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## The liability of the shipmaster in early modern law: comparative (and practice-oriented) remarks\*

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ABSTRACT: This article deals with the liability of the shipmaster in early modern law in civil and common law, focusing on the approach of Italian and (to a lesser extent) also Iberian courts on the one hand, and on that of common law courts (mostly the King's Bench) on the other. The practice-oriented approach is deliberate: the article seeks to understand what the actual position of the carrier was, not how did learned jurists classify it. Once distinguished practice from dogmatic elaborations (especially for the civil law), this work then proceeds to compare the rules applicable in the two different legal systems. Common law courts imposed strict liability on the shipmaster, for it qualified the common carrier as a bailee. This discouraged complex discussions on causation. In theory, civil law courts applied the *culpa levissima* of the shipmaster (*qua nauta*) as elaborated by the jurists. As such, one would be tempted to conclude for the substantial affinity of the two systems: in both, the shipmaster should prove *vis maior* or answer for the loss. In practice, however, civil law courts relied more on a series of presumptions of causality. As the burden of proof depended on the specific kind of presumption (or on its absence), the abstract standard of care counted for little. Thus, the actual difference between civil and common law approaches was more on causation than the standard of care.

KEY WORDS: Shipmaster, Fault and *culpa levissima*, Law courts

### 1. Introduction (methodology in disguise)

This work looks at the position of early modern courts on the liability of the shipmaster, focusing especially on Mediterranean and English courts. The reason for choosing southern European case law (especially Italian, but also Castilian, Catalanian and Portuguese) is rather simple: unlike many northern European courts, Mediterranean ones often provided a reason for their decisions. Not all of them were bound to do so of course - suffices only to think of the greatly influential Neapolitan *Sacro Real Consiglio* and most other senates.<sup>1</sup> But, even so, when publishing a collection

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\* The research for this essay was conducted thanks to funding from the European Research Council (ERC) under the European Union's Horizon 2020 research and Innovation Programme ERC Grant agreement No. 724544: *AveTransRisk – Average - Transaction Costs and Risk Management during the First Globalization (Sixteenth-Eighteenth Centuries)*. The present contribution is meant as a preliminary study on the issue of *vis maior* and its qualification by law courts. This qualification was indeed necessary to establish when the rules for maritime averages could find application (see *infra*, § 2.6).



I am especially grateful to David Ibbetson, Paul du Plessis, Peter Oestmann, Nils Jansen and Maria Fusaro for the helpful and stimulating discussions on *culpa* in early modern law and practice. All errors

of their decisions, the editor (typically, a judge of that court) would normally seek to fill the gap with his own notes on each case.<sup>2</sup> The need of homogeneity suggested to exclude Venetian courts: despite the valiant efforts of some scholars to provide a harmonised picture of the *Serenissima* with the rest of Italy, its legal system remained remarkably *sui generis* at the very least until Napoleon and the Habsburgs took a close interest in her well being.<sup>3</sup>

The practice-oriented approach of this work, on the other hand, probably warrants a few more words. While theory and practice are equally important, Continental legal historians have frequently focused more on the first and somehow neglected the second. In all probability, this was not due to any a priori assumption about their different importance. It just happened that most studies focused on the development of legal thought.<sup>4</sup> While perhaps involuntary, however, this imbalance led many common lawyers to assume that one side was less important than the other: if most civil lawyers only looked at doctrine, they thought, then there must be a clear reason for this. Hence the belief, among more than a few common lawyers, that the history of civil law is an eminently theoretical business, much unlike the practice- and court-based evolution of the common law itself. Perhaps a different approach of most civilians could have helped to avoid this. In many a subject, the reader has often the impression that a reasoned survey of the mainstream doctrinal literature is considered as sufficient. Whether such literature provides a faithful description of the way in which the law was actually applied does not always strike as something worth checking. The risk in doing so is to create an implicit presumption of symmetry between legal literature and legal practice: although rebuttable, such a presumption might have sometimes discouraged actual verification.

In turn, this approach perhaps contributed to strengthen the perceived difference between civil and common law in terms of deductive vs. inductive reasoning. Thus,

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remain of course my own.

<sup>1</sup> The duty to justify the decision applied only to the high courts shaped as *rotae* – and so, having exclusively judicial powers and, in principle, staffed with foreigners who would sit there for a short period, from 3 to 5 years. For a short but very informative introduction see M. Ascheri, *I grandi tribunali*, in *Enciclopedia Italiana*, Appendix VIII: *Il contributo italiano alla storia del pensiero - Diritto*, Roma 2012, pp. 121-128.

<sup>2</sup> Indeed, the first printed collection of the decisions of a high court was precisely of the Neapolitan one, at the hands of Matthaeus de Afflictis (1447/50-c.1523), a law professor appointed to the *Sacro Real Consiglio* towards the end of his career, *Mathei De Afflicto Neapolitani regii consiliarii Decisiones causarum Sacri Consilii Neapolitani suo tempore*, In ciuitate Neapoli, per magistrum Ioannem Antonium de Cane Papiensem, die vltima mensis Aprilis 1509.

<sup>3</sup> Not to mention that the Venetian state was the only one in the Italian Peninsula without what it is often described as a “high court” (a central, supreme law court – not even the *Avogaria di comun* had both these features, being supreme but not properly “central”, at least in the way we would understand the term). The fragmentation of judicial power within a large number of different institutions was one of the peculiar features of the Venetian Republic.

<sup>4</sup> There are of course exceptions to this trend. Suffices to remember the pioneering work of G. Gorla, *I Tribunali Supremi degli Stati italiani fra i secc. XVI e XIX, quali fattori della unificazione del diritto nello Stato e della sua uniformazione fra Stati (Disegno storico-comparatistico)*, in B. Paradisi (ed.), *La formazione storica del diritto moderno in Europa*, Firenze 1977, vol. 1, pp. 445-532. See also R. Savelli, *Tribunali, “decisiones” e giuristi: una proposta di ritorno alle fonti*, in G. Chittolini, A. Molho and P. Schiera (eds.), *Origini dello Stato. Processi di formazione statale in Italia fra medioevo ed età moderna*, Bologna 1994, pp. 397-421.

while the common lawyer seeks to make sense of the trend in case law by collecting, ordering and studying the main decisions on a given subject, the civil lawyer would just identify what the abstract rule at stake is, and expect to find it applied by law courts time and again. The perspective of the common lawyer is therefore traditionally described as “bottom-up”, whereas that of the civilian is usually considered to be the reverse. It is here that the abovementioned “presumption of symmetry” of some civil lawyers applies: so long as what is found “up” (in the more sophisticated legal literature) is not disproven, it clarifies what must have happened “down”, in the realm of practice.

