the tortfeasor nor the ship owner can pay in practice. In practice, thus the liability of a ship owner has to be carried by an insurer.

\(^{112}\) NFT (1947) pp. 77-78.

\(^{113}\) The preventive effect seems to have a low acceptance, generally (SOU 1969:58, p. 29f).

\(^{114}\) Brækhus (1953), p. 11.
Furthermore, there is an argument that the ship owner already does have sufficient causes to take precautions. If an accident happens, the ship owner will risk bad publicity and he will risk having his vessel left at a wharf for repairs and not generating any income. Additionally, of course, shipping is a joint risk. If the vessel is wrecked, the crew will at its worse lose their lives, the cargo owners will lose their cargo and the ship owners will lose their vessel. Those risks would probably be enough to provide against accidents.\footnote{Brækhus (1953) p. 8ff – especially p. 11.}

From the preventive effect of tort law also follows the punitive effect of tort law. The basic argument is that the one who has acted blameworthy shall be punished for his actions.

In the maritime field, the compensation for punitive damages has been applied quite rarely. However, the effect will have a quite short range.\footnote{Duff, Aaron T. (2009) "Punitive Damages in Maritime Torts: Examining Shipowners' Punitive Damage Liability in the Wake of the Exxon Valdez Decision," Seton Hall Law Review: Vol. 39: Iss. 3, Article 6.} Within the general maritime law the ship owner may, under certain conditions, limit his liability. Generally, the right of limitation cannot harmonize very well with the thought of “punishment”.

The effects of tort law that I have presented above are possible ones. However, they may not be the only even though they are the most commonly ones named in connection with tort law. Below, I will try to clarify some of these in a maritime context.

4.2 What is the function of tort law?

When a loss has occurred, it is evident that the victim has to carry the loss as a starting point. That is an epistemological – not a normative – regulation. The victim has the interest to shift the loss to someone else and he is the one that has an interest in taking action. If, as I assumed before, the victim is the cheapest cost avoider why should he then be able to shift the losses to someone else?

To answer that question, one may questioning what the general function of tort law is and if that function is another regarding maritime tort law. Unless the function of tort
law is another than just *distributive justice* it has to be understood *which* function there is. I do thus presuppose that *there is* a function at all of tort law.\(^{117}\)

Even if tort law may prove traces of distributive justice, that function may be secondary and will not be further analyzed in this paper. One example of distributive justice would perhaps be if a “poor” tortfeasor negligently causes damage to a “rich victim”. Under certain circumstances, the claim from the rich towards the poor will not be met (cf. Skadeståndslagen 6 chap. 2 §). Even the absence of insurance will – sometimes – play a certain role. It can be said that sometimes compensation will be adjusted if the tortfeasor does not have insurance or a tortfeasor that has insurance may pay for damage that he would not have been forced to do otherwise.\(^{118}\)

Within the framework of *corrective justice* it is said that someone who has caused loss by *blameworthy actions* has a moral obligation to compensate the loss.\(^{119}\) If we suppose that is true, why should the state benefit from establish courts where judges where to decide what moral obligations that were necessary to execute by the power of the state? Can the state – somehow – gain by letting *moral obligations* be judged in the court in any other way than just to implement *corrective justice* in the legal system?

4.2.1 The goal: increased trust – decreased transactional costs?

If it is presupposed that trade is “good” since it enables resources most efficient disposal, than transportations are necessary to facilitate trade between distant locations. However, transport in itself is not – normally – adding anything to the transported product itself. It is just an additional cost. The most efficient trade would thus be promoted by minimizing the cost of transportation.\(^{120}\) That is a goal: minimizing the costs of transportation. Can that goal be stimulated by – inter alia – the maritime tort law? I would say it can and I will evaluate on that answer below:

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\(^{117}\) I thus presuppose that the tort law *has* a function and thereby I leave doctrines that claim the opposite to their destiny (cf. Weinrib, 2012)


\(^{120}\) Coleman (1992) p. 5.
On an unregulated market, all individuals are competing to reach individual goals, regardless of whether common goals are reached or not. On such a market, every individual has to take extensive precautions. Those precautions will cause increasing transactional costs. If, for example, the right of ownership is not protected – the owner of something he wants to keep must thus himself secure his right.

