

## **Collision Damages – Does the Eggshell Skull Rule apply in collisions between ships?**

In this edition of *Seaview*, we examine whether under English and Hong Kong law, (subject to apportionment) the owners of a vessel are responsible for all of the damage to the vessel with which she collides and her cargo, if the damage to the other vessel and her cargo is exacerbated by the poor condition of the latter vessel.

### ***Introduction***

In most cases, a collision between two vessels caused by negligent navigation gives rise to mutual claims in tort between the vessels.

In order for a vessel to be found liable for damages in tort arising out of a collision at sea, it must first be proven that the vessel had a duty of care, for example, a duty to take reasonable care and use reasonable skill to prevent the vessel from doing injury (*The Voorwaarts and the Khedive* (1880) 5 App Cas 876) or a duty to exercise good seamanship. Then it must be shown that the duty of care was breached by the vessel's negligent action, that damages were suffered as a result and that the damage suffered was caused by the vessel's negligence.

In addition to the negligence, the Privy Council established in the case of *The Wagon Mound* (No 1) [1961] 1 AC 617, the principle that to find a party liable for negligence, the damage caused must be reasonably foreseeable.

To what extent then, does damage have to be foreseeable before a party may be considered liable for negligence? Let us examine the eggshell skull rule.

### ***The eggshell skull rule***

The eggshell skull rule is a legal principle which provides that a wrongdoer must take his victim as he finds him. This means, that even if the damage suffered by the victim is more serious than that which an ordinary person would suffer because the victim has a special condition which the wrongdoer did not know about, the wrongdoer would still be responsible for the damage caused.

An illustration of this principle can be found in cases such as *Smith v Leech Brain & Co* [1962] 2 QB 405 and *Robinson v Post Office* [1974] 1 WLR 1176.

In *Leech Brain*, the plaintiff's husband worked for the defendant company as a galvaniser. As part of his work, he was required to lift articles into a tank of molten metal via a crane. He was burnt on the lip by molten metal in the course of his work and died of cancer three years later. It was not known at the time of the accident that he had any form of pre-malignant cancer or that the burn would activate a latent cancer condition in him. The court held nonetheless, that the employer was responsible for the man's death, because it was reasonably foreseeable that the man could be burnt during the course of his employment even though it was not reasonably foreseeable that the burn would induce cancer.

In *Robinson v Post Office*, a Post Office employee grazed his leg when he fell off a step of a ladder. The employee was allergic to the anti-tetanus serum administered and contracted encephalitis. This caused him to suffer brain damage. The court held that the employer was liable for the encephalitis as well as the leg injury because the employer had to take his victim as he was and the need for an anti-tetanus injection was a reasonably foreseeable consequence of the man's fall.

As can be seen from the above illustrations, this principle is generally applicable to personal injury cases. Is this principle also applicable to property damage cases? In particular, is this principle applicable to collision cases where one of the vessels involved in the collision is in poor condition and the poor condition exacerbates the damage suffered?

This matter arose for consideration in the case of *The Fedra* [2002] 1 Lloyd's Rep. 453.

### ***Considering The Fedra***

*The Fedra* was laden with a cargo of cement in bulk stowed in six of her seven holds.

A collision occurred between *The Fedra* and *Seafarer 1*. In the collision, the bow of *The Fedra* struck the starboard side of *Seafarer 1*. As a result of the collision, *The Fedra's* forepeak was breached and flooded but, after inspection, it was believed that there was no ingress of water to other spaces in the vessel. No damage was observed aft of *The Fedra's* collision bulkhead immediately after the collision.

Nine days after the collision, water was discovered in the no. 3 and 4 holds of *The Fedra*. That water had entered through a hole in the bottom plate of a "discharge box", located high up on the aft end of the no. 4 hold on the starboard side. This position was about 79 metres aft of the external bow damage suffered by *The Fedra* in the collision.

The cause of the ingress of water into the no. 4 hold was agreed to be a failure of the bottom plate of the discharge box, which was severely corroded. The impact of the collision dislodged the plate rust. The no. 4 hold was full of cement in bulk. The water then flowed from the no. 4 hold to the no. 3 hold through corrosion holes in the transverse bulkhead between the two holds. As a result of water flowing into the two holds and wetting of the cargo, the vessel became a constructive total loss.

The issue which the court had to decide was: whether the loss and damage to the no. 3 and 4 holds of *The Fedra* and the cargo carried therein was caused by the collision. In a claim for collision damages, the owners of *The Fedra* claimed for a total loss. The owners of the *Seafarer 1* said that while they were responsible for collision damage forward, this did not extend to the total loss which was caused by *The Fedra's* poor condition and the possibility that the water had entered the hold through the corrosion perforations before the collision.

The judge held that the owners of *The Fedra* were in a similar position to the insured shipowner who claims on a standard form hull and machinery policy that the ship has been lost by perils of the seas. Under English law, the party claiming on the policy must show the sequence of events relied on that the vessel was lost by peril of the seas and must prove those

facts on the balance of probabilities. If he does not do so, the court can find that the case has not been proved (see Rhesa Shipping S.A. v Edmunds (the Popi M) [1985] 2 LR 1). Fedra was classed with RINA. In the two months preceding the collision, she had undergone special survey in drydock and on leaving the dock had no outstanding recommendations. The class surveyor had not inspected the discharge box which, after the collision, was found to be very badly corroded. It was held that the collision would have caused a shock wave to be transmitted longitudinally through the hull structure from the point of impact to where the plate rust in the discharge box was dislodged.

After considering the expert evidence and the facts of the case, the judge in The Fedra found that the owners of the The Fedra had not shown on the balance of probabilities that the ingress of water began at or shortly after the collision and hence that the collision caused the ingress of water into the no. 4 hold. This was particularly because the owner of Fedra could not prove that there was no water ingress into the no. 4 hold before the collision.

However, the judge commented in his judgment, that, if the owners of the The Fedra had been able to prove on balance of probabilities that there had been no ingress of water into no. 4 hold before the collision, and that the collision triggered the final failure of the bottom plate, then the negligence resulting in the collision was the legal cause of the ingress of the water and hence the total loss. He further commented that the physical damage caused by a collision must have been foreseeable but in law, it does not matter that the precise extent of the damage was not foreseeable.

### ***Does the eggshell skull rule apply in Collision cases?***

The judge's comments in the The Fedra suggests that the eggshell skull rule **does** apply in collision cases, provided liability for the collision has been established and it has been proven that the ingress was triggered, on balance, by the collision.

This means that:-

- (i) if Vessel A collides with Vessel B, thereby allowing water to enter Vessel B and;
- (ii) Vessel B's rusty and weakened bulkheads cause an ingress of water into parts of Vessel B that would not be flooded in circumstances where Vessel B was in seaworthy condition, then;
- (iii) Vessel A would be liable for all the damage caused by the water ingress in proportion to the extent that Vessel A is liable for the collision, because Vessel B must be taken "as she is", in her existing condition, whether or not Vessel A was aware of Vessel B's condition at the time of the collision.

### ***Conclusion***

Although the eggshell skull rule in collision cases has not been considered by the courts in any great detail, The Fedra suggests that the courts would be open to applying the eggshell

skull rule in collision cases. In a collision, between vessels, provided that the owner foresaw some damage as a result of the collision, he does not have to foresee the entire extent of that damage and hence would be liable for exacerbated damages to the hull and cargo flowing from the collision even if caused by the other vessel's poor condition.

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