This might have contributed to the widespread misconception that common law courts followed their precedents and civil law courts did not. While neither group was bound to any *stare decisis* rule (this happened in England only after the re-organisation of the courts in the nineteenth century), it was the position of common law courts to be less consistent. This lack of rigid consistency over the centuries is obvious to the common lawyer – most changes in the law took place in court<sup>5</sup> – but perhaps not always to the civilian. By contrast, especially in a long-term perspective, civil law courts were often more consistent. They built on their own jurisprudence and on that of other, particularly important high courts, at the very least as much as common law courts did. With the difference that they tended to apply the same principles in the same way for a remarkably longer time, without particularly significant changes either in procedural terms or in substantive ones. If it is difficult to find open statements pointing to the strength of precedents in early modern civil law courts, it is equally rare to find actual evidence suggesting the opposite.<sup>6</sup>

Clearly, the subject is too complex to be dealt with in a few pages. I am currently working on a more in-depth analysis on the difference between the more theoretical approach of the jurists and the more practice-oriented stance of the law courts in the early modern period.<sup>7</sup> This article will only seek to understand the position of early modern civil law on a specific subject - the maritime carrier’s liability – and compare it with the approach followed in the common law. Tentatively, and within this limited scope, the result would seem to suggest that civil law courts might have played a role at least as important as that of civil law jurists, possibly even more so.

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<sup>5</sup> Indeed, it would be unthinkable to apply the famous saying of Henry Maine on the development of the common law as “gradually secreted in the interstices of procedure” beyond the Channel. H.J.S. Maine, *Dissertations on Early Law and Custom*, 1883; 2<sup>nd</sup> edn., London 1891, p. 389.

<sup>6</sup> A rare occasion in which this may be seen is a remark of the judges of the Florentine Civil Rota on the inconstancy of their Roman colleagues in the middle of the seventeenth century: “Rotam ipsam Romanam novis adductis legibus, aut rationibus aliquando a decisis recedere”, *Selectarum Rotae Florentinae Decisionum Thesaurus ex Bibliotheca Iohannis Pauli Ombrosi ...*, Florentiae, ex Typographia Bonducciana, 1784, vol. 11, dec. 11 (2.4.1655), p. 128, n. 122. This statement is interesting because remarkably isolated. It is precisely because courts seldom changed position that the Florentine Rota marvelled at the inconstancy of the Roman one. Such an inconstancy, it should be noted, was not about the legal principles and/or any legal term (even implied ones) in contractual obligations, but about their application to the specific circumstances of the case. The Florentine judges, in effect, marvelled at the fact that their Roman counterparts detached themselves from the older *stylus* of their own *curia*.

<sup>7</sup> G. Rossi, *The Big Divide: Doctrine and Practice in Early Modern Civil Law. A Study on Fault in Case Law*, forthcoming.

Had the evolution of the common law been less conditioned by the form of pleading, perhaps common lawyers might have experienced the same divide between theory and practice in their scholarship. Be that as it may, the different attitude between common and civil lawyers has probably not helped to make full sense of the – objective – differences between the two legal systems when comparing them in their historical development. A more abstract approach to the history of the common law is unrealistic, unpractical, and especially not desirable. There could be nothing worse than moving from substantive, abstract ideas when examining the development of the common law. Further, with a very few exceptions, legal treatises appeared only considerably late – especially if compared with the Continent. Thus, the only way to have a sense of the similarities and differences between the two legal systems seems to be focusing more on court practice also for the Continent. Incidentally, this might help to get a better sense of the actual working of the legal system, and so, perhaps, it could prove useful even beyond the realm of comparative law.

## 2. The shipmaster's liability in civil law

Among the Mediterranean and English approaches, it is probably easier to start with the first. The reason has much to do with the presence of a vast amount of treatises and a tradition of learned legal scholarship often not present (or at least nowhere near as abundant) in England during the early modern period, surely not before the eve of the eighteenth century at the very least. If such treatises are of great help to the modern scholar, however, they need to be compared with – and, typically, distinguished from – coeval practice. This adds a further layer not present in the history of the common law. To compare civil with common law on any given subject, it is therefore necessary to disentangle practice from doctrine in civil law first. Another reason to start with civil law is the mention – increasingly frequent in the King's Bench during the eighteenth century – of the *culpa levissima* of the *nauta*. This has sometimes led Continental legal historians to envisage a link, or even a direct influence, between Roman law and common law on the subject. The connection however, as we will see, appears doubtful.

### 2.1 The shipmaster as *conductor*

The moment civilians and civil law courts alike began to qualify the position of the shipmaster with respect to the merchant consignor, they thought of *locatio-conductio*. From a legal perspective, it was the obvious choice. Further, the extreme flexibility of *locatio-conductio* – barring the odd case<sup>8</sup> – suited well most of the features of the carrier.

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<sup>8</sup> The possibility to qualify the contract of carriage in terms of *locatio-conductio* occasionally led the bench to somewhat bizarre conclusions. A (fortunately, rarely attested) one was to recognise the right of the shipmaster-*conductor* to terminate the contract when no longer economically convenient. See esp. Josephus Laurentius Maria de Casaregis, *Discursus Legales de Commercio* (2<sup>nd</sup> edn.), Venetiis, Ex Typographia Balleoniana, 1740, vol. 1, disc. 69, pp. 216-218 (vol. 2, pp. 216-223, in the first edition of 1719), reporting a case where the Spanish authorities forced the ship (sailing from Leghorn to Lisbon) to unload most of the cargo at Majorca. As the freight was due only upon arrival and it was reckoned only on the cargo arrived at destination, the shipmaster found more convenient to terminate the charter-party, discharge also the remaining part of the cargo at Majorca and look for new customers.