To the extent that basic rights are protected, an individual does not need to take these precautions. If there is a normative acceptance of the right of ownership, each member in the community will have a normative reason to believe that each community member will follow the norm. If, on the other hand, the norm is not followed the non-follower is liable to compensate other community members that suffer damage due to the non-following of the norm.\(^\text{121}\) That will bring social stability.\(^\text{122}\)

This kind of increased certainty ought to increase economical efficiency and reliance amongst the parties.\(^\text{123}\) With a basic standard of certainty, parties would have a reason to trust each other and to exchange products amongst each others. That will – probably – lead to that products are more efficient used.

Furthermore, a community with a high standard of social stability will bring cooperation to meet higher goals then each community member could reach on his own.\(^\text{124}\) From this point of view, the state thus has to compare increased administrative costs to a higher standard of social stability and decide if social stability is worth the increased administrative costs. If this comparison shows that the increased social stability is preferred – a rational state will implement standards that are rational for each individual of the community to follow.\(^\text{125}\)

\(^{121}\)Coleman (1992) p. 280f.

\(^{122}\)Coleman (1992) p. 5.

\(^{123}\)Coleman (1992) pp. 2-5.

\(^{124}\)Coleman (1992) p. 10f.

4.3 A contractual outlook

The basic point for an organised market is that a merchant easily can get in touch with other merchants: the cost of “searching” for a merchant is thereby minimized. If the market also provides basic levels of certainty (for example, that the community will force contractors to fulfil their contractual obligations). The transactional costs will be minimized, if parties may exchange products and information – and other parts will believe that what the parties say is true. The cost for precautions will be minimized. The low transactional costs will gain the most efficient use of property.\(^{126}\)

In form of a contract, parties to an organised market may in advance decide how their risks shall be divided and what one party gains to stand a risk that the other party does not want to stand. The division of risk is central in contracts. As the risks are identified and divided as between the parties, each party may decide if he stands the risk himself, if he wants his counterparty to stand the risk or if he chooses to take out insurance from someone else (by “insurance-contract”!) and pay the insurer to stand the risk.

4.4 Risk assessment – what distinguishes the contractual law from the tort law?

If we see the contract as the starting point for risk assessment – a precondition for a contract is that there is an organized market. If a presumptive tortfeasor would have to find all presumptive victims before he started his operations – the transactional costs would increase significantly.

If a ship owner would have to stand the risk for that those increased transactional costs later were covered by income from his operations, a rational ship owner would probably not start the operations. The costs would be too high versus the risk he has to stand.

In this sense, the tort law fills a function of a failed market. Since there is no proper market where a ship owner could meet and contract with all presumptive victims, there must be some other way for create a certainty for both parties. The ship owner needs certainty, so he knows what he risks and the presumptive victim needs certainty so he

\(^{126}\) Coleman (1992) p. 69.
can decide whether he accepts maritime transportations and what he may claim if something goes wrong. As I have been trying to argue, the tort law is necessary where there is no possibility of contracting. In one way, the argument is however weak. If the cost of sharing information is so high – why does, then, the legislator not prescribe that the victim always stands his own loss. Such a solution would probably be the cheapest of all. I will discuss that solution below.

An example may highlight the question. The shipping industry itself is a useful industry since it contributes to circulation of goods and to the goods most efficient use. However, normally the transport itself does not bring anything further to the product than a cost.

As a ship owner transports goods, he exposes others to a great risk. As already have been said, the ship owner cannot in any rational way contract with all those. That would increase the transactional costs to a large extent. Since the transport itself does not bring anything further, it is important to keep the transactional costs low.\(^{127}\)

A theory, the theory of reciprocal risks, supposes that the one who puts someone else at a larger risk than conversely has to pay the costs for that risk. The argument is based on the principle that the one who takes larger risk, profits on the one who take extensive precautions to avoid risks. This profit is the starting point for the compensation, but if each side stands equal risks, each part has to stand his loss.

