# COLLISION LIABILITY OF TUG AND TOW IN MARITIME LAW

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UDK 347.796.3
Izvorni znanstveni rad
Primljeno (received):
svibanj 1991.

*The author expounds collision liability in the law of tug and tow. He analyses the liability for collisions between tug and tow and between the towing unit and third vessels. The author suggests that in view of certain modifications introduced by the 1976 Limitation of Liability Convention, some changes could be made in the limitation of liability for collisions between the towing unit and third vessels.*

## INTRODUCTION

Although there are no special rules in maritime law to be followed in collision cases involving tugs and tows, these vessels have some special navigational characteristics which sometimes may alter procedural regulations in a case of collision. This is especially applicable in the field of limitation of liability. Collisions at sea between vessels are actionable on proof of negligence[1], and this applies also to tugs and tows. But since towing involves operations in connection with the holding, pushing, pulling, moving, escorting, guiding or standing by another vessel, and since tug and tow may sometimes constitute a navigational unit or »flotilla«, there is undoubtedly a unique navigational relationship between them. This is enhanced by the fact that the International Regulations for Preventing Collisions at Sea (1972) do not allow of a divided command[2], so that for the purposes of the Collision Regulations tug and tow are *usually* regarded as one entity (»one long steamer«). Although the courts do not advocate (any longer) the doctrine of the

[1] International Convention for the Unification of Certain Rules of Law with Respect to Collision Between Vessels Brussels 1910, and articles 644, 755 of the (Yugoslav) Maritime and Internal-Waters Navigation Act (1978).

[2] International Regulations for Preventing Collisions at Sea, 1972, in British Shipping Laws, International Maritime Law Conventions, London 1983, vol. 1, p. 14 ff.

tug being legally identified with her tow, the question of their identity is sometimes one of fact and not of law. Then there is another specific aspect of towage operations. Although tug and tow do not automatically belong to the category of vessels »restricted in their ability to manoeuvre«, when they do belong to it because of the nature of the towing operation, they are excused from the requirement applicable to all other vessels (save those not under command) to avoid impeding the safe passage of a vessel constrained by her draught.

All these special considerations applicable to tug and tow have their repercussions on the question of collision liability as it is presented in court proceedings, and especially on the question of the limitation of liability. In this article we shall look more closely into this distinctiveness.

## BURDEN OF PROOF

As has already been mentioned, there is no presumption of fault in collisions between vessels at sea. This applies even in cases where the collision regulations have been infringed. Disobedience to these regulations carries criminal or trespass penalties, but it has no implication on the question of presumed collision liability. In the United States of America, however, there is still a rule of evidence to the effect, that when a ship was at the time of collision in actual violation of a statutory provision intended to prevent collisions, it is presumed that the fault was a contributory cause of the disaster, if not its sole cause[3]. In such a case the burden rests upon that ship of showing not merely that her fault might not have been one of the causes of collision, or that it probably was not, but that it could not have been[4]. In practice, however, once a breach of the collision regulations is established, it is obvious that the burden of proving that vessel's fault, to all practical intents and purposes, is discharged. The anly thing that still remains is to prove that the fault caused or contributed to the collision. In this sense we can say that a proved infringement of the collision regulations could be in court proceedings not only psychologically, but also procedurally, detrimental to the party which infringed them, although the causal link between the infringement and the damage must still be proved.

## COLLISION BETWEEN TUG AND TOW

When a collision occurs between tug and her tow(s), liability very frequently turns more on the construction of the towage agreement between them

[3] The so-called »Pennsylvania Rule« from the decision in the Pennsylvania (1873).

[4] American courts assuaged this presumption by other rules of evidence (major-minor fault rule, last clear chance rule, error in extremis rule). Most of these rules became obsolete when the American courts abandoned the divided damage rule and by a unanimous decision of the Supreme Court in 1975 adopted the rule of proportionate fault in the U.S. v. the Reliable Transport Co. (421 US 397/1975).