While there was little doubt that the shipmaster should be qualified as a *conductor*, however, not many early modern works on *locatio-conductio* dealt with his liability. Let us take for instance the influential treatise of Vincentius Carocius (Vincenzo Carocci, 1547-1623), published in 1584.<sup>9</sup> Throughout the entire work, only twice does Carocius venture into maritime affairs. The first and main case is the legal qualification of the hiring out of the whole vessel.<sup>10</sup> The other is the undertaking to ferry a mule that dies while on the boat, the whole question focusing on whether the ferryman (as *conductor*) should receive payment.<sup>11</sup> What is conspicuous is the absence of the shipmaster. The reason is obvious enough: in Carocius' times, the reader would have expected a good *locatio-conductio* treatise to deal with land and chattels. Carocius is hardly an isolated case: fifty years later, for instance, the (extremely meticulous) *locatio-conductio* treatise of Thomas Maulius does not mention a single time the carrier.<sup>12</sup> Again, almost fifty years after Maulius, nothing can be found in the similar treatise of Petrus Pacionus (Pietro Pacioni) either.<sup>13</sup> Sea-transport was a business for merchants, and it seems rather significant that coeval works specifically devoted on insurance made on the contrary abundant (and even excessive) use of the *locatio-conductio* scheme.<sup>14</sup> Learned jurists were

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When sued by the merchant, the Rota of Florence found for the shipmaster: "Considerandum insuper est, quod de natura contractus naulizationis tacita in eo inest conditio, videlicet si Capitaneus absque ullo impedimento poterit vehere merces, et sic omne pactum, et obligatio, quam possit pro obiecto habere res variabilis, numquam alterat illam mutabilitatem proveniente ex propria natura rei variabilis, et sicuti suapte natura ista res est variabilis, ita hac variata variatur etiam, imo dissolvitur obligatio ... cum itaque natura transuentionis mercium destinatarum a contrahentibus ad certum locum sit variabilis, ita variata destinatione transuentionis mercium remanet per consequens variata etiam obligatio Capitanei progrediendi suum iter, et vehendi merces ad locum destinatum. Et quamvis videatur hoc argumentum solummodo concludere in eo casu, in quo mutatio sequeretur in omnibus partibus contractus, respondetur mutationem status rerum secutam in una parte tantum similiter operari in contractibus, quam illam mutationem integre secutam in omnibus eorumdem partibus ... Nihilque officeret oppositio, quod semper naulizator utique soluturus fuisset omnem naulorum quantitatem in contractu naulizationis promissam non obstante exoneratione majoris partis mercium secutae in Portu Maone. Quia facile responsio in promptu est, nam quotiescumque naulizationis contractus propter aliquem inopinatum eventum de jure resolvitur, contrahentes statim liberantur ab obligatione primae naulizationis, et ad stabiliendum novum contractum novus requiritur, et reciprocos Partium consensus, quo rursus naulizator se soluturum spondeat idem naulum ab initio promissum pro itu, et reditu navis, et rursus Capitaneus eodem consensu primae evam suam obligationem assumat. Quare hoc non secuto poterant utique contrahentes agere quod magis ipsis lubebat, aliter Capitaneus post inopinatam mercium exonerationem in Portu Maone prosequendo iter debebat omnino dependere a voluntate naulizatoris circa approbationem continuationis itineris. ... Et quando quis in casu non praevisto se gerit, ut probabiliter se gessisset ejus Dominus, liberatur ab omni damno, et culpa" (*ibid.*, p. 217, n. 8-10 and 15; vol. 2, pp. 104-105 in the 1719 edition).

<sup>9</sup> *Tractatus Locati et Conducti ... D. Vincentio Carocio ... Auctore ...*, Venetiis, 1584, apud Lucianum Pasinum, et Marcum Amadorum.

<sup>10</sup> *Ibid.*, pt. 2, s.v. *Naulo*, fol. 38r.

<sup>11</sup> *Ibid.*, pt. 2, s.v. *ad l. Rhodia de iactu*, fol. 50r-v.

<sup>12</sup> *Thomae Mavli ... Tractatus solvissimus de Locatione et Conductione ...*, Francofurtii ad Moenum, apud Ioannem Fridericum Weissivm, 1633.

<sup>13</sup> *Petri Pacioni ... De Locatione et Conductione Tractatus ...*, Romae, Typis et Sumptibus Nicolai Angeli Tinassij, 1677.

<sup>14</sup> Cf. on the point G. Rossi, *Civilians and insurance: approximations of reality to the law*, 83 (2015), *Tijdschrift voor Rechtsgeschiedenis*, pp. 323-364.

not the only ones to pay little attention to sea-carriage in more general works. It is not frequent to find decisions of law courts dealing with maritime transport before the late sixteenth century either. Even then, their number (at least judging on the basis of published collections) was rather limited. Only during the seventeenth century (especially its second half) did law courts begin to issue an increasing number of decisions on the subject.

Qualifying the carrier as *conductor* did not pose particular problems (at least in principle) with regard to *casus fortuitus*: it fell beyond the liability of the shipmaster<sup>15</sup> - just as any other *conductor*.<sup>16</sup> Nor is the shipmaster liable for the mishap imputable to the merchant, just as the *conductor* does not answer for the loss or damage imputable to the *locator* even if he undertook to cover any *casus fortuitus*.<sup>17</sup> The most problematic feature was that of the standard of care of the shipmaster-*conductor*.

To get a sense of the position of civil law courts on the *conductor's* liability, three elements must be briefly mentioned: the degree of fault required to trigger liability, the causation link between fault and damage, and - especially - the system of presumptions used by the courts. The three points, as we shall see, are deeply related to each other. Among the plethora of early modern forensic manuals, we will make frequent use of that of Emanuel Alvarez Pegas (c.1526-1583)<sup>18</sup> - both because very well known (and often relied upon by the bench) and especially since, in all probability, it is the most complete on issues of fault.

## 2.2. The problem of *culpa levissima*

The many different facets of liability found in the Justinianic compilation led to an even larger number of definitions of fault in medieval learned law. In principle, such

<sup>15</sup> *Gasparis Antonii Thesauri I.C. Taurinensis, ... Quaestionum Forensium, Libri Duo Posteriores*, Avgvstae Taurinorum, apud HH. Io. Dominici Tarini, 1619, lib. 3, q. 79, p. 65, n. 2: “locator [i.e. the merchant consignor] tenetur de damno conductori illato ab eo cui resisti nullo modo potest ... periculum casus fortuiti in re, seu fructibus rei locatae contingens spectat ad locatorem” (decision of the Piedmont Senate, 19.9.1611).

<sup>16</sup> See for instance, among the many examples that could be given, an interesting case of the late 1580s about tax-collecting rights which the Apostolic Chamber farmed out, and which were subsequently sub-contracted for specific towns to third parties. The sub-contracting mechanism was described in *locatio-conductio* terms, and so the moment that famine broke out in those towns, the sub-contractor - as *conductor* - obtained a reduction in the price previously agreed upon from the main contractor-*locator*. In turn, the latter was able to obtain a similar reduction of the original price from the Apostolic Chamber because himself was to be considered *conductor* and the Chamber *locator*. The case is reported in Jacopo Menochio (1532-1607), *Iacobi Menochii ... Consiliorum sive Responsorum*, Francofurti ad Moenum, Typis et sumptibus Wecheliorum, apud Danielelem et Daudem aubrios et Clementem Schleichium, 1625, vol. 9, cons. 835, esp. p. 132, n. 13.

