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Sea collision rules and damage liabilities in Nigeria

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Abstract
Collision can be as a result of a physical impact between two ships or between a ship and other structures at sea which results in a damaging accident. Both local statutes and international conventions made provision for collision prevention rules. Collision can be prevented by adhering to the various regulations that can reduce collision at sea. Section 265 to 271 of the Nigerian Merchant Shipping Act 2007, made some provisions which can assist in collision accident prevention. For the defendant to be liable in a collision accident claim, damage which resulted from the collision has to be foreseeable and must be a direct consequence of the defendant's action or omission. There should be deliberate attempt by all concerned in making sure that collision at sea is reduced to barest minimum.

Keywords: collision, collision rules, damage, foreseeability, claims sea

Introduction

Collision at sea can be said to be a term given to the physical impact that occurs between two ships resulting in a damaging accident [1]. The collision can also be between a ship and a stable or a floating structure such as an offshore drilling platform or an iceberg [2]. Collision between ships is predicated on an unlawful act or omission on the part of someone responsible, perhaps, the ship owner whose ship goes into collision with another vessel.

Collision usually results in damage to properties or goods. The responsibility apportioned to parties as a result of collision may be on a percentage basis depending on the surrounding circumstances of the collision incident. However, responsibility may not fall solely on one vessel. Thus, no matter how minor the collision may seem to appear, responsibility would fall on each vessel to the collision [3].

It is of note that collision claims hardly directly affect the *res*, rather it arises from the operation of the *res* or an agreement relating to the *res* [4]. Therefore, in vessel collision claims, an action *in rem* may be instituted against the ship or property in connection to which the claim arose [5].

Liability in *rem* attaches to the ship for the damage caused by the collision. This is because the damage caused by the ship is a maritime *lien*.

> This is also irrespective of the fact that her owner may not be the employer of the master and crew at the time of the negligence which resulted in the claim, if the ship is under a demise charterer.
>
> It is the voluntary entrusting of the possession of the vessel to the demise charterer for a temporary period that has been held not to relieve the ship from being arrested as security by the claimant, even though her owner would not be in such a case vicariously liable for the negligence of those employed by the demise charterer [6].

The procedure for maintaining an action in court in Nigeria for collision cases is regulated by the Admiralty Jurisdiction Procedure Rules ('AJPR') 2011. Order 3, Rule 1, provides that admiralty action filed in court shall be commenced by Writ of Summons or Originating Summons and where such action is commenced by Writ of Summons, it shall be issued by the Admiralty Marshal [7].

It is to be noted that Order 3, sub-rules (1) and (2) AJPR 2011, are in tandem with the procedure for the initiation of legal action in the Federal High Court as provided for in the Federal High Court (Civil Procedure) Rules 2009. However, the provision in the former Admiralty Jurisdiction Procedure Rules 1993, which required the claimant's solicitor to prepare Particulars of Claim summarizing the nature of his case and giving particulars of the claim was removed by the extant Rules.

The limitation period for instituting a maritime claim is a period of 3 years after the cause of action arose [8]. Collision claims fall under the general category of claims that can be instituted under the maritime law [9].

Order 4, AJPR 2011, provides that in an action to enforce damages arising from collision between two or more ships, each party is expected to file a 'preliminary act' unless the court orders otherwise. It is the opinion of Mbanefo, that preliminary acts are necessary in collision cases to prevent parties from tailoring their evidence as the case progresses in order to accord with the evidence as it unfolded in the course of the trial [10].

> For example, if at the time of filing the action, the plaintiff alleges in his preliminary act that the weather was calm and then later in the case, all the evidence points to the fact that it was stormy, he is bound by the contents of his preliminary acts [11].

Order 4, r.2 provides what constitutes preliminary act. It is obligatory on the part of parties to a collision action to file 'preliminary acts'. Mbanefo states that the 'preliminary act' is in the nature of a questionnaire wherein the party filing

the preliminary act is expected to supply details of such issues as the time of the collision, the place, the direction of the wind, the state of the weather, the state and force of the tide, the lights carried by the ship, measures taken to avoid the collision, etc [12].

Liability for collision and determination of fault

The liability that flows from damage as a result of collision has gone through some transformation. At the early stage, liability was based on what was regarded as Statutory Presumption of Fault. This principle was applied in situations where a collision had occurred and it was proved that prior to the collision, one of the ships had infringed on one or other of the rules against collision [13]. So, there was a presumption that the very infringement of the rules caused the collision. But this statutory presumption of fault was considered harsh and arbitrary in that it imposed an obligation upon the court to find fault for the collision without proof of negligence. This was the basis of the decision of court in *The Englishman* [14], where a trawler, which was not carrying sidelights and therefore, was not seen by the other colliding ship, was held not to be at fault, while the other ship was held alone to blame for the collision on the ground of no look out.