than on the actual control of the towage operations. There was an attempt in the Unites States to limit orprohibit indemnity or exemption clauses in the towage contract as being against public policy to exculpate by contract one party (usually the tug) from liability for damage caused by its negligence to the other party. In Bisso v. Inland Waterways Corp. and a number of other similar cases American courts disallowed the clause that the venture was at the sole risk of the tow, or that the master and crew of the tug were the servants of the tow[5]. This trend has now been reserved, yet even when it was at its peak there were some loopholes enabling to assuage its rigour, such as to name the tug an additional assured on the tow's policies thus preventing the subrogated insurer from suing the tugowner, or to stipulate that the tow require its insurers to waive subrogation against the tug[6]. Court practice of many other states has always allowed similar exemption and indemnity clauses considering them part of the freedom of contract, but subjecting them to the strict rules of contract[7]. Such clauses are usually inserted in standard conditions for towage services. So, for example, the U.K. Standard Conditions for Towage and Other Services, as revised in 1986, stipulate that, whilst towing, the master and crew of the tug or tender shall be deemed to be the servants of the hirer and that this latter shall be vicariously liable for their any act or omission[8]. These Conditions exempt the tugowner from liability for, among others, damage by or to the tug resp. the hirer's vessel, or loss of these vessels, arising from any cause whatsoever, including negligence of the tugowner or his servants or agents, unseaworthiness or unfitness of the tug and her gear or equipment[9].

It schould be observed that such stipulations cannot exempt the tugowner from liability to third parties in relation to which there is no privity of contract. The most such provisions could achieve would be to prevent the tow from claiming contribution or indemnity from the tug in an action by third parties against the tow, even where the tow's liability to such third parties arose out of the tug's negligence or breach of the towage contract[10]. Such exemption clauses in a towage contract are construed subject to the tug's overriding duty to be fit for the particular endeavour as regards her crew, tackle and equipment at the commencement of the towage. It is, therefore, submitted, that the above mentioned exemptions in the Standard Conditions will apply only to circumstances occuring after the beginning of the towage. Furthermore, it is very likely that such exemptions will not affect the tug's liability where the tug abandons the tow. Exemption and indemnity clauses can only come into operation while the towage proceeds, i.e. after its commence-

[5] 349 U.S. 85, 1955, A.M.C. 899 (1955).

[6] For more details see T. J. McKey: »Towage Contracts Since Bisso« in The Law of Tug and Tow, Intern. Maritime Law Seminar, Vancouver 1979.

[7] More on the admissibility of such clauses in B. Lukšić: »Oslobođenje odgovornosti u ugovoru o tegljenju« (Exemption from Liability in Towage Contracts), Comparative Maritime Law, Zagreb 1987, vol. 3—4.

[8] Art. 3, printed in R. Davison and A. Snelson: »The Law of Towage«, Lloyd's of London Press 1990, p. 135—139.

[9] Art. 4.

[10] Cf. the case of the Albion (1953), 2 Lloyd's Rep. 82.

ment and before its termination. If the towage is interrupted, either lawfully or unlawfully (abandonment), the exemption and indemnity clauses cannot be relied on by the tug during that interruption interval[11]. There are, however, some circumstances in which by contract such exemption provisions will not be applicable. So the U.K. Standard Conditions exclude the application of an exemption clause in respect of claims which the hirer proves to have resulted directly and solely from the personal failure of the tugowner to exercise reasonable care to make the tug seaworthy at the commencement of the towing, and in respect of claims which arise when the tug, although towing or rendering some other service, is not in a position of proximity to or risk from the hirer's vessel, and is detached from and safely clear of any ropes, lines, wire cables or moorings associated with the hirer's vessel.[12]

Even more severe against the tow are the Netherlands Towage Conditions (1951) which state that the tow will take for her account all damages, also if sustained by third parties, even if they are due to any fault or negligence on the part of the tug or to any defective equipment of the tug. Excepted from this »omnibus clause« is only damage which the tug sustains by her own defects or through faults or negligence by her personnel and damage inflicted to third vessels or property through collision with the tug, yet even this exception is dependent on the proviso that the tow prove that the damage was not contributed to or caused by herself[13]. The same comment made above in connection with the U.K. Standard Conditions applies here; these provisions are only part of the privity of contract and they cannot prevent third vessels from suing and seeking damages from the negligent tug.

More recent standard conditions, kowever, apportion the risk of loss or damage between tug and tow more equitably. So, for example, according to »Towcon« (International Ocean Towage Agreement, Lump Sum) and »Towhire« (International Ocean Towage Agreement, Daily Hire) which are widely in use and intended for commercial towage at sea (not for port towage) the risk is allocated in such a way that each of the vessels mentioned bears her losses and is accountable for her own equipment and personnel, but notwithstanding any provision to the contrary of these two standard agreements, the tugowner has the benefit of all limitations of and exemptions from liability accorded to the owners or chartered owners of vessels by any applicable statute or rule of law in force when the damage occurs[14].

[11] Cf. Chorley and Giles, Shipping Law, London 1982, p. 265.

[12] Art. 4c(i) and (ii). Notwithstanding any contrary stipulation, the tugowner cannot contract out of liability for death or personal injury resulting from his negligence or that of his servants and agents.

[13] Art. 6, printed in R. Davison and A. Snelson, op. cit. p. 178—181.