<sup>17</sup> E.g. *Practicarum Conclusiovm Iuris ... Dominici TT. S. Oniphrii S.R.E. Presbyt. Card. Tuschi* (3<sup>rd</sup> edn.), Lvdgvi, ex Officina Ioannis Pillehotte, Sumpt. Ioannis Caffin, et Francisci Plaignard, 1634, vol. 3, concl. 430, p. 576, n. 35 and 37: “conductor ... susceperit in se omnes casus fortuitos ... non tenetur de casu proveniente facto locatoris ... Extende, vt procedat etiam quando casus, qui interuenit, potuit praeuideri, et obiuari a locator; quia si culpa locatoris prouenit, nedum conductor, qui susceperit omnem casum fortuitum, debet consequi omne damnum, et interesse”.

<sup>18</sup> *Emmanuelis Alvarez Pegas ... Resolutiones forenses practicabiles ...*, pt. 1, Vlyssipone, Ex Typographia Michaelis Deslandes, Sumptibus, et expensis Amtonij Leyte Pereyra, 1682.

definitions envisaged different degrees of liability.<sup>19</sup> The reluctance to speak openly of strict liability led medieval jurists to elaborate a liability system almost entirely based on fault. This, coupled with a soft spot for symmetry, led to a series of sub-divisions of fault, whose precise number sometimes changed from an author to the other. By the time of the early commentators, the scheme accepted by many jurists encompassed six different categories - three for aggravated fault and three for lesser fault.<sup>20</sup> The most important and successful (basic) division was the tripartition of *culpa* into *lata*, *levis* and *levissima*, on the basis of the degree of fault necessary to trigger liability. So, for *culpa lata*, a remarkably high degree of fault was requested – so high to verge on fraud. By contrast, a very low degree of fault sufficed to trigger liability in case of *culpa levis*, and an even lower degree would do for *culpa levissima*. The default standard was that of *culpa levis*. At least, this is how medieval civilians interpreted ordinary *culpa*, unless doing as much would have clashed with some specific Roman law texts or with the more general principle of utility.<sup>21</sup>

The main reference in the sources for *culpa levis* is D.9.2.31, pointing to what a diligent person could have foreseen. While some jurists stuck to that (average) diligence for *culpa levis*,<sup>22</sup> the standard interpretation of *culpa levis* came however to highlight that diligence, making the *bonus paterfamilias* an extremely vigilant person.<sup>23</sup> This way, *culpa levis in abstracto* came to entail a remarkably high standard of care.

*Locatio-conductio* was no exception to this approach (on the contrary, it was a good application of the utility principle)<sup>24</sup> and so, as a general rule, the *conductor* was subjected to the (very high) standard of care of *culpa levis*.<sup>25</sup> As such, the *conductor* would

<sup>19</sup> A clear summary may be found in J. Hallebeek, *Negligence in Medieval Roman Law*, in E.H. Schrage (ed.), *Negligence. The Comparative Legal History of the Law of Torts*, Berlin 2001, pp. 73-100, esp. 74-79.

<sup>20</sup> That was particularly the case from the early commentators, at least from Bartolus de Sassoferrato and then Bartholomaeus de Saliceto. For the sake of symmetry, they opposed *culpa latior* (lying mid-way between *latissima* and *lata*) to *culpa levior* (placed between *levis* and *levissima*). While *culpa latior* had some – vague – foothold in the sources (mainly D.16.3.32), *culpa levior* had none. Cf. H.-J. Hoffmann, *Die Abstufung der Fahrlässigkeit in der Rechtsgeschichte, unter besonderer Berücksichtigung der culpa levissima*, Berlin 1968, pp. 51-52.

<sup>21</sup> Cf. Hallebeek (note 19), p. 77.

<sup>22</sup> Such as Juan Yañes Parladorio: “Levem itaque culpam communis diligentia excludit: leuissimam vero nonnisi maxima diligentia”, *Ioannis Yanez Parladorii ..., Quotidianarum differentiarum Sesquicenturia ..., Matriti, apud Ioannem de la Cuesta, 1612, diff. 132, p. 422, n. 12*. Cf. Casaregis, *Discursus Legales de Commercio* (note 8), vol. 2, disc. 122, p. 4, n. 8: “levis culpa est negligentia eorum quae ab homine mediocriter diligenti ejusdem conditionis, ac professionis omitti non solent”.

<sup>23</sup> E.g. Hallebeek (note 19), pp. 77-78.

<sup>24</sup> In effect, looking at the Roman law sources on *locatio-conductio*, two texts used the word *diligentissimus*: D.19.2.25.7 and Inst.3.24.5. The point led to some discussion among medieval jurists: cf. Hallebeek (note 19), pp. 88-89.

<sup>25</sup> Pegas, *Resolutiones forenses practicabiles* (note 18), vol. 1, cap. 3, p. 120, n. 250: “Sexto infertur in contractu locationis, et conductionis ad inuicem contrahentes teneri, non solum de dolo, sed etiam de lata, et leui culpa, ex eo quia in gratiam vtriusque celebratur”. Cf. Josephus Mascardus (Giuseppe Mascardi, c.1540-c.1585), *Josephi Mascardi ..., Conclusiones Probationum Omnium Quibusvis in vtroque Foro versantibus ..., Francofurti, Impensis Joan. Syberti Heyl, Typis Nicolai Kuchenbeckeri, 1661, vol. 3, concl. 997, p. 43, n. 1*; Anacletus Reiffenstuel, *Jus canonicum universum clara methodo juxta titulos quinque librorum decretalium ... dilucidatum*, Venetiis, apud Antonium Bortoli, 1742, vol. 3, pp. 266-7, n. 60. There would be little point in listing the (printed) decisions where the *conductor* was found to be liable for *culpa levis*, for their number is very large. Among the most clear ones on the point see however *Sacrae Rotae*

be liable if his conduct were to fall short of a remarkably high level diligence. But, at least in principle, it would be up to the *locator* to prove as much.<sup>26</sup> This seems to be a rule universally shared by early modern courts, as well as by the vast majority of jurists.<sup>27</sup>

The contract of carriage, we have seen, falls within the *locatio-conductio* scheme. The shipmaster is therefore a *conductor*. But his liability goes beyond that of *culpa levis*: it is *culpa levissima*.<sup>28</sup> In early modern *ius commune* it is not easy to find *culpa levissima* as a general standard of care. Sometimes it was invoked for particular kinds of people, such as those whom we would consider senior civil servants.<sup>29</sup> By and large, however, the main situation where *culpa levissima* applied was that of few specific kinds of *conductores*: *nautae*, *caupones* and *stabularii*. In the Digest, the undertaking of shipmasters,<sup>30</sup> inn- and stable-keepers to vouch for their customers' goods while on the ship or the premises was clearly framed in terms of strict liability: they would answer 'etiam sine culpa', unless the mishap was due to *vis maior*.<sup>31</sup> In order to bring

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*Romanae Decisiones coram R.P.D. Alexandro Ludovico nunc S.<sup>mo</sup> D.N. Gregorio XV ...*, Coloniae Agrippinae, apud Ioannem Gymnicum, 1623, dec. 528 (14.4.1613), p. 743, n. 8. See also *Sacrae Rotae Romanae Decisionum Recentiorum a Pavlo Rufo I.C. Romano selectarum*, Romae, apud Paulum Balleonium, 1716, vol. 12 (1655-1658), dec. 159, p. 229, n. 24.

