CONTRIBUTORY FAULT IN MARITIME COLLISIONS IN THE LAW OF HOLLAND

Philip J. THOMAS

(*University of Pretoria*)

Introduction

This paper deals with the collision between ships and aims to show how in Roman-Dutch law various approaches in respect of contributory negligence developed around this topic. I shall first deal with the texts of the *Corpus Juris Civilis* pertaining to collision between vessels, and thereafter take one of the principal works of Hugo de Groot, as the starting point for the law of Holland. Thereafter the approach of Roman law *vis à vis* negligence of the aggrieved party will be analysed. After which the contribution of the Roman-Dutch jurists is described and evaluated.

Roman law

Although the Romans did not have a special reputation as mariners, it should be kept in mind that the Roman empire embraced the Mediterranean and that bulk and cheap transport took place by ship. It is thus that a number of titles in the Digest[1] and Code[2] are dedicated to maritime matters and deal with skippers and shippers, shipwreck, maritime insurance and the apportionment of damage and loss.

[1] D.4.9 *Nautae caupones stabularii ut recepta restituant*; D.14.1 *De exercitoria actione*; D.14.2 *De lege Rhodia de iactu*; D.22.2 *De nautico fenore*.
[2] C.4.25 *De exercitoria et institutoria actione*; C.4.33 *De nautico fenore*; C.11.6 *De naufragiis*.

Collision between ships is, however, dealt with in the title on the *lex Aquilia*[3]. In consequence, Proculus gave the owner of a skiff damaged as the result of a collision with a boat an *actio legis Aquiliae* against the negligent skipper[4]. Where one ship sank another ship, Alfenus said that an action under the *lex Aquilia* lay either against the helmsman or the captain, unless the ship was unmanageable as the result of *vis maior*. Ulpian concurred and stressed the requirement of fault on the part of the sailors[5]. It is remarkable that in both texts the jurist gave an action against the negligent sailor[6], but held *obiter* that in the event of no fault no action could be brought against the owner[7] The question whether the captain or the owner of the ship could be held liable in terms of the *lex Aquilia*, falls, however, outside the ambit of this paper and will be discussed at another occasion.

Roman-Dutch law

Hugo de Groot is internationally recognised as one of the fathers of both natural law and international law[8], but in a national context he can be considered the father of Roman-Dutch law or rather, as he called it himself, the jurisprudence of Holland. During his busy and eventful life he was amongst others, the *raadpensionaris* of Rotterdam from 1613 until his arrest in 1618. In this capacity he acted as adviser and secretary to the city council,

[3] D.9.2 *Ad Legem Aquiliam*.

[4] D.9.2.29.2 (Ulp., *l.18 ad ed.*): *Si navis tua inpacta in meam scapham damnum mihi dedit, quaesitum est, quae actio mihi competeret. et ait Proculus, si in potestate nautarum fuit, ne id accideret, et culpa eorum factum sit, lege Aquilia cum nautis agendum, (...): sed si fune rupto aut cum a nullo regeretur navis incurrisset, cum domino agendum non esse.*

[5] D.9.2.29.4 (Ulp., *l.18 ad ed.*): *Si navis alteram contra se venientem obruisset, aut in gubernatorem aut in ducatorem actionem competere damni iniuriae Alfenus ait: sed si tanta vis navis facta sit, quae temperari non potuit, nullam in dominum dandam actionem: sin autem culpa nautarum id factum sit, puto Aquiliae sufficere.*

[6] D.29.2.9.2 (...) *lege Aquilia cum nautis agendum,* (...); D.29.2.9.4 (...) *in gubernatorem aut in ducatorem actionem competere damni iniuriae* (...).

[7] *Loc cit* (...) *cum domino agendum non esse*; (...) *nullam in dominum dandam actionem.*

[8] H.R. HAHLO and E. KAHN, *The South African Legal System and its Background*, 1973, 551sq.; D.H. VAN ZYL, *Geskiedenis van die Romeins-Hollandse Reg*, 1979, 191sqq, 349sqq.

and prepared and executed the decisions of this body of which he was the president. The *raadpensionaris* also represented the city in the States of Holland and Zeeland[9].

De Groot's claim to the fatherhood of the jurisprudence of Holland is illustrated by the manner in which he deals with maritime collisions. This subject-matter is found in the third book of his *Introduction to Dutch Jurisprudence*[10] in parts 37 and 38. In the first-mentioned part he discusses delicts against property[11], while part 38 deals with quasi-delict[12]. In contrast to the practice current in his day of writing extensive commentaries on the *usus modernus* of Roman law with, where necessary, a short reference to contemporary local law, de Groot incorporates local law, received Roman law and natural law into one institutional system.