The argument seems – earlier – to have been more important in a maritime context, since parties by mutual damaging had to cover their own loss. If the theory regarding reciprocal risks were implemented larger vessels would thus be liable for smaller vessels regardless of fault.\(^{128}\)

In his doctoral thesis, Axel Møller argues that a hypothetical ship owner with a few big vessels put others to a minor risk than a ship owner that owns many smaller vessels.\(^{129}\) He continues, that”[m]an kan jo ikke paa Forhaand gaa ud fra, at Rederiet for et stort Skib er økonomisk bedre stillet end Rederiet for et lille”.\(^{130}\) But, in my opinion he misses the point that a big vessel sets a smaller vessel to a higher degree of the extent of damage in casu.

\(^{127}\) Coleman (1992) p. 79.


\(^{129}\) Møller, (1914) p. 209f.

\(^{130}\) Møller, (1914) p. 300.
In Turkish and Egyptian law, there was earlier a rule that explicitly took the vessels worth into account, so that the collective damage was divided amongst the tortfeasors as to how much the vessel was worth. In the Swedish preparatory works to the maritime code of 1891, it was stated that the only factor of division of liability was the respective fault on respective side. Norway took another position, by stating that also “other circumstances” could be taken into account. It is explicitly stated in the Swedish preparatory works, that the worth of the vessel not should be taken into account.

The theory on reciprocal risk may thus be abandoned, even though its principles may reflect the doctrine of “fault” to some extent. A state will put up rules on precautions that a ship owner will have to do, so that he that he not puts other at a higher risk than necessary. If those precautions are not taken, the ship owner will be at fault (even if the fault not is enough per se: it takes causation, too).

In this context, it is necessary to question to what extent it is rational to take precautions. If we start with the question from the perspective of the owner: if the owner of some goods risks losing his goods by accident, he would accept to take precautions to the worth of his goods. If he pays more, he would be irrational – since he only could by new goods instead of taking precautions.

To convert that to a liability regime, the presumptive tortfeasor may take precautions to a level that he risks to pay, if he does not take the precautions. But, a rational presumptive tortfeasor would not pay more. That must be the starting point.

The ordinary principle should be that the cheapest cost avoider covers loss or damage – since that minimizes the transactional costs. However, the basic fundamentals of the principle have to be accepted: if there is no reliance to the principle, the principle will not be accepted. So, the general basis is that someone who by fault causes damage to someone else has to compensate for the fault. That follows from the principle, that all victims have a normative reason to trust that others will follow normative rules.

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131 Møller (1914) p. 319f.
132 Förslag till sjölag (1887) – motiv, p. 159.
4.4.1 Division of risk, allocation of risk and spreading of risk

As a loss has occurred, the first question to answer is who should cover the loss. There is a known, typical decision spoken by Lord Wilberforce in the case Buchanan v. Babco: "[t]he question simply is whether this loss is to fall on the owner or on the carrier". That is the normal case, that there are only two parties, but perhaps there may be someone else?

As I argued before, the principle that the victim may cover his own loss may be based on several arguments – even normative ones. It is easier for an insurer of goods to assess the risks since the value is known. There is, further, no need for a process and no need to find the tortfeasor. The victim may further choose to cover his risks alone or if he wants to insure the risk. The problem is that the insurance shows tendency of distributive justice – that the insurer shall pay because he has taken out a risk and that the company has “more money”. The theory does – however – not fit in the theory of corrective justice and not in the theory of reciprocal risks.

If the general principles of fault must be accepted, the general starting point should be that even if the epistemological principle not were that the owner has to cover his loss, he had to carry the loss since he is the cheapest cost avoider. Therefore the owner has to stand the loss, even if his actions neither are faulty or causative to the damage.

So, even if the rule were normative the starting point should be that the owner is liable, unless shifting of the loss is gaining the community (interpreted broadly). It is thus the victim that has to show, that shifting of the loss to someone else gains the community. As we already have found, it gains the community that someone that is to blame for fault also is liable for the consequences of his fault.

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The arguments of the cheapest cost avoider seem to have been accepted as the ship owner is made liable for blameworthy actions done by his employees.\textsuperscript{138} When the liability is channelized to the ship owner the transaction costs amongst the chain to the ship owner will be minimized. Neither the crew, the stevedores, the pilots nor the tows need to insure their liability: the ship owner will be liable and the extra cost for the other parties is thereby cut. It also saves the other side of tort: the \textit{victim} will get compensation for fault caused by someone for whom the ship owner is liable.