<sup>26</sup> Juan Pedro Fontanella, *Decisiones Sacri Regii Senatus Cathaloniae auctore Ioh. Petro Fontanella ...*, Genevae, Sumptibus Samuelis Chouët, 1662, vol. 2, dec. 533, p. 503, n. 10, and dec. 535, p. 506, n. 8.

<sup>27</sup> Cp. the – remarkably isolated – position of Ripoll, *infra*, note 49.

<sup>28</sup> E.g. Pegas, *Resolutiones forenses practicabiles* (note 18), vol. 1, cap. 3, p. 126, n. 321: “Septimo infertur in magistro naus, quia non solum tenetur de dolo, sed etiam de culpa lata, leui, et leuissima”.

<sup>29</sup> See for instance a decision of the Florentine Rota reported in *Josephi Urceoli ... Decisiones Inclytae Rotae Florentinae*, Coloniae Allobrogium, sumptibus Fratrum de Tournes, 1732, dec. 21 (5.11.1676), p. 116, n. 12: “ille, qui officium et munus aliquod administrandum, et gerendum suscipit, is omnem culpam subire tenetur ... maxime hoc verum dicit, quando officium, et munus est valde grave, in quo magna hominis fides, et prudentia requiritur.” In early modern case law it is fairly frequent (or at least not particularly rare) to find cases clearly pointing to the *culpa levissima* of high officials. On a practical level, apart from the theoretical justification provided in the decision above, the reason for this might have something to do with the fact that those officers were often entrusted with money – whether collecting, distributing, moving or watching after them. The *prima facie* similarity with the common law on the point is tenuous at best. So for instance in his classic study Winfield groups together certain categories of persons as being under a duty of care “arising from a public calling” (P. Winfield, *Duty in Tortious Negligence*, XLI (1934) *Columbia Law Review*, pp. 41-66, at 44), but that public calling is in effect almost the opposite as the position of higher officials in civil law. The perspective is almost inverted: the “public calling” at common law implies a bottom-up approach: anyone who deals with someone exercising those specific professions is entitled to rely on their expertise. By contrast, in civil law the approach is closer to a top-bottom one: the commonwealth (more often, the prince) entrusts specific persons with tasks of great importance.

<sup>30</sup> The deep institutional and economic differences of the Roman and late-medieval contexts make comparisons between *nautae* and shipmasters somewhat fragile. As to the other members of the crew, occasional mentions may be found among learned jurists, but mainly with regard to the vicarious liability of the shipmaster for *culpa in eligendo*. But even in that context the aggravated liability was only of the shipmaster.

<sup>31</sup> D.4.9.3.1 (Ulp. 14 ed.): “...at hoc edicto omnimodo qui receperit tenetur, etiam si sine culpa eius res perit vel damnum datum est, nisi si quid damno fatali contingit. Inde Labeo scribit, si quid naufragio aut per vim piratarum perierit, non esse iniquum exceptionem ei dari. Idem erit dicendum et si in



this kind of liability within the language of fault, medieval jurists resorted to the standard of *culpa levissima*.<sup>32</sup> To say that they soon reached unanimous views as to its actual meaning would be inaccurate.<sup>33</sup> But, progressively, some consensus was reached on the fact that - at least in principle - the liability for *culpa levissima* was not strict. The problem was to make sense of what exactly this *culpa levissima* was.

The traditional explanation for the aggravated liability of shipmasters (as well as for inn- and stable-keepers) was a sort of presumption of dishonesty. Roman law made no mystery of considering *nautae* as base and mean people, hence the most plausible explanation for the damage or loss was that they caused it. Their aggravated liability was thus viewed as an exception to the default rule in *locatio-conductio*, which the Romans thought necessary so as to protect the *locator* from the mischief of those particularly base categories of *conductores*.<sup>34</sup> The Accursian Gloss accepted this presumption,<sup>35</sup> and later jurists did not oppose much resistance, perhaps also because the explanation relieved them from providing other (and more legally-focused) reasons for the selective imposition of *culpa levissima* to specific categories of *conductores*.

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stabulo aut in caupona vis maior contigerit.” D.4.9.5pr in particular stated that the same shipmasters, inn- and stable-keepers are charged with *custodia* of the cargo, although they do not receive additional consideration to assume strict liability (“Nauta et caupo et stabularius mercedem accipiunt non pro custodia ... et tamen custodiae nomine tenentur”).

<sup>32</sup> E.g. R. Zimmermann, *The Law of Obligations. Roman Foundations of the Civilian Tradition*, Oxford 1996, pp. 524-5. See further the same Zimmermann, *Die Geschichte der Gastwirtschaftung in Deutschland*, in H.-P. Haferkamp and T. Reppen (eds.), *Usus modernus pandectarum. Römisches Recht, deutsches Recht und Naturrecht in der frühen Neuzeit*, Cologne-Weimar-Vienna 2007, pp. 271-339 at 274-288. While the Gloss was clear in considering the peculiar liability of *nautae*, *caupones* and *stabularii* as an exception to the default position of *locatio-conductio* rule (e.g. Gloss *ad* D.4.9.5pr, § *Tenentur*, *Digestum Vetus seu Pandectarum Ivris Civilis*, Parisiis, apud Gulielmum Merlin, 1566, vol. 1, col. 667: “et sic de leui culpa, si agitur locati. At hic de leuissima”), it also made sure to highlight that the exception could not be considered as introducing strict liability in *locatio-conductio* either. Without some degree of fault, no *conductor* is liable (Gloss *ad* D.4.9.3.1, § *Etiam si sine culpa*, *ibid.*, cols. 664-665: “Scilicet leui. Leuissima tamen interuenit. Nam si nec leuissima interuenit, ergo fuit casus fortuitus, et sic non tenetur”). *Culpa levissima* was still considered a fault-based criterion, incompatible - on a substantive level - with strict liability (Gloss *ad* D.4.9.3.1, § *Etiam si sine culpa*, *ibid.*, col. 665: “nam inter leuissimam culpam, et casum fortuitum, nihil est medium”). Cf. Baldus, *ad* D.4.9.3.1, § *Ex hoc edicto* (*Baldi Vbaldi Persini ... In Primam Digesti Veteris Partem Commentaria ... Venetiis* [apud Iuntas], 1577, fol. 269v, n. 3).