Although one would expect to find texts dealing with contributory negligence in part 37 where delicts against property are discussed, the mother text is found in part 38. This results from the fact that de Groot refers in his discussion of the quasi-delictual maritime collisions on several occasions to situations where Aquilian liability would apply.

It is thus that *Inleidinge* 3 38 16 states that if two ships under sail collide, which collision could not have been avoided, and the one ship goes down or is damaged, the loss on both sides is borne in equal parts, irrespective whether this occurred during day or night, in clear or bad weather. However, if this occurred as the result of intent or negligence by the one party, such party would bear the loss alone[13].

---

[9] D.H. VAN ZYL, 347; J.PH. DE MONTE VERLOREN, J.E. SPRUIT, *Hoofdlijnen uit de ontwikkeling der rechterlijke organisatie in de Noordelijke Nederlanden tot de Bataafse omwenteling*, 1982, 223.

[10] *Inleydinge tot de Hollandsche Rechts-Geleertheyt*. The first edition appeared in 1631's Gravenhage;

[11] III Boek XXXVII *Deel Van Misdaed tegens Goed.*

[12] III Boek XXXVIII *Deel Van Misdaed door Wet-Duyding*.

[13] III 38 16. *Zoo wanneer twee schepen binnen ofte buyten 's Lands elkander aen boord komen: niet konnende ontzeylen nogte ontwyken, ende zulks 't een het ander in de grond stiet ofte schade aendede, die schade zoo ter eener als ter andere zyde werd gedragen half ende half, 't zy dat het gebeurde by dage ofte by nachte, by schoon weder ofte onweder: maer geschiedet by wille ofte schuld van de eene, die zoude als dan de schade alleen gelden*.

In 3 38 18 de Groot states that if a vessel under sail runs into a ship which is lying at anchor or is moored and the latter suffers damage, the sailing ship is liable for all damage to the other if the collsion was her fault. If it was not her fault she was liable for half the damage caused to the other ship. The absence of fault on the part of the sailing ship must be purged by an oath, which fault, however, can be proven by the ship run into, in which case the latter must also prove that there was no fault on her side[14].

The notes which Simon Groenewegen van der Made added in 1644[15] to the *Inleidinge* indicate that the sources used by de Groot were the Ordinance of emperor Charles V on maritime matters of 1551[16] and the further Ordinance of king Philip of Spain on the same of 1563[17] as well as the laws of Whisby[18].

---

[14] III 38 18. *Ingevalle een schip binnen ofte buyten 's Lands zeylende ofte fockende, een ander schip vast leggende inzeylde, ende schade dede, zoo is den zeylende gehouden in de helft van de schade, ende moet hem met zyn schipsgezellen by eede zuyveren, dat zulks by zyne schuld niet en is geschied, ten waer de beschadigde wilde betoonen dat den inzeyler schuld hadde gehad, ende dat hy zelve ware geweest buyten alle schuld, in welken gevalle de inzeyler de geheele schade moet betalen.*
The question how a ship can be held to be at fault and thus liable for the whole damage falls outside the scope of this article and shall be dealt with elsewhere.

[15] *Inleydinge tot de Hollandse Regts-Geleertheyt*, beschreven by Hugo de Groot, bevestigt met Placaten, Hand-Vesten, oude Herkomen, Regten, Regts-geleerden, Sententien van de Hoven in Holland en elders, mitsgaders eenige byvoegsels en aanmerkingen op de selve door Mr Simon van Groenwegen van der Made Amsteldam (1644).

[16] De Ordonnantie, Statuit ende Nieuw Edict van keiser Karel den Vijfden, op het faict vander See-vaerte, &c van den 19 Julius 1551. Art *46 Schepen beschadigende malkanderen, door niet te konnen wijcken. Item, oft gebeurde dat twee Schepen binne oft buyten 's Lands zeylende, en in 't zeylen elcx anderen aan boort quamen, niet mogende ontzeylen noch ontwijcken, ende de selve Schepen elckander aan boort komende, ende in den grondt stootende, oft anderen schade aan de Schepen doende, soo sal de schade van den Schipper, die alsoo gedaan ende geschiet is, gerekent worden half ende half, als d'eene helft den genen die de schade geleden heeft, ende d'ander helft tot last van den genen die alsulcke schade gedaan heeft, soo wel of 't voorschreven ongeluck geschiede by dage ofte by nachte deur tempeeste ofte schoon weder, hoe 't selve soude mogen gebeuren.*
Art. 48 *Schip hem beschadigende op een ander mans Anker. Item, ende ingevalle dat een Schip van binnen oft buyten's Lants komende, zeylende oft soeckende een ander Schip liggende aan sijnen ancker inne zeylde, schade doende, Soo sal de gene die alsoo is komen zeylende den gequetsten oft beschadighden Schepe, die geheele schade betalen, ten ware dat sulcx toe-quame by groote tempeeste of andersins, buyten schulde van den gene die de schade doet.*

This statute is found in Pieter LE CLERCQ, *Algemeene Verhandeling van de Heerschappy der Zee: en een compleet lichaam van de Zee-Rechten*, Amsterdam 1757, 207sqq. De Clercq mentioned that he followed the text-edition by Adriaan Verwer of Amsterdam 1711, but the Verwer edition contains only three articles from this Ordinance; VERWER, *Nederlants See-Rechten*, Amsterdam 1711.