4.5 Law and politics – in a maritime nature

As an author is arguing from the “nature” of legal relations, there is primary a thought of \textit{presupposed facts} – such as, for example, that the ship owner will use his vessel in a maritime nature. The legal rules shall be “\textit{adequate in relation to the actual circumstances}”\textsuperscript{139} – that has been expressly stated by the Finish legislator.\textsuperscript{140}

By applying legal rules, it is of huge importance that the background – at which the rules have been written – is clear, so that the rules not are applied at another background. Within the framework for this paper, the background picture has to be reviewed. The same goes for general tort law: since the risk division is quite different amongst the two legal systems, perhaps the background may be the explanation why.

While at sea, there are a couple of different risks. There are, on the one hand commercial risks and, on the other hand risks for accidents. While the first kinds of risks may be identified and regulated within a contract, the second one is more difficult. The second one is also characteristic in the sense that all interests are carrying a part of the risk. If the vessel is wrecked, the ship owner loses his vessel, the cargo owners lose their cargo and the crew lose their lives. It is also true, that the vessel to a large extent is left to its own destiny whilst at sea. It may travel far away from shore and far away

\textsuperscript{138} Coleman (1992) p. 245.

\textsuperscript{139} NJA 1961 p. 686 on page 694.

\textsuperscript{140} Sjölag (674/1994) chap. 1 § 9: ”\textit{På fartyg som inte används i handelssjöfart tillämpas stadgandena i denna lag endast om stadgandena i det enskilda fallet är tillämpliga på ett sådant fartyg}”. 

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from any possible support. The ship owner does also have a lowered influence as the vessel is travelling within coastal waters of different countries or while the vessel is moored in various countries harbours.

Of course, there are big differences between different kinds of maritime trade. A vessel operating close to the shore may be at a quite different risk than a vessel operating over the oceans. In countries where the trade on canals are extensive, has certain rules been adopted. This goes for example for Germany ("Binnenschiffahrtsrecht") and France ("droit fluvial").

As the 1910 Brussels convention on collisions was adopted, the representatives agreed on the formulation "En cas d’abordage survenu entre navires de mer ou autres navires de mer et bateaux de navigation intérieure" (artikel 1) which would has to be interpreted as the convention applies to all “seagoing vessels”. ¹⁴¹

Which are than the differences that motivate separate laws for trade on canals—respectively trade on oceans? Particularly striking is of course the distance to shore and external support. For example, if a vessel starts to burn on a canal there may be external help in the vicinity but that is however not the case if the fire starts on a far distance away from shore. Within Scandinavian law, those kinds of differences are treated in the rules of – for example – safety precautions. ¹⁴²

4.6 What is the goal?

As we have seen, the maritime industry is associated with major risks. The risks are – however – divided amongst all participants on the market. In some way, all those participants are to cover the risk they accept when they participate in the industry. A third party, however, may need to be protected, so that he accepts that the shipping industry can continue. To save a third persons rights, he will have a strong claim of compensation of something within the shipping operations went wrong. The goal, it


¹⁴² See for instance Fartygssäkerhetsförordningen (2003:438) that is diving the fairway into seperate so called "fartområden" (sea areas), chap. 1 § 3.
seems to me, is to keep the acceptance of the maritime sector high at the same time as the transactional costs for the sector are at its lowest possible rate.
5 The pro rata liability – de lege ferenda

5.1 Starting point

In what I have stated above, I have found that the division of loss – to a large extent – after all is quite alike regardless if the general rules on tort or the maritime rules of tort are applied. I have accepted that fault is adequate for dividing losses, since people do have a normative reason to accept normative regulations. The party, who does not accept the regulations, do have to carry the additional costs that results from his non-compliance.

It is clear, that the victim initially has to carry a significant burden. It is not enough that he has to carry the loss itself, he additionally has to prepare actions to obtain compensation for the damage, inter alia to secure evidence, investigate if he has a legal right of recovery, and sue in the right court of law before his right has been time barred. The result (not necessarily the aim), by applying joint and several liability is to enlighten this burden to some extent. The victim does not need to prepare two (or more) legal processes, he may be satisfied by just sue one of the tortfeasors.