<sup>33</sup> See first of all D. Maffei, *Caso fortuito e responsabilita contrattuale nell'eta dei glossatori*, Milano 1957, esp. pp. 23-27. Cf. further H.-J. Hoffmann (note 20), pp. 35-38; H. Lange, *Schadensersatz und Privatstrafe in der mittelalterlichen Rechtstheorie*, Münster-Köln 1955, esp. pp. 120-121.

Among the glossators, the utility principle was invoked to explain *culpa levissima* in some, specific cases (on which see H.-J. Hoffmann (note 20), p. 42). Failing that, as in the case of *locatio-conductio*, some alternative explanations were tentatively provided (*ibid.*, pp. 47-48 and 65). Cf. also H. Dilcher, *Die Theorie der Leistungsstörungen bei Glossatoren, Kommentatoren und Kanonisten*, Frankfurt-am-Main 1960, pp. 74-90; W. Engelmann, *Die Schuldlehre der Postglossatoren und ihre Fortentwicklung*, Aalen 1965, pp. 6-7.

<sup>34</sup> For instance, in his comment on the strict liability of *nautae*, *caupones* and *stabularii* Ulpian stated openly as much, and did not hide his bias against them: cf. D.4.9.1.1.

<sup>35</sup> Gloss, *casus ad* D.4.9.1pr, § *Maxima* (*Digestum Vetus, seu Pandectarum Ivris Civilis* (note 32), vol. 1, col. 661): “Dicit Vlpia[nus] quod maxima et vtilitas huius edicti: quia nautae, cau[pones] stabularij surripiebant olim omnia, et associabant se furibus, et etiam post hoc edictum huiusmodi flagitiis non abstinebant: vnde statuit hoc edictum vt tollantur fures, et eorum malitiis obuietur, et vt etiam puniantur: cum sit in ipsorum arbitrio vt eos non recipiant.”

Not all the “usual suspects” followed the Gloss though. Bartolus for instance did not (and it might not be fortuitous that his stance on the aggravated probatory position of those categories seems to betray some uneasiness).<sup>36</sup> But Baldus did, and in so doing he greatly contributed to the crystallisation of this “presumption of dishonesty”. More specifically, Baldus reported - approvingly - the position of Nicolaus de Mattarelli (Niccolò Mattarelli, 1240-*ante* 1314), who explained the inversion of the burden of proof for *nautae*, *caupones* and *stabularii* with their typical malice.<sup>37</sup> By the late sixteenth and early seventeenth century, jurists had little doubt as to the veracity of Gloss on the point. In his famed *Política para corregidores*, Jerónimo Castillo de Bobadilla (c.1547-1605) for instance praised the wisdom of that “ancient law”, introduced to protect the *locator* from the mischief of those particularly nasty kinds of *conductores*.<sup>38</sup> The same argument is to be found, among many other jurists, also in Pegas: the reason why the *nautae* (together with the other two categories) are under *culpa levissima* is “to curb their malice”.<sup>39</sup>

Writers of maritime law inherited this position. As they worked within the *ius commune* framework, they could not detach themselves from it. What they could do was to provide a different and less biased explanation for the aggravated liability, although they were probably conscious of its inner ambiguity. So for instance Benvenuto Stracca (1509–1578) explained the *culpa levissima* of the shipmaster with the fact that he was chosen for his skills.<sup>40</sup> The argument remains weak: it would have made sense if it applied to the sea-carrier as much as the land-carrier - but it did not. Similarly, both Juan de Hevia Bolaño (c.1570-c.1623) and Franciscus Roccus (Francesco Rocco, 1605-1676) stated that the shipmaster was liable for *culpa levissima* because he owed “*exactissima diligentia*”.<sup>41</sup> Again, the explanation is circular (owing *exactissima diligentia* is another way of saying that one is answerable for *culpa levissima*), and it does not clarify why such a standard was imposed on the sea-carrier alone.

<sup>36</sup> See esp. Bartolus’ (short) commentary on D.4.9, esp. *ad* D.4.9.3 (*Bartoli a Saxoferrato, in Primam Digesti Veteris Partem Commentaria ...* Basileae, ex Officina Episcopiana, 1588, p. 486). Cp. however his comment on D.19.2.55pr, § *Dominus horreum* (Id., *in Secundam Digesti Veteris Partem Commentaria, ibid.*, p. 409, n. 1).

<sup>37</sup> “[P]ropter eorum ... malitiam vt teneantur nisi quando probent casum”, Baldus, *ad* C.4.65.1, § *Ominus* (*Baldi de Pervisio Iuriconsulti clarissimi, super Quarto, et Quinto Codicis Iust[iniani] lib[ris] Commentaria luculentissima ...* Lvdgvi [typis Gaspar & Melchior Trechsel], 1539, fol. 132rb, n. 3). Baldus approved, especially with regard to *caupones*, “quia communiter sunt homines vulgares et rapaces” (*ibid.*).

<sup>38</sup> Jerónimo Castillo de Bobadilla, *Política para corregidores y señores de vasallo ...* Barcelona, Por Sebastian de Cormellas y à su costa, 1624, vol. 2, lib. 3, cap. 4, p. 88, n. 92.

<sup>39</sup> “[V]t refrenetur praedictorum malitia”. Pegas, *Resolutiones forenses practicabiles* (note 18), vol. 1, cap. 3, p. 123, n. 284.

<sup>40</sup> Benvenutus Stracca, *Clarissimi Iurisc. Benvenuti Stracchae ...*, *De Assecurationibus, Tractatus ...*, Venetiis, 1569, gl. 15, fol. 104v, n. 7-8. Cf. the same Stracca, *de Nautis*, in Id., *Tractatus Clariss. Iuriconsulti Benvenuti Stracchae Anconitani, de Nautis, Navibus, et Navigatione*, Coloniae Agrippinae, apud Viduam iohannis Gymnici, 1599, pt. 2, p. 244, n. 4.

<sup>41</sup> Juan de Hevia Bolaño, *Laberinto de Comercio Terrestre y Naval ... autor Ivan de Hevia Bolaño ...*, Madrid, por Luis Sanchez ... a su costa, y de Geronimo de Courbes, 1619, lib. 3, cap. 12, p. 634, n. 30; Franciscus Roccus, *De Navibus et Navlo*, in Id., *Responsorum legalium cum decisionibus centuria secunda ac mercatorum notabilia in sex titulos distributa*, Neapoli, ex Typographia Lucae Antonij Fusci, sumptibus Iacobi Antonii Bagnuli, 1655, not. 9, p. 364, n. 22.