[17] De Nader Ordonnantie, Statuit ende Eeuwig Edict van Koning Filips van Spanje op het faict vander See-Vaert van de 31 October 1563 Titel Van Schepen die malcanderen beschadigen Art. 1: *Seylende Schepen malcanderen beschadigende. Oft gebeurde dat twee Schepen, binnen oft buyten 's Lants zeylende, in 't zeylen malcander aen boort quamen, niet moghende ontseylen noch ontwijcken; ende sulck d'een d'ander inden gront stiete, oft ander schade aan dede: soo sal die schade zijn half en half: 't zy dat 't selve gebeurde by daghe of by nachte, in tempeeste, schoon weder, oft anderssins: maar gheschiedet met wille, of by schulde van den eenen, die sal die schade alleen ghelden.*

Art. 3: *Seylende Schip, een ander vast ligghende beschadigende. Ingevalle dat een schip van binnen of buyten 's Lants comende, seylende of sockende, een ander schip vast leggende, in-seylde, ende schade dede; soo sal de gene die alsoo is comen seylende, den gequetsten of beschadighden schepe de helft vande schade betalen; ende hem met sijnen schiplieden purgeren by eede, dattet by sijne schult niet geschiedt en is: ten zij dat die beschadighde contrarie weet te toonen, ende dat hy selve oock buyten alle schult is; in welcken ghevalle sal 't voorsz Schip, van buyten comende, de geheele schade betalen.* DE CLERCQ, 233sq; VERWER, 118sq.

[18] Die Gemeene Costumen vander See: meest doorgaens genoemdt Wisbuische See-Rechten; doch nu, naer hunne waerheidt, in drien afgedeelt. II Dit sijn die Vonnissen vanden Waterrechte ten Damme in Vlaenderen. Art 27. *Item. Het gebeurt dat een Schip leit in eender haven gemeert met touwen, ende een ander Schip komt met den getijde ende slaet aen dat Schip dat daer gemeert leit: soo dat van die slage scade heeft, en de Wijn dair in den boêm uitvliget: die scade is schuldig te sijn gedeeld bij prijse onder beide die Scepen, ende die Wijn ofte goed dat in beide Schepen is, is sculdig te deilen gemeenlijke die scade onder hemlieden. De Schipper die de schade gedaen heeft is schuldig te sweren met sijnen Schipmannen, dat hij het niet met willen gedaen en heeft, ook dat hij daer niet om doen en konde: soo is hij schuldig, ende en verliest die schade niet meer dan, half te betalen: ende en derst hij dat met sijne Schipluiden niet sweren, soo moet hij de schade gantsch ende geheel betalen. Dat is 't recht daer van.*

Dit is die reden, waerom 't vonnisse alsoo gemaekt ende gevonden is. Het gevalt dat men geerne een oud Schip legt inden weg van andere goede Schepen, op dat het vanden anderen alle de schade mochte hebben indien dat het vanden anderen Schepe gebroken word. maer als men weet dat de schade half en half gewijst word, soo legt men 't geerne uitten weg.

III *Dit is die Ordinancie, die de Scippers en de Coopluden met malkanderen begheren van Scip-recht*, (tot Amsterdam) Art. 48: *Item. Een Schip seilt van Amstelredam of van anderen steden; ende dat een dat ander aenseijlt, ende en geschied niet met willen: een ygelijk sal de schade half gelden ende hebben. Maer geschiedet met willen, soo soude die, die dat ander Schip aenseilde, die schade alleen gelden ende beteren.*

Art. 68: *Item. Het gevalt dat het eene Schip het ander aenseilt met ongevalle, soo dat dat eene Schip met sijne goederen verloren blijft: soo sal men dat goed dat in beijde Schepen is (eer dat eenig Schip verloren sij) op geld setten of waerderen.*

