§ 3 Roots of Wilful Misconduct

Being a term of Anglo-Saxon law, wilful misconduct originates from English law. As is the case in all terms of British law, the term of wilful misconduct has also been developed through case law. Nonetheless, it would be beyond the scope of this thesis to search and explain the origin of the term in ancient cases.

The term “wilful misconduct” was, for the first time in an act, adopted in the Marine Insurance Act (MIA), 1906 § 55 (2)(a). Undoubtedly, the drafters of the MIA 1906 had been inspired by the case law regarding carriage by rail, since the term used to be a part of a contractual clause which leads to the unlimited liability of the railway.

However, prior to the adoption of the term “wilful misconduct” in the MIA, the appearance of the phrase “wilful fault” in the Merchant Shipping Act (MSA) 1894 is also worth mentioning. In application, the phrase “wilful fault” in MSA 1894 also referred to the same degree of fault as the term “wilful misconduct”¹. However, the interpretation of “wilful fault” in the MSA 1894 was related to criminal liability, whereas the consequences of “wilful misconduct” within marine insurance or railway carriage were, naturally, borne within private law.

A. Criminal Liability under Admiralty Law

I. Merchant Shipping Act, 1894 § 419

The MSA 1894 was enacted for the purpose of consolidating the shipping legislation of the UK². It covered almost all aspects of merchant shipping such as registration of ships, training of seamen, liability of shipowners, wrecks, legal proceedings etc³. Among these issues, the MSA also regulated safety at sea in Part V. The first section of Part V was on the “Prevention of Collisions”, and § 419 of the Act was provided for the observance of collision regulations⁴. The first three paragraphs of the section stated:

“(1) All owners and masters of ships shall obey the collision regulations, and shall not carry or exhibit any other lights, or use any other fog signals, than such as are required by those regulations.

(2) If an infringement of the collision regulations is caused by the wilful fault of the master or owner of the ship, that master or owner shall, in respect of each offence, be guilty of a misdemeanour.

¹ Clarke, Carriage by Air, p. 160 fn. 967.
² 57&58 Vict., Ch. 60. The exact name of the Act is “An Act to Consolidate Enactments relating to Merchant Shipping”.
³ Today, all these aspects are covered by the MSA of 1995 which consolidates the UK shipping legislation since the MSA, 1894; for detailed information see Aengus Richard Martyn Fogarty, Merchant Shipping Legislation, 2nd Ed., London 2004.
⁴ Marsden, p. 731 para. 20-22.
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(3) If any damage to person or property arises from the non-observance by any ship of any of the collision regulations, the damage shall be deemed to have been occasioned by the wilful fault of the person in charge of the deck of the ship at that time, unless it is shown to the satisfaction of the court that the circumstances of the case made a departure from the regulation necessary."

Accordingly, owners and masters of ships were required to comply with the collision regulations and if they infringed the regulations by “wilful fault”, they were held criminally accountable and punished. Furthermore, if any damage arose from the non-observance of the regulations, damage was deemed to have been occasioned by the “wilful fault” of the person in charge of the deck of the ship at the time of the accident.

II. Cases and “Wilful Fault”

The interpretation of the term “wilful fault” by the courts is of core importance in showing the parallelism between “wilful fault” and “wilful misconduct”. To this end, cases addressing § 419 of MSA 1894 should be examined.

1. Cases

a) Bradshaw v. Ewart-James (The “N.F. Tiger”)

The master of the “N.F. Tiger” ordered a course in accordance with the collision regulations then in force. After a period of time he left the bridge and handed over the navigation of the ship to his chief officer. However, during the watch of the chief officer, the ship crossed the traffic lane, infringing the collision regulations. The Secretary of State for Trade claimed that the master of the ship was in contravention of the MSA 1894 § 419. The prosecutor further claimed that the master could not delegate his statutory duty of obeying collision regulations and this fact would support his being found guilty of an offence under MSA 1894 § 419 (2).

The defendant contended “that it was not sufficient [...] to show merely a breach of duty or act of negligence because sub-section (2) of Section 419 of the Merchant Shipping Act, 1894 requires any infringement of the Collision Regulations to be caused by the wilful fault of the master before the master can be guilty of an offence and further that ‘wilful’ meant deliberately and ‘fault’ meant knowing and intending so that to succeed the appellant had to prove the master knew of

5 Part XIII – Legal Proceedings – Prosecution of offences, § 680: “(1) Subject to any special provisions of this Act and to the provisions hereinafter contained with respect to Scotland, (a) an offence under this Act declared to be a misdemeanour, shall be punishable by fine or by imprisonment not exceeding two years, with or without hard labour, but may, instead of being prosecuted as a misdemeanour, be prosecuted summarily in manner provided by the Summary Jurisdiction Acts, and if so prosecuted shall be punishable only with imprisonment for a term not exceeding six months, with or without hard labour, or with a fine not exceeding one hundred pounds, […]”.

6 Marsden, p. 731 para. 20-22.