Almost a century later, Josephus Laurentius Maria de Casaregis (Giuseppe Lorenzo Maria Casaregis, 1670-1737) motivated the *culpa levissima* of the shipmaster with the fact that he was paid for his job<sup>42</sup> - as if any other *conductor* worked for free.

The truth is that there was no clear reason why only the sea-carrier should be saddled with that very stringent standard of care. No jurist writing on maritime commerce mentioned the classical presumption of dishonesty, but none of them could find a different reason for the aggravated standard either. Nor is it likely to imagine that jurists sought to provide a theoretical basis for the coeval mercantile practice, which was quite the opposite.

The root of most problems on *culpa levissima* lies in the very thin margin between *culpa levis* and strict liability. *Culpa* in essence is the deviation from a certain standard. Raising the standard of *culpa levis* to the highest degree of care effectively meant pushing that of *culpa levissima* beyond fault. The most widespread explanation of *culpa levissima* was that shared also by Bartolus: a deviation from the taxing diligence of the most diligent men of the same condition and profession as the defendant.<sup>43</sup> *Culpa levissima* would thus differ from *culpa levis* in that it referred to the standard of care (theoretically) ascribed to the most diligent and prudent persons exercising the same profession as the defendant, whereas the standard of *culpa levis* looked “just” at the standard ascribed to very diligent and prudent men of the same condition as the defendant.<sup>44</sup>

<sup>42</sup> Casaregis, *Discursus Legales de Commercio* (note 8), vol. 1, disc. 19, p. 53, n. 33 (vol. 1, p. 102, in the 1719 edition): “quinmo attendenda ea mercede, seu nauulo mercium, quod solvitur Magistro, iste non solum de levi culpa, sed etiam de levissima”. Cf. also *ibid.*, vol. 1, disc. 46, p. 148, n. 3 (vol. 1, p. 285, in the first edition of 1719). Although debatable, the position was not extravagant. Some courts were inclined to qualify even a mandate as entailing *culpa levissima* if remunerated (e.g. *Decisiones Rotae Florentinae Authore Martio Venturini ...*, Florentiae, Typis Regiae Celsitudinis, apud Antonium Mariam Albizzini, 1709, dec. 45, p. 318, n. 24). Perhaps the rationale of such positions might have been that both mandatee and *conductor* were carrying out an *opus* and it was their responsibility to bring it to conclusion. The same Casaregis was very clear that *culpa levissima* did not apply to the *locator operarum*. Casaregis, *Discursus Legales de Commercio* (note 8), vol. 1, disc. 36, p. 119, n. 21 (vol. 1, p. 230, in the first edition of 1719).

<sup>43</sup> Bartolus, *repetitio ad D.16.3.32, in Secundam Digesti Veteris Partem Commentaria* (note 36), p. 324, n. 27: “Leuissima culpa est deuatio incircumspecta ab ea diligentia, quam habent homines diligentes et diligentissimi, eiusdem conditionis et professionis.” Cf. e.g. H.-J. Hoffmann (note 20), p. 50

<sup>44</sup> Bartolus noted how other definitions of *culpa levis* were exceedingly broad, and therefore also encompassing *culpa levissima*. To avoid that, he provided a somewhat more elaborate definition, according to whether the object of damage or loss was did not belong to the defendant or on the contrary its ownership was shared between plaintiff and defendant. Yet his main definition – on the damage to property not belonging to the defendant – was almost just as broad as that he criticised. Bartolus, *repetitio ad D.16.3.32, in Secundam Digesti Veteris Partem Commentaria* (note 36), p. 324, n. 26: “Petrus [*scil.*, de Bellapertica] uero sic diffinit: Leuis culpa, est negligentia, quae non in magna fatuitate consistit, sed in eo quod aliquis minorem diligentiam adhibet, quam secundum communem naturam hominum diligentium et diligentissimorum adhiberi debuit: nec allegat iura. Ista diffinitio est ... falsa in eo quod dicit, hominum diligentium, etc. Nam ista est leuissima culpa ... Qualiter ergo diffiniemus? Mihi uidetur, quod leuis culpa ueniat tripliciter consideranda. Nam leuis culpa assumitur aliter in rebus prorsus alienis, aliter sumitur in rebus communibus incidenter, aliter in rebus communib(us) ex conuentione. Et sic triplicem diffinitionem requirit. Ad primum dico, quod *leuis culpa in rebus alienis, est deuatio incircumspecta ab ea diligentia, quam adhibent homines diligentes eiusdem conditionis et professionis ...*” (emphasis added).

In its essence, the Bartolian distinction was just a question of grammar: superlative trumps intensifier. So, in theory, “highly diligent” is not exactly the same as “the most diligent”. But on a practical level the difference is preciously thin, all the more since the standard, as said, is *in abstracto*, and so “the most diligent” conveys the idea of someone, in effect, just highly diligent. When it came to applying the concept of *culpa levissima*, therefore, this distinction (amounting to being “more diligent than diligent”)<sup>45</sup> was virtually useless. Treating *culpa levissima* as actual fault but keeping it distinct from *culpa levis* would have meant looking at what someone suffering from obsessive-compulsive disorder would have done to make sure that nothing could possibly go wrong.<sup>46</sup> In practice, there was no further degree of fault beyond *culpa levis*.<sup>47</sup>

A different way of justifying *culpa levissima* (but not to explain it in practice), rather widespread among early modern civilians and civil law courts alike, was playing with the different gravity between omission and commission. Within *culpa levis*, it was generally acknowledged that faulty omissions (*culpa in omittendo* or *in non faciendo*) were somewhat less serious than faulty commissions (*culpa in committendo* or *in faciendo*).<sup>48</sup> On that basis, it was possible to explain *culpa levissima in faciendo* as lying on the same level of blameworthiness as *culpa levis in omittendo*. Since omissions resulting in *culpa levis* were punishable, condemning the defendant for *culpa levissima in faciendo* could be construed in fault-based terms as well.<sup>49</sup> This approach, however, could explain in terms of fault

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Moving towards the early modern period, see *inter multos* Alphonsus Alvarez Guerrero, *Thesaurus Christianae Religionis ...* Florentiae, apud Filios Laurentii Torrentini, 1563, p. 435: “... levis culpa est secundum Bar(tolum) in l. quod nerua ff. depositi (D.16.3.32) deuiatio incircumspecta ab ea diligentia quam communiter habent omnes qui sunt eiusdem conditionibus et professionibus ... leuissima culpa est deuiatio incircumspecta ab alia diligentia quam adhiberent diligentiores et diligentissimi eiusdem conditionis et professionis”, and Pegas, *Resolutiones forenses practicabiles* (note 18), vol. 1, cap. 3, p. 100, n. 75-76: “Leuis culpa est deuiatio ab ea diligentia, quam adhibere solent homines diligentissimi ejusdem conditionis ... leuissima culpa est deuiatio circumspecta, ab ea diligentia, quam habent omnes diligentissimi ejusdem professionis”.