The laws of Whisby

A brief explanation on the latter may be necessary. The Amsterdam merchant Adriaen Verwer published in 1711 his *Nederlants See-Rechten* which he commenced with the text of the general customs of the sea commonly known as the laws of Whisby. Verwer explains in his notes that the name was a misnomer, brought about as the result of negligent editing of a 1505 publication in Copenhagen. This publication was meant to contain a body of maritime law in use in various countries. Thus, Verwer explains the first twelve articles dealt with the maritime code of Whisby or the Baltic Sea[19], while the other two collections incorporated in the volume, were the decisions on maritime law from Damme in Flanders[20] and the collected customs on maritime matters of Amsterdam[21]. As a result of an editorial oversight, the whole publication appeared under the title "Laws of Whisby". The first of the other two collections was in fact a collection of judgments by the court of admiralty of the French isle of Oléron[22]. The Flemish transplant hereof, the Damme decisions, were adopted by Westkappele in Zeeland about 1500 AD and thereafter in other maritime ports in Zeeland as well as on the Meuse and the whole of South-Holland. The second collection, which Verwer attributed to Amsterdam, probably originated in Staveren[23], and spread after its reception by Amsterdam to the rest of North-Holland.

Verwer was of the opinion that the twelve articles of Baltic or Whisbic maritime law did not apply in Holland, but that the other

---

Dan sal de waerde van de goeden van beide Schepen (te samen gesommet) betalen dat verloren goed, ponde ponde-gelijk: mark marke-gelijk. Alsoo salmen ook prijseren de waerde van beide Schepen, eer die schade geschiedde: soo sal die prijs van beide Schepen (te samen gesommet) betalen dat verloren Schip, pond ponde gelijk: mark mark-gelijk.

[19] VERWER, *Aenteikeningen*, 36.

[20] *Die Vonnissen vanden Water-Regte ten Damme in Vlaenderen*. Verwer was of the opinion that these contained the oldest maritime law in the Netherlands and were collected even before 1300 AD.

[21] Verwer is not sure about the date of this collection, but is of the opinion that this was after 1400 AD.

[22] P. GERBENZON/ N.E. ALGRA, *Voortgangh des rechts*, 1972, 113. The Roles of Oléron dated from the twelfth century. HAHLO and KAHN, 466.

[23] GERBENZON/ ALGRA 113.

two collections were still in force as customary law, unless abrogated by later statute.[24]

De Groot's texts

As stated both texts of de Groot deal primarily with quasi-delict, which in the institutional system of de Groot is limited to no fault liability in cases where somebody suffers damage "from or by what is ours." In respect of accidental losses caused by vessels to other vessels, customary law and statutory intervention had abolished the Roman law principle that no action could be instituted and thus no compensation was payable.

A new rule developed by the court of Oléron, was generally adopted and slightly adapted with the result that in Dutch maritime law the loss on both sides was borne in moieties. However, this rule only applied in no fault collisions, which fact is stressed by the repeat article of Philip of Spain where it is added that in the event of fault of one of the parties, that ship shall bear the loss alone[25].

De Groot limited himself to the incorporation of the statutes into the system of delictual and quasi-delictual claims and did not enter into the possibility of fault on the part of both ships. Nevertheless, these texts did provide the basis for a development on contributory negligence in Roman-Dutch law.

Before discussion of the Roman-Dutch law a brief exposé of contributory negligence in Roman law is required.

Negligence of the plaintiff in Roman law

Contributory negligence is found when negligence of the plaintiff has contributed to delictual damage.

[24] VERWER, 38 where he cites art XX of the *Verklaringe van Costuimen der Stede van Amsterdam, onderhouden in civile Saken*, which was sent on 12 January 1570 to the Hof van Holland. *Item. Wort ook inderf voorsz Stede gehouden Seevaerdig recht, in saken der Seilinge ende Seevaerdige neringe beroerende: waer inne gebesigt worden de Costumen vande Water-regten; eendeels bij Ordonnantie vande Majesteit, ende eensdeels na den Waterregte van Wisbui, in gewoonte ende observantie wesende.*

[25] Cf *supra* n.17, art.1.

Negligence on the part of the plaintiff is encountered in several of the texts dealing with the *lex Aquilia* [26], from which it appears that fault on the part of the aggrieved person was a defence in Roman law, if the damage had been caused negligently[27]. Thus we find in the *regulae iuris* that if anyone incurs loss which is his own fault, he is not regarded as incurring loss[28].

It is not clear whether the Roman jurists viewed negligence by the plaintiff as compensation of the negligence of the defendant or as an interruption of the causal connection between act and damage[29]. The Accursian gloss on *Dig* 9 2 9 4 appears to adhere to the first solution by stating that *culpae culpa compensata dissolvitur*[30].