[14] »Towcon« art. 18 and »Towhire« art. 18 printed in R. Davison and A. Snelson, op. cit. p. 140—177.

## COLLISION BETWEEN TUG AND/OR TOW AND THIRD VESSELS

A collision involving a third vessel can happen between an innocent or a guilty third vessel, on one side, and tug or tow, or both of them, on the other. If the third vessel in innocent we can have a situation where only tug or tow is to blame, or where both of them are responsible for the collision with the third vessel. In the case where the responsibility for collision rests wholly only on tug or tow, the innocent third vessel can have the culprit to shoulder all the blame regardless of the contractual provisions between tug and tow, though the towage contract may impose an indemnity in favour of the vessel at fault or redistribute the loss in some other way. Sometimes it is not the vessel of the towing unit which actually collides with a third vessel who is at fault, because the fault of the other (or another) vessel in the towing unit may have caused or contributed to the collision, as when a tug comes into collision with a third vessel by reason of a faulty manoeuvre of the tow, or when the tow was in control of the towing operation. The principle, however, remains, that the negligent vessel in the towing unit is entirely responsible for the damage inficted to the third innocent vessel.

When both tug and tow are to blame, they are both liable jointly and severally, and both may be sued by the third vessel for the whole damage.

When the third vessel was also negligent in relation to the ensuing collision, the court will apportion liability in proportion to the degree of fault of each vessel. In such a case the fault of tug and tow is assessed separately and it is in principle wrong to regard them as one shipping unit for the purpose of assessing liability. If the fault of the one of them can be imputed also to the other, as when, for instance, the controlling mind (the brain) was with the tow and the motive power (the brawn) with the tug, then they must be regarded as one unit when liability is assessed. For the sake of completeness a case should be mentioned here when a collision happens between a third cargo-carrying vessel and a towing unit. If both are to blame, i.e. the third vessel and the towing unit, the cargo owners can only recover from the negligent tug and tow (or one of them which was at fault) that proportion of the damage or loss of their cargo which corresponds to the degree of fault of the towing unit (or the negligent vessel in it), and very probably they will be prevented from recovering anything at all from the carrying vessel because of contractual exceptions in favour of the carrier in case the loss or damage was caused by a fault in the navigation or management of the vessel's master or crew[15].

## LIMITATION OF LIABILITY

In view of the fact that relatively small limitation funds must be set up when tugs are to blame for collision damage, attempts have been made to

[15] It should be mentioned that in the case of personal injuries the liability of the owners of all vessels at fault is joint and several (art. 4 of the 1910 Collision Convention and corresponding provisions of national enactments such as art. 759 of the Yugoslav Maritime and Internal-Waters Navigation Act).

treat the whole flotilla consisting of tug and tow(s) as one unit for the purpose of limitation of liability, and to aggregate their tonnages (the flotilla rule). It is now well established that the flotilla rule is inadmissible. In a collision between a barge in tow or between a tug and a third vessel, it is now an established principle that liability can be limited only to the tonnage of the negligent vessel in the towing unit, i.e. whose fault in the navigation and management caused the collision. This principle stands regardless of whether tug and tow are in common or separate ownership[16]. Different conclusion could be reached only in the case of carriage of goods by sea when the tug and her cargo-carrying tow(s) are in common ownership. In the landmark case of Sacramento Nav. Co. v. Salz a barge loaded with grain was being towed up the Sacramento River in California when it struck a British ship at anchor through the sole negligence of the tug. The tug and tow were in common ownership. The U.S. Supreme Court ruled that the tug and tow were a single vessel for the purpose of a suit brought by the cargo owner to recover damages arising out of breach of the carriage of goods contract. The court was of the opinion the both tug and barge were the »offending vessel« by which the contract of transportation was to be effected[17]. American courts demand some additional preconditions if tug and tow, engaged in the carriage of goods, are to be considered a single vessel for the purpose of limitation of liability. These are: (1) that there must be a contractual relationship between the claimant and the shipowner as carrier, (2) that the vessels whose tonnages are to be aggregated should be in common ownership, and (3) that they must be engaged in a single venture[18]. This means that even though there may be several barges in the towing unit, only the tug and the barge(s) involved in the particular contract of carriage of goods are part of the »venture« for limitation purposes.

