

[Title]

Collision at Sea due to Negligence of Both Parties

[Deciding Court]

Tokyo District Court

[Date of Decision]

2 July 1965

[Case No.]

Case No. 1 (wa) of 1963

[Case Name]

Claim for Damages

[Source]

*Kaminshu* Vol. 16 No. 7: 125

[Party Names]

Plaintiff X Kitanihon Kisen K.K.

Vs.

Defendants Y1, Y2 Chiba Suisan Co., Ltd. and 1 Or.

[Summary of Facts]

Around 2325 hours on 21 July 1961, a motorized vessel owned by Company X, Vessel M, and another motorized vessel, Vessel N, owned by Company Y1 and leased and utilized by Company Y2, collided at a site approximately 3.5 nautical sea miles slightly east south east of the lighthouse at Cape Esan, at the eastern entrance to the Tsugaru Strait. Vessel M did not navigate at an appropriate speed, despite extremely poor visibility due to dense fog, kept proceeding at full speed, and did not take any measures when she recognized the image of another vessel in front of her on the radar, even though the vessels were approaching each other. Vessel N did not navigate at an appropriate speed, either, despite extremely poor visibility due to dense fog. The collision was caused by the above professional negligence on the part of the Master of Vessel M in his operation of the ship, as well as the above professional negligence on the part of the Master of Vessel N in his operation of the vessel. As a result of the collision, Vessel M suffered actual losses of 2,171,359 yen (consisting of 2,094,750 yen for repair and inspection related expenses, and 76,609 yen for incidental expenses), and lost income of 1,448,015 yen, totaling 3,615,036 yen. X filed a suit against Y1 and Y2 claiming damages. X asserted that the principle of ‘intersecting liability’ should be adopted, claiming that Y2 could not assert a set-off and damages in the amount described above. On the other hand, Y2 asserted that the principle of ‘sole liability’ should be adopted, that, even if the principle of ‘intersecting liability’ were adopted, the prohibition against set-offs prescribed in Article 509 of the *Civil Code* did not apply to this case, and that the damages should be offset by equal amounts.

[Summary of Decision]

Claim dismissed.

1. “Vessel N was leased by Y2, and Y2, not Y1, was the party liable for the collision. It followed that X’s claim against Y1 was groundless and there was no need to rule on the rest of the arguments against Y1.”

2. “In a case of a collision at sea due to negligence on the part of both parties, there is a theory that this constitutes a single tortious act because there was a single collision, and that loss also arises in the singular with sole liability on the part of the party liable for payment. However, when both parties have suffered losses and the elements of tort are satisfied for both parties, it is proper to interpret, rather, that there were two separate tortious acts, even if there was one event, namely the collision.”

“Article 797 of the *Commercial Code* merely prescribes the appropriate interpretation that lawful contributory negligence set-offs should be obviously be applied with respect to the burden of the amount of loss in a case of a collision at sea involving mutual tortious acts committed simultaneously under one set of facts (when the extent of the negligence of each party cannot be determined, it should be apportioned equally). We cannot interpret Article 797 as having changed the substantive features of a claim for business compensation in tort. On the other hand, under the interpretation described above, Article 509 of the *Civil Code*, which prohibits set-offs does become an issue. However, Article 509 of the *Civil Code* is intended to allow a victim of a tortious act to receive compensation for losses by way of actual payments, and does not purport to prohibit set-offs for similar losses arising mutually as a simultaneous phenomenon, such as a collision due to negligence on the part of both parties.

“Turning to the issue of whether unfairness arises when the other party’s liability is limited (Article 690 of the *Commercial Code*), it is possible, from a perspective of fairness, to demand a deduction in the calculation of damages even if the liability is limited, and in any event, the issue should be decided as a matter of the interpretation of Article 690 of the *Commercial Code*. It is not proper to deny the principle of ‘intersecting liability’ for that reason.

“Incidentally, with respect to the extent of negligence on the part of the parties in this case, it was not disputed between the parties that X’s negligence was the more serious. According to the undisputed account of the events leading to the collision, X’s negligence was serious in that X’s vessel was equipped with radar, and, in addition, X maintained course at full speed. It was proper to acknowledge the ratio of negligence between X and Y2 to be at least 60% for X and 40% for Y2. Therefore, according to the equally undisputed amount of loss suffered by both parties, X had a duty of payment to Y2 in the amount of at least 2,301,021 yen, and Y2 has a duty of payment to X in only the amount of 1,447,749 yen.

“Accordingly, X’s claim for damages is extinguished on the ground of Y2’s clear expression to the Court of intent to set-off.”