---

[26] D.9.2.9.4 (Ulp., *l.18 ad ed.*): *sed si cum alii in campo iacularentur, servus per eum locum transierit, Aquilia cessat, quia non debuit per campum iaculatorium iter intempestive facere.* D.9.2.11pr. (Ulp., *l.18 ad ed.*): *quamvis nec illud male dicatur, si in loco periculoso sellam habenti tonsori se quis commiserit, ipsum de se queri debere.* D.9.2.28pr. (Paul., *l.10 ad Sab.*): *Qui foveas ursorum cervorumque capiendorum causa faciunt, si in itineribus fecerunt eoque aliquid decidit factumque deterius est, lege Aquilia obligati sunt: at si in aliis locis, ubi fieri solent, fecerunt, nihil tenentur.* D.9.2.30.4 (Paul., *l.22 ad ed.*): *Si vulneratus fuerit servus non mortifere, neglegentia autem perierit, de vulnerato actio erit, non de occiso.* D.9.2.52.1 (Alf., *l.2 digest.*): *Tabernarius in semita noctu supra lapidem lucernam posuerat: quidam praeteriens eam sustulerat: tabernarius eum consecutus lucernam reposcebat et fugientem retinebat: ille flagello, quod in manu habebat, in quo dolor inerat, verberare tabernarium coeperat, ut se mitteret: ex eo maiore rixa facta tabernarius ei, qui lucernam sustulerat, oculum effoderat: consulebat, num damnum iniuria non videtur dedisse, quoniam prior flagello percussus esset. respondi, nisi data opera effodisset oculum, non videri damnum iniuria fecisse, culpam enim penes eum, qui prior flagello percussit, residere:*

[27] If the damage was caused intentionally Aquilian liability would have been incurred. D.9.2.9.4 *in fine*: *qui tamen data opera in eum iaculatus est, utique Aquilia tenebitur*. D.9.2.52.1: *respondi, nisi data opera effodisset oculum, non videri damnum iniuria fecisse, culpam enim penes eum, qui prior flagello percussit, residere.*

[28] D.50.17.203 (Pomp., *l.8 ad Q. Mucium*): *Quod quis ex culpa sua damnum sentit, non intellegitur damnum sentire*.

[29] As regards the use of the terms contributory negligence and culpa compensation and the criticism thereof vide W.W. BUCKLAND, *A Text-book of Roman law from Augustus to Justinian*, 1963, 587; T.J. SCOTT, *Some Reflections on Section 1(1) (a) of the Apportionment of Damages Act 1956 and Contributory Intent*, in: *Huldigingsbundel Paul van Warmelo*, 1984, 168.

[30] Gloss r *Quia non debuit.* ergo culpae culpa compensata dissolvitur: *ut j de compen l ambo & j sol matr l viro*. Ioan. Cf gloss s *Tenebitur* (...) & est ratio, ut dixi: quia culpa culpam abolet, (...) The allegations used in support of the culpa compensatio doctrine are D.16.2.10 and D.24.3.39. The doctrine is build on the

In consequence, a collision between two ships would in Roman law have been adjudicated in terms of Aquilian liability. Where the collision could not have been avoided, each side bore her own loss. If the collision occurred as the result of intent or negligence of the one side, that party would bear the total loss; in the event of fault on both sides, the solution is identical to the case where the collision was the result of vis maior or casus, namely no claims and each side bears her own loss.

Roman-Dutch law

De Groot's emulator Simon van Leeuwen makes no mention of contributory negligence in his treatment of collision between ships in *Het Rooms-Hollands-Regt*[31] nor anywhere else in his work.

Joannes Voet is one of the principal Roman-Dutch authors who adresses in *Commentarius ad Pandectas*[32] 9 2 17 the matter of contributory negligence. On the topic of the barber who cut the throat of the slave which he was shaving where people customarily played games, when a ball knocked his hand[33], Voet approvingly cites the argument that someone entrusting himself to a barber with his chair in a dangerous place, has himself to blame. Voet's approach appears to be based on *culpae compensatio*, but with a more logical application of the rules of set-off, since Voet is of the opinion that the greater negligence of the barber cannot be excused. Here Voet introduces a new rule, namely that in the event of mutual but unequal fault, he whose negligence was the greater shall be liable. This approach implies that a quantitative estimate of the negligence on each side must be made; if the negligences are unequal the smaller fault is discharged, but the larger remains in force. The result is that the claim against the more negligent

words .. *ipso iure compensatione neglegentiae facta*. of the first, and the sentence *Paria enim delicta mutua pensatione dissolvuntur*. of the second text. Cf The Accursian gloss e *Paria enim*. Nota. delictum cum delicto compensari. See also gloss c *Quod quis.* on D.50.17.203.

[31] Simon VAN LEEUWEN, *Het Rooms-Hollands Regt* (Amsteldam 6 impr 1686) IV 39 7.

[32] The Hagae-Comitum edition of 1731 was used.

[33] D.9.2.11pr.

succeeds in its totality.[34] The logical consequence of this set-off should be that where the fault is equal on both sides, both are discharged. This would make the situation identical to a no fault accident. As the Roman principle that each party would bear her own loss, has been relinquished in Roman-Dutch marine collisions by the principle that the loss on both sides is borne in halves, this moiety rule should apply in marine collisions where mutual equal fault was present.