However, the presumption of fault rule was later abolished by section 4 of the Maritime Conventions Act, 1911 [15].

This abolition set the stage for the principle which enjoined the court, in apportioning liability, to consider whether the fault in question actually caused or contributed to the collision or otherwise. 'This is done by examining closely the steps leading up to the collision and applying more strictly the principle *maxim causa poxima non remota spectatur*' [16]. This rule is called the causation rule and imposes the duty on the judge to go through all the phases of the collision issue so as to arrive at the last or operating cause [17].

But Lord Stowell, in the old case of *Woodrop Sims* [18], addressed what he considered to be the *proportionate fault rule*, detailing out the probable situations under which collision could occur and the liability that could result from it. According to Lord Stowell, collision could occur where:

a. Without the blame being imputable to any party to it, that is by a storm or without human error. In such a case the loss is borne by the party upon whom it happens to fall;
b. both parties are to blame for want of due diligence and skill, where upon the loss will be apportioned in accordance to the proportion of fault;
c. misconduct of the suffering party only, who must bear his own loss;
d. fault of the ship which ran the other down-the innocent party is entitled to recover compensation.

Mandaraka-Sheppard carefully analysed how and when these rules apply [19]. According to the author, apportionment of loss with regard to rule (a) applies only 'to damage or loss caused by the fault of two or more ships' and 'apportionment applies only to those vessels at fault and their cargo on board' [20]. Therefore, where there is a collision between a ship and non-ship, the principle of contributory negligence would apply [21].

For rule (b) to apply, 'the ships at fault do not have to be in actual collision with each other'.

> It will suffice if by the fault of ships A and B, for example, a collision occurs between B and C. If C sues B, the latter will join A in the proceedings and all will be apportioned by assessing the faults of each so that B can recover from A the adjudged proportion of what she has to pay C as well as her own damage [22].

With respect to rule (c), Mandaraka- Sheppard was of the opinion that no liability would be attached to a ship whose fault had not contributed to the loss or damage at all [23].

It is to be noted that 'in apportioning liability, there are no strict rules, but there exists some guidelines for the court to take account [24].

For example, the court will look at the nature and quality of faults rather than their number; it will also look at the seriousness and extent to which such faults contributed to the collision and damage. Furthermore, the court will distinguish a fault- creating danger from a fault which was a reaction to danger. Ships embarking on a deliberate action bear a greater degree of fault [25].

Further note that

> The tendency of the courts is to deal with apportionment in a fairly broad way, and the most usual division of blame has been 60/40 or 70/30 or 75/25 or 80/20 or sometimes 50/50 and very rarely 100%. Further apportionment or sub apportionment for a subsequent head of damage may be made in appropriate cases, which may be adjudged on a 50/50 basis of the original apportionment [26].

In Nigeria, the Merchant Shipping Act 2007, has provided a guideline on how collision damage should be assessed. It provides to the effect that:

Where there has been a collision, a claimant shall be entitled to recover only such damages as may reasonably be considered to be the direct and immediate consequence of the collision [27]. The damages recoverable shall be such as to place the claimant in the same financial position as he would have been, had the collision not occurred [28]. The burden of proof of damages is on the claimant and damages shall not be recoverable, to the extent that the person against whom the claim is made is able to show that the claimant could have avoided or mitigated the damage by exercise of reasonable diligence [29].

Furthermore, where, by the fault of two or more ships, damage or loss is caused to one or more of them, or to their cargo or freight, or to any property on board, the liability to make good the damage or loss, shall be in proportion to the degree in which each ship was at fault. This provision is similar to that of the Collision Convention 1910 [30]. However, if, having regard to all the circumstances of the case, it is not possible to establish different degrees of fault, the liability shall be apportioned equally, provided that no ship shall be liable for any loss or damage to which her fault was not contributed [31]. Where there is a total loss of a vessel, the claimant shall be entitled to damages equal to the cost of purchasing a similar vessel in the market at the date

of the collision [32]. But where no similar vessel is available, the claimant shall be entitled to recover as damages, the value of the vessel at the date of the collision, calculated by reference to the type, age, condition, nature of operation of the vessel and any other relevant factors [33]. However, where the damage to the vessel does not result in total loss, the claimant shall be entitled to recover as damages, the cost of temporary repairs reasonably effected, and the reasonable cost of permanent repairs [34].

Remoteness of damage in collision liabilities at sea

It is not every type of damage that can be recoverable in law. Where it is too remote or unconnected with the original negligence, it would be unfair for the defendant to be liable for them. The general rule in the law of tort is that the defendant is only liable where he can reasonably foresee the kind of damage suffered by the claimant.