The situation is different when both tug and tow cause or contribute to the loss or damage, regardless of whether they are in common or separate ownership. Their owners can limit liability only to an aggregate amount of the tonnages of both tug and tow[19], of course, if the owners of tug and/or tow are not personally at fault. So in a recent Canadian case, when the boom of a crane mounted on the deck of a barge struck a bridge while the barge was being towed by a tug. The court held that the management of the tug company was obliged to see to the fact that the crane was unusually high before allowing the tug and tow to proceed, and that it was not a matter to be left entirely to the tugmaster's judgement who was not furnished by his employer with a means for an accurate determination of the crane's height before and during the voyage. The court held that this was not a merely

[16] Cf. The Bramley Moore (1963) 2 Lloyd's Rep. 429 CA, and the Sir Joseph Rawlinson (1972) 2 Lloyd's Rep. 437.

[17] 273 U.S. 326 (1927).

[18] Cf. Kenneth H. Volk: United States Limitation of Liability and Tug and Tow, in The Law of Tug and Tow (Intern. Maritime Seminar, Voncouver 1979).

[19] Cf. the case of the Croatian Tug The Smjeli (1982) 2 Lloyd's Rep. 74.

unforeseen navigational error on the part of the tugmaster, but an actual fault and privity of the tug-company, and limitation of liability was refused[20].

As we have seen the present position is, that since the negligence which caused the damage must be in the navigation or management of the ship, the liability fund should be restricted to the tonnage of that vessel in the towing unit which caused the damage through her navigational negligence. Now, with the coming into force of the 1976 Limitation of Liability Convention, the party wishing to limit liability has only to show that the liability arose »in direct connection with the operation of the ship«[21]. It is here suggested that this could conceivably introduce a change in the limitation of liability of tug and tow. In a case where only the tug is to blame for a collision with a third vessel, there appears to be now less reason to restrict the fund to the usually insignificant tonnage of the tug alone, because there is no danger any more in the 1976 Convention that in such a case the tow, if also held responsible, would be subject to unlimited liability. In order to limit her liability she has only to show now that it arose »in direct connection with the operation of the ship«. In such a way, to paraphrase a saying of Lord Denning's, there would be much more room for justice in the principle underlying limitation of liability when it is applied to the law of towage, where frequently a small tug, of comparatively small value, towing a great vessel can cause great damage[22].

[20] The Westminster Tyee (Canadian Federal Court of Appeal, 21. 2. 1991), cited in Lloyd's Maritime Law Newsletter 303, 15th June 1991.

[21] Art. 2 (1) (a), printed in British Shipping Laws, Int. Marit. Law Conventions, London 1983, vol. 4, p. 2979.

[22] In the Bramley Moore (1963), loc. cit.

Sažetak

*ODGOVORNOST ZA SUDAR U POMORSKOM TEGLJENJU*

*Premda u pomorskom pravu ne postoje posebne odredbe za sudar u kojem sudjeluju brodovi u teglju, postoje posebne navigacijske karakteristike tegljenja, koje ponekad mogu značajno utjecati na procesne odredbe kod sudara. Autor obrađuje upravo ove specifičnosti kod odgovornosti za sudar. On među njima spominje tzv. »Pennsylvania pravilo« u američkoj sudskoj praksi i njegov utjecaj na teret dokaza. Kod odgovornosti za sudar između tegljača i tegljenog broda autor pokazuje kroz komparativni prikaz formularnih ugovora o tegljenju kako se ova odgovornost pretežno ravna prema ugovornom utanačenju između brodova koji plove u teglju čak mnogo više nego prema tome koji je od njih imao kontrolu tegljenja. On analizira odredbe standardnih uvjeta tegljenja Velike Britanije, Nizozemske, te tipiziranih ugovora za tegljenje na otvorenom moru »Towcon« i »Towhire«, ukazujući i na granice stranačke dispozicije. Zatim se osvrće na sudar između brodova u teglju i trećih brodova i na doseg erga tertios ugovornih klauzula o naknadi i oslobođenju (indemnity and exemption clauses). Na kraju prikazuje i pitanje oslobođenja od odgovornosti za štete pri sudaru kod tegljenja. Autor smatra, da bi primjenom odredaba Konvencije o ograničenju odgovornosti iz 1976. godine, prema kojima stranka koja želi ograničiti svoju odgovornost treba samo dokazati da je odgovornost nastala »u izravnoj svezi sa operacijama broda«, mogla biti otklonjena neadekvatnost i nepravednost dosadašnje prakse, prema kojoj mali i relativno bezvrijedan tegljač, tegleći veliki brod može počiniti veliku štetu i za nju odgovarati relativno malim fondom. Autor smatra da bi primjenom odredaba Konvencije iz 1976. godine, u slučaju da brodovi u teglju počine štetu trećem brodu krivnjom tegljača, oni morali i mogli ograničiti odgovornost na novčani iznos dobijen ukupnom tonažom tegljača i tegljenog broda.*