However, in his treatment of maritime collisions in 9 2 15 Voet does not draw the consequences of his own rule on culpa compensation and limits himself to the statement that contemporary legislation has abrogated the Roman law position concerning accidental damage[35]. He sets out the statutory provisions and gives references to the relevant statutes, case law and literature[36].

Legal practice as reflected in collections of opinions and decisions was primarily occupied with the questions whether these statutes applied to all ships both at sea and on inland waters, and whether the loss to be divided was limited to losses to the ships or whether the goods on board were included as well[37]. In only one instance contributory negligence was mentioned, namely in a case before the Hooge Raad[38] of Holland, Zeeland and West-Vriesland

[34] VOET, *Commentarius ad Pandectas* 9.2.17. *dum novum non est, ut in concurrente duorum culpa is tenetur, cuius culpa maior conspicitur*. Voet bases this argument rather strangely on D.18.6.13(12) & 14(13) and D.2.7.1.2 and D.2.7.2.

[35] *Commentarius ad Pandectas* 9.2.15. *Quae tamen de damno sine culpa navigantium illato per navigiorum collisionem paulo aliter hodiernis legibus nauticis definita sunt*.

[36] *Placitum nauticum Philippi Regis ult Octob anni 1563 tit van Schepen die malkander beschadigen art 1 2 3 4 5 vol 1 plac Holl pag 817, Wisbuysche Zeerechten art 48 49 50, Hugo Grotius Manudictio ad Jurisprudentiam Hollandicam lib 3 c 38 num 18 & seqq, Neostadius Curiae Supremae Decisiones 48 49, Jac Coren Observationes 40, Responsa Jurisc Holl pars 1 consil 198, Vinnius ad Peckium de re nautica ad l5 ff de lege Rhod de jact and Bellum Juridicum casus 49*.

[37] Cornelis VAN NIEUSTAD en Jacob KOOREN, *Hollandsche Praktyk in Rechten*, Rotterdam 1655, Vonnis 48 and 49; Jacobus COREN, *Observationes Rerum Iudicatarum*, Amstelredam 1661, Obs. 40 and 41; *Consultatien , Advijsen en Advertissementen* Deel 2, Rotterdam 1670, Cons. 27; *Bellum Juridicum ofte den Oorlogh der Advocaten*, Amsterdam 1683, casus 48 and 49; J.M. BARELS, *Advysen over den Koophandel en Zeevaert* I, Amsterdam 1780, Advys 28 en 34.

[38] The Hoogen Raad van Holland en Zeeland was from 1582 the Supreme Court of Appeal in Holland and from 1587 the same for Zeeland. See H.R. HAHLO and

reported by Neostadius[39]. Both sides had blamed the other party and the court came to the logical solution that since negligence had not been established, or that the fault on each side appeared to be equal, the loss was to be borne equally by both[40].

It was therefore left to the two most eminent protagonists of 18th century Dutch law, van Bynkershoek[41] and van der Keessel[42] to pose the question of contributory negligence and to provide impetus for development.

In Chapter 22 of the fourth book of *Quaestionum Juris Privati Libri quatuor*[43] van Bynkershoek, a member of the Hooge Raad van Holland en Zeeland since 1704 and the president of this court from 1724 until his death in 1743[44], discusses damage to ships caused by the fault of one or both.

In the opinion of van Bynkershoek Roman law predominates and he states that the rule that loss is carried by the party, who negligently caused such loss, has been followed in the various maritime codes. Thus damage negligently caused by a ship under sail to another ship under sail, or to another vessel at anchor or in moorings, as well as damage caused by a ship which has as the

---

E. KAHN, *The South African Legal System and its Background*, 1973, 542sq; MONTE VERLOREN-SPRUIT, 136sq.

[39] CORNELIUS NEOSTADIUS, *Utriusque Hollandiae, Zelandiae, Frisiaeque Curiae Decisiones*, Hagea-Comitis 1767, Dec. 49.

[40] *Curia, cum de culpae auctore non constaret, vel quod utrobique culpa par erat, damnum commune ad utrumque spectare censuit.*

[41] Born in 1673, van Bynkershoek became a member of the Hooge Raad van Holland and Zeeland in 1704 and its president in 1724 until his death in 1743. This did not prevent him to publish widely. His *Quaestiones juris publici* (Lugduni Batavorum 1737) is one of the fundamental works on public international law. In *Quaestiones juris privati* (Lugduni Batavorum 1744) van Bynkershoek dealt with Roman-Dutch law, while his *Observationes juris romani* show him to have been a true humanist. His *Observationes tumultuariae* describing the discussion in chambers of the Hooge Raad were published between 1926 and 1962 by E.M. MEIJERS *et al*. HAHLO and KAHN, 557-559; ROBERTS, 68sqq; VAN ZYL, 376-370.