The rule of remoteness of damage refers to the requirement that damage must be foreseeable. Once a claimant has established that the defendant owes him a duty of care and a breach of duty has occurred which has caused damage, the claimant must prove and demonstrate that the damage was not too remote [35]. Remoteness of damage is concerned with the question of whether damages may be recovered for particular items of the plaintiff's loss. And where the damage is not too remote, the defendant must pay in respect of those items of the plaintiff's loss [36].

The rule in respect of remoteness of damage is that the defendant is not responsible for all the consequences of his wrongful act or omission. If the court considers damages to be too remote, they will not be recovered. Several court decisions have referred to damages as direct or immediate. In *Re Polemis* [37], Scruttton J stated that damage is indirect if it is 'due to the operation of independent causes having no connection with the negligent act, except that they could not avoid the results'. In this case, a ship was hired under a charter which exempted both the ship owner and charterers from liability for fire. Among other cargo, there was a large amount of flammable material in tins. During this voyage, the tins leaked, filling the hold with vapor. Upon unloading, due to the negligent actions of the servants of the charterers, a spark was created, and flames engulfed the ship which was totally destroyed. The charterers were held liable, because the damage was deemed to be direct.

However, in *The Wagon Mound* [38] the Privy Council stated its disapproval with the principle of *Re Polemis* and refused to follow it. The Privy Council held that a plaintiff can recover damages for the negligence of a defendant only if that damage could not be foreseen by a reasonable man and that it was not enough that the damage was a direct physical consequence of the negligent act. The Privy Council laid much stress upon the difficulties of the directness test, which they felt was unfair. It stated that:

> It does not seem consonant with current ideas of justice or morality that for an act of negligence, however slight or venial, which results in some trivial foreseeable damage, however grave, so long as they can be said to direct [39].

It is debatable if foreseeability is absolute. This is because 'foresight as a test of remoteness is heavily qualified by the fact that neither the precise extent of the damage nor the precise manner of its inflection need be foreseeable [40].

Therefore, where fault is considered not to be an effective cause of damage or where damage is suffered without fault, no cause of action arises. 'Thus, the breach of duty must have cause or contributed to the collision and so there must be a link, a so-called "chain" between the breach and the damage' [41]. In *The Empire Jamaica* [42] a collision occurred, and it was subsequently discovered that the Officer of the watch did not possess a certificate of competence. The question before the courts was whether the lack of qualification was the cause of the accident. The evidence showed that the officer was fully competent, and it was held that there was no causal connection between the lack of certification and the collision.

Frequently, 'the court finds a number of faults on each ship such as bad lookout and excessive speed. Some of these may contribute to the collision, while others may not'. The rule is that 'only the faults which are the proximate cause are to be taken into account in the assessment of the blame'.

The proximate cause is the efficient cause and note merely an incidental cause which may be nearer in time to the event [43].

Prevention of Collision at Sea in Nigeria

As a way of reducing the incident of collision at sea, the law has empowered the Minister charged with the responsibility for matters relating to merchant shipping to make rules for the prevention of collisions at sea. These are known as 'collision rules' [44].

The collision rules shall apply to all ships and aircraft which are locally within the jurisdiction of Nigeria [45]. One thing that is clear about the collision rules as provided by the Merchant Shipping Act (MSA) 2007 is that it applies both to ships and the aircraft [46]. Every owner, master of a ship or owner and person in command of aircraft are enjoined to obey the collision rules, and shall not carry or exhibit any lights or shapes, carry or use any means of making signals other than those which are required or permitted by the collision rules to be carried, exhibited or used [47].

Where infringement of the collision rules is caused by the wilful default of the owner or master of a ship or the owner of any aircraft or of pilot or other person on duty in charge of any aircraft, that person commits an offence and on conviction is liable to a fine not less than Five Hundred Thousand Naira or to imprisonment for a term not less than two years or both [48].

Any damage to person or property which arises from the non-compliance by any ship or aircraft with any of the collision rules, the resultant damage shall be deemed to have been occasioned by the wilful default of the officer in charge of the deck of the ship or the pilot or any other person on duty in charge of the aircraft, unless it is shown to the satisfaction of the court that the circumstances of the case made departure from the rules necessary [49].

Any ship may be inspected by a surveyor of ships for the purpose of seeing that the ship is properly provided with lights, shapes and the means of making sound signals in conformity with the collision rules; and if he finds that the ship is not so provided, the surveyor of ships shall give to the master, owner or his agent notice in writing pointing out the deficiency and also what is in his opinion, required in order to remedy the same [50].