5.2 For what reasons should the pro rata liability be kept?

The joint and several liability may be an advantage by – at least primary – reduce the costs of legal processes. The victim does not have to bring another process against a tortfeasor whose guilt and causation to the damage is clear. This argument is of particular strength when there are a lot of victims (for example a big quantity of passengers onboard a ship). If they were forced to sue both ships, the quantity of processes would increase to a large extent. By letting them sue each of the vessels at fault, the transaction costs for processes are probably being lowered. The same argument, will of course be valid for cargo claims.

Since legal processes to a large extent increase transactional costs, it would be desirable to find a compromise that did not involve a legal process. The cheapest compromise would – probably – be that the tortfeasor accepts the compensation he has to pay.
In this context, an argument in favour of the pro rata liability cannot be avoided. If a vessel is *in fault* for a part of the total damage and he accepts to pay *that part*. If the ship owner *accepts* this part of the damage and he *realises* that he has to pay for some part, he will try to hold his costs down: he would thus be prepared to pay compensation without first go through a legal process. If, however, the tortfeasor is at risk to pay the total cost he will probably not be compliant to the same degree. That would likely result in that as well the victim as the tortfeasor needs to employ lawyers and go through a legal process – something that to a large extent probably would increase the legal costs.

It seems like the *corrective justice* prefers the solution of the pro rata liability. The tortfeasor has a moral obligation to make good the damage *he has caused*. If he has to pay more than the damages he has caused, he will put the victim in a better position than he was before the accident occurred. Such a solution would be grounded in thoughts of *distributive justice* and is therefore not permissible.

This was the case in *Rôles d'Oléron* where it – from the beginning – was stated a strict liability for the vessel that had brought on the collision. Later, however, there was implemented an equal division, so that – as it expressly stated – owners of old vessels not should let them lie in the way and thereby be allowed compensation for a new one.\(^\text{143}\)

The pro rata liability has primary been accepted towards the vessels in fault, even if there are more than two. The same would apply in ordinary tort law. That the cargo owner is identified with the carrier is – probably – based in mainly economical grounds.

In practice, I would suppose, there is often an insurer that carries the final loss, even if the ship owner always has to carry the loss of goodwill. That must be good incentives for the insurer as well as the ship owner to take reasonable precautions. From an insurer point of view, those precautions will mainly be carried out by the premium, certain conditions and a certain duty of care. The risk the ship owner carries to get a reduced compensation from the insurer, will ordinary make him willing to take precautions.

To apply a joint and several liability results in that the victim is being allowed to pass on the risk of insolvency to the tortfeasors and the victim is thus placed in a far better

position than ordinarily. There is always a cost of pass on the risk for something to someone. The extra protection the victim receives by the possibility to pass the risk of insolvency to the tortfeasors must be paid for, somewhere. Insurance companies, for example, do need to have a bigger amount of liquidity if they risk covering more liability than what the ordinary should have done if there was a shared liability. Furthermore, the reinsurance market does need to absorb sudden, big needs for liquidity.

5.3 A proposed solution

If a tortfeasor can limit his liability by showing which part of the damage he has caused, the division of risk would be almost “normal”: if two tortfeasors are causing a damage to a third party, the third party does initially have to cover his losses, but if the victim can prove fault, he may pass on the liability to the tortfeasors. If a victim succeeds by pass on the liability, the tortfeasor normally has to carry the whole loss; if not the tortfeasor can excuse him by showing that he is innocent for a part of the damage.

The loss must thus be collected as one. Thereafter it is divided towards the involved tortfeasors by measurement of blame. However, the damage stays at the victim: each tortfeasor is only liable for his part, and if a tortfeasor cannot pay (due to insolvency); the victim has to stand this risk.