[42] Dionysius Godefridus van der Keessel (1738-1816) held a chair of law from 1770 until 1808. His lectures on de Groot's *Inleidinge* (see infra n.50) provide closure to the law of province of Holland. HAHLO and KAHN, 559sq; ROBERTS, 172sq; VAN ZYL, 392-394.

[43] Lugduni Batavorum 1744.

[44] HAHLO and KAHN, 557. VAN ZYL, 367-370.

result of negligence come adrift, is borne totally by the vessel at fault.

Van Bynkershoek is of the opinion that Roman law equally applies where both parties to a collision are to blame. He refers to the decision of the Hooge Raad as reported by Neostadius, but remains unconvinced that this case was decided correctly. It is his opinion that in such instances no actions are available and that each party consequently carries its own loss. This opinion he bases on Digest 50 17 203, and 39 2 8[45].

However, van Bynkershoek plays the devils advocate by proposing the argument that article 3 of title 5 of the Placaet of Philip could have introduced an exception to the Roman rule. This article provided that where a ship under sail damaged a ship at anchor, the ship under sail bears her own loss and the damages to the stationary ship are to be borne in equal parts, if the crew of the sailing ship declared under oath that they were without blame. However, if the stationary ship could prove the fault of the sailing ship, the latter would be liable for the total loss, but only if the stationary ship could also prove that there was no fault on her side.

Van Bynkershoek questions whether the rule of the equal division of the loss would apply in the case where the stationary ship succeeded in proving the fault of the perpetrator, but failed to prove her own absence of all blame.

He rejects this solution[46] and states that the correct interpretation must be that the guilty party has to carry all loss, unless the party suffering loss was also to blame, in which case both sides bear their own losses. This interpretation is in accordance with his belief that in the event of contributory negligence no action is available. He supports his argument with art 46 of the Placaet of Charles and art 1 of title 5 of the Placaet of Philip, which provide that only in the event of no fault on both sides is the loss carried equally by both parties.[47]

---

[45] D.39.2.8 (Gaius, *ad ed. praet. urb. titulo de damno infecto*): *Quod forte tunc recte dicetur, cum non ipsius neglegentia, sed propter aliquod impedimentum sibi non prospexit.*

[46] *Quaestionum* IV 22. *(s)ed cum ne Jure quidem Romano semper recte argumenteris a contrario, noli id exspectare a jurisprudentia posterioris aevi.*

[47] *Loc cit*.

In his *Theses Selectae*[48] the academic van der Keessel follows the interpretation of van Bynkershoek in preference over the decision of the Hooge Raad as reported by Neostadius.[49]

However, in his lectures based on the *Inleidinge*[50] of de Groot van der Keessel discusses the question of contributory negligence on several occasions. In his lecture on *Inleidinge* III 38 16[51] he poses the question regarding the position where both sides to a collision were negligent. After mentioning the decision of the Hooge Raad holding that where the fault on each side appeared to be equal, the loss was to be borne equally by both[52] he sets out van Bynkershoek's objections to this solution. Van der Keessel's own interpretation of article 3 of title 5 of the Placaet of King Philip in the case of contributory negligence is that a ship under sail is more to blame than a stationary ship. For this reason culpa compensation is not admitted and in consequence the ship under sail must pay half the loss of the ship at anchor[53].

In his lecture on III 38 18 van der Keessel returns to the topic of contributory negligence. He explains that sailing ships are usually controlled with a rudder. Therefore in a collision between a ship under sail and a ship at anchor there is a presumption of negligence against the skipper and crew of the vessel under sail. This presumption he interprets from the Placaeten of Charles and Philip and finds confirmed by the fact that the sailing vessel bears her own loss even in the no fault scenario. Van der Keessel states categorically that the correct meaning of article 3 of the statute of king Philip appears to be that if any negligence was present on the

[48] Dionysius Godefridus VAN DER KEESSEL, *Theses selectae juris Hollandici et Zelandici ad supplendam Hugonis Grotii Introductionem ad Jurisprudentiam Hollandicam*, Amstelodami 1860, was the available edition.

[49] *Theses* 815 ad de Groot III 38 16 and 821 ad III 38 18.

[50] D.G. VAN DER KEESSEL, *Praelectiones Iuris Hodierni ad Hugonis Grotii Introductionem ad Iurisprudentiam Hollandicam* (edd. P. VAN WARMELO *et al.*, 1961-1967).

[51] S. v.: *Schuld van de eene*.

[52] Cf supra n.39.