In every case of collision between two ships, the master or person in charge of each ship, shall, if he can do so without endangering his own ship, crew or passengers if any, render to the other ship, its master, crew or passengers, assistance

as may be practicable and necessary to save them from any danger caused by the collision and shall stay by the other ship until he has ascertained that there is no need for assistance [51].

The ship owner is also enjoined by the rules to give to the master or person in charge of the other ship the name of his own ship and of the port at which the ship is registered or to which it belongs and also the names of the ports from which it comes and to which it is bound [52]. If the master or person in charge of a ship fails, without reasonable cause to comply with this section, he commits an offence and on conviction is liable to a fine not less than Five Hundred Thousand Naira or to imprisonment for a term not less than two years or both [53]. However, the failure of the master or person in charge of a ship to comply with the provision of this section shall not raise any presumption of law that the collision was caused by his wrongful act, neglect or default [54].

It is submitted that in as much as these rules can help in reducing the issue of collision at sea, it is still debatable if the application or observance of these rules can totally eliminate the incident of collision at sea.

International regulations for preventing collisions at sea

Aside the local regulatory measures provided for in the Merchant Shipping Act 2007, there are other international regulations which are aimed at preventing collision at sea. These include the International Regulations for Preventing Collision at Sea (COLERG) which was established in 1972 by the International Maritime Organisation (IMO). Rule 2 of the Regulations provides to the effect that every owner, master or crew of a ship should comply with the rules on navigation and collision and that nothing in the regulation exonerates any vessel, owner, master or crew of a ship from the consequence of refusing or neglecting to obey the rules of navigation. Rule 5 provides that every vessel has the duty to be on the look-out by sight and hearing to prevent risk of collision while Rule 6 states that vessels shall move at safe speed so that it can take effective action to prevent collision.

Another convention that made provision for safety at sea is the International Convention for the Safety of Life at Sea of 1974 (SOLAS) [55]. This Convention amongst other provisions, states that the officer in charge of the navigational watch is expected to take accurate compass bearing frequently so as to detect approaching ships and prevent collision.

It could be deduced from this that both the local statutes and international conventions made similar rules with regard to prevention of collision at sea.

It is hoped that these rules are properly observed so as to maintain adequate safety at sea.

Conclusion

Collision at sea can arise as a result of a physical impact between a ship and a ship and a ship and other structures located at the sea. Several claims can arise from collision at sea and fault is apportioned to those in charge of the vessels. To ground liability for collision incident, damage caused must be foreseeable and must be a direct consequence of the defendant's action or omission. Several rules have been made both locally and internationally as a way of preventing collision at sea. However, it is still subject to debate whether these rules have been effective enough to prevent collision at sea. It is suggested that there should be a deliberate attempt by all concerned in making sure that collision at sea is reduced to the barest minimum.

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7. Admiralty Jurisdiction Procedure Rules, 2011, 3, 2.
8. Admiralty Jurisdiction Act, 1991, s. 18(1)(b).
9. Admiralty Jurisdiction Act, 1991, s. 5(2).
10. Louis N. Mbanefo, Nigerian Shipping Practice and Procedure, (Lagos, Nigeria: Lomac Books, 2012). p.112.
11. ibid.
12. ibid. See Captain Panagiotis Axis v. Tidex (Nig.) Ltd & Anor. (1972) NSC 203. See also British Shipping Laws: Admiralty Practice Volume 1, Para 671-680; See The Vortigen (1859) SW. 518.
13. See s.419(4) of the English Shipping Act 1894, which provided as follows:
14. Where in the case of a collision, it is proved to the court before which the case is tried that any of the collision regulations have been infringed, the ship by which the regulation has been infringed shall be deemed to be in fault, unless it is shown to the satisfaction of the court that the circumstances of the case made departure from the regulation necessary.
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16. Aleka Mandaraka-Sheppard fn 6.
17. (While assessing damages, immediate cause and not the remote one has to be considered)
18. See Chief Otonyesiegha Ololo v. Nigerian Agip Oil Ltd and Anor, 2001, 6SC 136.
19. (1815) 2 Dod 83. p85.
20. Aleka-Mandaraka-Sheppard, fn 6.
21. ibid.
22. ibid.
23. ibid. See also *The Cainbahn* (1914) B.25 The Betavier II (1925) 42 TLR 8.
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26. ibid. See also The Bywell Castle, (1879)4 PD 219.
27. ibid. See The Sitavem and The Spirit (2001) 2 Lloyd's Rep 17; The Topaz and The Iraqua (2003) 2 Lloyds Rep 19 The Pearl and the Jahre Ventures (2003) 2 Lloyd's Rep. 188.
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52. S. 268(1)(a).
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