Such a solution would – in the long run – minimize unnecessary transactional costs and ensure an economical efficient shipping industry.
6 Cited sources

6.1 Literature & Articles


Johansson, K (1905) *Konferencen i Brüssel* (ND 1905 p. 113)


Smith, C (1962) *Solidaritet og regress i erstatningsretten.* Oslo: Universitetsforl


6.2 Treaties/Statutes

6.2.1 Swedish law

Lag (1936:81) om skuldebrev

Rättegångsbalken (1942:740)

Skadeståndslag (1972:207)

Sjömanslag (1973:282)

Preskriptionslag (1981:130)

Sjölag (1994:1009)

Fartygssäkerhetslag (2003:364)

Fartygssäkerhetsförordningen (2003:438)

Försäkringsavtalslag (2005:104)

6.2.2 Foreign law, international agreements etc.

Brussels convention, Sveriges Internationella Överenskommelser (SÖ) 1912 nr 12 (1913)


Sjölag (674/1994) (The Maritime Code of Finland)


6.3 Preparatory works

6.3.1 Denmark

RT, 1912-13 i FT (Folketinget) pp. 64, 175, 4219, 4905

LT (Landstinget) pp. 1300, 1592, 1639, 1887

6.3.2 Norway

Ot. prp. nr. 9 for 1912
Dok. nr. 56 med tillæg for 1912
Ot. prp. nr. 4 for 1913
Dok. nr. 1 med tillæg for 1913
Indst. O. 111 for 1913
Forhandl. i Odelst. for 1913 p. 106-123
Forhandl. i Lagt. for 1913 p. 34-44

6.3.3 Sweden

[SJÖLAG] Betänkande och Lagförslag (1887)
SOU 1969:58 (“Rättssociologisk undersökning av skadeståndsrätten”)
SOU 1981:8 (“Översyn av sjölagen : betänkande. I”)
Prop. nr 81 (1863) (“Kongl. Maj:ts Nådiga Proposition till Rikets Ständar, med förslag till
ny Sjölag; Gifven Stockholms slott den 17 Februari 1863”)
Prop. nr 6 (1874) (“Kongl. Maj:ts Nådiga Proposition till Riksdagen, med förslag till
Förordningangående ändring och tillägg i vissa §§ af Sjölagen; Gifven
Stockholms slott den 27 December 1873”)
Prop. nr 2 (1891) (“Regeringens proposition till ny sjölag”)
Prop. nr. 26 (1912) (“Regeringens proposition till ändring i sjölagen”)
Prop. 1972:5 (“ Förslag till ny skadeståndslag”)
Prop. 1982/83:159 (“Regeringens proposition till ändring i sjölagen”)
Prop. 2009/10:161 (“Ändrade regler om ersättning vid sjukdom och ökad flexibilitet för
anställning av sjömän”)

6.4 List of Judgements / Decisions

6.4.1 Nytt juridiskt arkiv, avd. I (“NJA”)

NJA 1950 p. 650 (”Magsåret”)
NJA 1961 p. 425 (”Tullupsyningsmannen”)
NJA 1961 p. 686 (”Svanesundsfärjan”)
NJA 1964 p. 177 (”Bilolycken”)
NJA 1978 s. 14 (”Kvinnholmsfallet”)
NJA 1978 p. 618 (”Attachéväskan”)
NJA 1981 p. 920 (”Skandia”)
NJA 1993 p. 737 (”Söraskolan”)
NJA 1994 p. 48 (”Eos C Hotell”)
NJA 1995 p. 661 (”MKA Guld & Klockor”)
NJA 1998 p. 390  ("Diamanttjuven")
NJA 1999 p. 197  ("Travtrännen")
NJA 2009 p. 104  ("Distriktssköterskan")

6.4.2  Nordiske Domme i Sjøfartsanliggender ("ND")
ND 1945 p. 225  ("Pan")
ND 1958 p. 562  ("M/S Sandnes")
ND 1965 p. 142  ("M/S Soltind")
ND 1965 p. 244  ("M/J Anna")
ND 1969 p. 23  ("M/S Lake Eyre")
ND 1984 p. 85  ("Anne-Marie Grenius")

6.4.3  Lloyds Law Reports
119
The Buccinum (1936) 55 Ll. L Rep. 205

6.4.4  Sø- og Handelsrets tidende
S.H.T. 1955 p. 127 (UfR 1955 p. 724)  ("M/S Cornelis")

6.4.5  Ugeskrift for retsvæsen
UfR 1958 p. 1212  ("M/F Kronborg")

6.4.6  Svensk juristtidning
SvJT 1916 ref. 64  ("Korsnäs 1")

6.5  Unpublished material