[53] *Praelectiones* ad III 38 16 *Schuld van de eene*. *Sed fortasse rectius dicemus rationem in d. art. esse, quoniam navis navigans, quae impetum facit in navim iacentem praesumptione culpae maioris gravatur, nam ob eam rem magister navis obruentis cum nautis iureiurando culpam purgare debet; cum itaque levior culpa sit navis damnum passae, ideoque haec compensatio levioris cum graviore culpa non est admissa, et dimidium adhuc damni navis impetum faciens luere debet*.

part of the moored ship, the liability of the collisive ship was reduced from the total damage caused to the stationary ship by half[54]. Thus van der Keessel builds on the principle developed by Voet that in cases of mutual fault a quantitative estimate of the negligence on each side must be made. However, he rejects Voet's solution that the party whose negligence is the greater is liable for the total damages of the other, but holds that the main culprit must pay half the damages of the other.

However, the statute of king Philip was amended by the Ordonnantie of Rotterdam which decreed in section 262 that if the vessel which was run into could have avoided the collision, she must bear her own loss, since such loss was caused as a result of her own or her skippers' negligence[55]. Thus the statutory law of Rotterdam reintroduced the Roman principle.

Van der Linden's treatment of maritime collisions in his *Koopmanshandboek*[56] IV 5 is an attempt to formulate general rules for maritime collisions stating that if a ship, either under sail or lying at anchor, is damaged in a collision with another ship, the negligent vessel must bear the loss alone; if both vessels are equally to blame, each bears her own loss, while if it is unclear by whose fault the collision was caused, the loss is borne in halves by each vessel.[57] Van der Linden skirts the issue of contributory negligence with unequal blame[58].

---

[54] *Praelectiones ad* III 38 18 In gevalle een Schip.

[55] VAN DER KEESSEL, *loc cit*.

[56] *Rechtsgeleerd practicaal en koopmans handboek, ten dienste van regters, practizijns, kooplieden, en allen die een algemeenen overzicht van regtskennis verlangen*, Amsteldam 1806.

[57] *Koopmanshandboek* 4 5 7 *Wordt een schip, zeilende of voor anker liggende, door aan- of overzeiling van een ander schip, beschadigd, zoo is hij, die door boosheid of nalatigheid daar aan schuld heeft, verpligt de schade alleen te dragen. Hebben zij beiden in gelijken graad schuld, draagt elk zijne eigene schade; (…) Is het niet blijkbaar, door wiens schuld de aan-of overzeiling veroorzaakt is, en konden zij dus elkander niet ontwijken, wordt de schade van wederzijden gedragen half en half* (...)

[58] His modern approach of formulating general rules, cannot avoid the exceptional case of the ship sailing into a moored or anchored ship, but he limits himself to a restatement of the rules; *loc cit*.

Conclusion

The equal division of loss in inevitable maritime accidents had developed in medieval maritime customs and is found with minor differences in both the Rolls of Oleron and the laws of Whisbuy. The statutes of the Habsburg rulers raised the customary rules to legal principles, but the rationale for the division of loss remained unclear. However, the deviation from the Roman principle of no recovery of loss in instances of inevitable accident caused Dutch jurists such as Voet, van Bynkershoek, and van der Keessel to query the Roman law approach to contributory negligence[59].

Voet made an exception to the Roman rule by quantifying the respective faults and holding that the party who had been guilty of the greater negligence should be liable in toto.

The legal acumen and practical knowledge of van Bynkershoek led him to notice the possibility of an extension of the moiety rule to cases of mutual fault by an a contrario interpretation of one of the statutory provisions. Van Bynkershoek was, however, reluctant to abandon the Roman rule, which attitude was not shared by the academic van der Keessel. The latter applied the thin end of the wedge, discovered by van Bynkershoek and taught to his students that in the event of contributory negligence the loss is to be shared. In doing so he sowed the seed for the proportionate fault rule with its system of comparative negligence.

However, the various practical documents show that fault is difficult to establish in maritime collisions, which also explains the frequent recourse to the oath. It remains doubtfull whether this solution facilitated matters. With both parties blaming the other, mutual fault is difficult to adjudicate and a division of loss sidesteps many problems. The equal division rule harboured, however, the possibility for severe injustices within itself, in that minor negligence could incur serious liability.

It has been shown that Dutch legal science was in the process of abandoning the Roman rule concerning contributory negligence.

[59] The isolated decision of the Hooge Raad appears to have had little impact. This might be attributed to the fact that the court was uncertain about the nature and extent of the respective faults, which situation is described by the term 'inscrutable fault' by American authority. Cf D.R. OWEN, *The Origins and Development of Marine Collision Law,* Tulane Law Review 51 (1977) 759 at 768.

The highest court in the province had with alacrity abandoned the same, but the cautious adherence to the rule of Roman law in matters of mutual fault by van Bynkershoek and the amendments to the Ordinance of Rotterdam show that the time for apportionment of damages pro rata to respective fault had not yet arrived.