<sup>45</sup> R. Zimmermann, *The Law of Obligations* (note 32), p. 192.

<sup>46</sup> This in effect seems to be the ironical description of Heineccius: see N. Jansen, *The development of legal doctrine in Europe. Extracontractual liability for fault*, in Id. (ed.), *The Development and Making of Legal Doctrine*, Cambridge 2010, pp. 1-45, at 7, text and notes 33-34.

<sup>47</sup> All the more with the introduction of *culpa levior*: *supra*, note 20.

<sup>48</sup> E.g., with specific reference to our subject, Stracca, *De Assecurationibus* (note 40), gl. 15, fol. 103r, n. 4.

<sup>49</sup> See e.g. the decision of the Roman Rota of 3.6.1613 on the case of a shipmaster who decided to enter the port despite a storm approaching: R.P.D. *Matthaei Bvratii ... Decisiones*, Lvdgvni, Sumpt. Ioannis-Antonii Hvgvetan et Marci-Antonii Ravavd, 1661, vol. 1, dec. 493, p. 433, n. 4. The *culpa levis in non faciendo* obviously consisted in that the ship could have changed her course instead of entering the port. Interestingly enough, the court qualified the behaviour of the shipmaster as *culpa levissima in faciendo* despite the fact that it clearly resulted from the evidence that the pilot had strongly insisted to change course (*ibid.*, p. 433, n. 4 and 8). That might have probably sufficed to “upgrade” the degree of fault of the shipmaster, given his recklessness, and qualify his behaviour (at the very least) as *culpa levis*.

Only very few jurists invoked the equivalence between *culpa levis (in omittendo)* with *culpa levissima (in committendo)*, so as to saddle the ordinary conductor with *culpa levissima* (and so, inverting the normal burden of proof): see esp. Acacius de Ripoll, *Acacii Antonii De Ripoll ... Variarum iuris resolutionum ...*, Lvdgvni, Sumptibus Iacobi, Andreae, et Matthaei Prost, 1630, cap. 12, p. 392, n. 129-130. In effect, Ripoll sought – unsuccessfully – to argue for the generalised application of the standard of *culpa levissima* to any conductor: *ibid.*, cap. 12, p. 400, n. 245-248. Ripoll’s position, it should be noted, was severely reprimanded not only by other jurists, but especially by the courts. See esp. Fontanella,

only the liability for positive actions resulting in *culpa levissima*, but not also that for omissions.<sup>50</sup> And omissions, it should be noted, accounted for most cases of *culpa levissima* in practice.

At this point, the obvious thing to do would be concluding that *culpa levissima* was just *culpa levis* with an inversion in the burden of proof. In other words, under *culpa levissima* the defendant might have been still under *culpa levis*, with the difference that it was up to him to prove that he met that standard - not to the plaintiff to disprove as much. Especially for omissions, the combination of the very high standard of care of *culpa levis* and the obvious difficulty in proving a negative would have meant that, while framed in the language of fault, *culpa levissima* amounted to strict liability.

Interpreting *culpa levissima* as the *culpa levis* presumptively saddled on the defendant would find some confirmation, although somewhat limited, among early modern authors.<sup>51</sup> It would also fit well with the position of ordinary *conductores* (i.e., apart from the case of *nautae, stabularii* and *cauponii*). A “normal” *conductor* becomes liable for *culpa levissima* only if he specifically undertakes to keep the thing safe. In such a case, the standard of care is higher because the *conductor* receives additional remuneration to vouch for the safety of the thing.<sup>52</sup> Hence law courts inferred from a conspicuously higher payment than usual the voluntary acceptance of *culpa levissima*.<sup>53</sup> The point is important for two reasons. First, because it justifies the higher standard of care with a

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*Decisiones Sacri Regii Senatus Cathaloniae* (note 26), vol. 2, dec. 533, p. 503, n. 10.

<sup>50</sup> Under this approach, omissions were considered as relevant for liability purposes only if falling within *culpa levis*. For considering omissions as relevant under *culpa levissima* would have been tantamount to imposing strict liability. A case very often relied upon was a decision of the *Sacro Consiglio* of Naples reported by Matthaeus de Afflictis, on a fire in a rented house, where the problem of the omission of the *conductor* was a relevant issue: *Decisiones Sacri Consilii Neapolitani*, Lvdgvi, apud haeredes Iacobi Iuntae, 1552, dec. 57, p. 126, n. 7-8. Incidentally, it was on the basis of this reasoning that some jurists and courts alike excluded the Aquilian liability in case of omissions depending on *culpa levissima*. Apart from the same decision reported by de Afflictis (which remained the most important and relied upon by other courts), see also esp. *Sacrae Rotae Romanae Decisionvm Recentiorvm a Pavlo Rubeo ... selectarum* (note 25), vol. 12 (1655-1658), dec. 159, p. 229, n. 21; *Sacrae Rotae Romanae Decisiones coram R.P.D. Alexandro Lvdovisio* (note 25), dec. 528 (14.4.1613), p. 743, n. 9; *Decisiones Caesarvm Tam Rotae Florentinae Quam Rotae Lucensis, Hieronymo Magonio I.V.D. Vrbeuetano Authore*, Venetiis, apud Sessas, 1605, dec. 111, pp. 274-275, n. 25-26, where vast literature.

Even the brocard “non facere, facere est” was not often applied to omissions giving rise to *culpa levissima*. Negligence was more commonly considered as *privatio diligentiae*: as the *privatio* was equated to *facere*, it pointed to some action of the negligent party. See e.g. the notes of Blasi Altimari to a decision (of 23.10.1625) of the *Sacro Consiglio* of Naples, reported in Scipione Rovito (ed.), *Decisiones Supremorum Tribunalium Regni Neapolitani ... Necnon Regiae Camerae Summariae Scipione Rovito ... Compilatore ...*, Neapoli, Ex Typographia Nicolai Abri., Expensis Antonij Bulifon., 1699, dec. 36, p. 201, n. 28.

<sup>51</sup> See e.g. the famed sixteenth-century gloss of Diego Pérez de Salamanca on the *Nueva Recopilación* (Madrid, 1779, en la Imprenta de Josef Doblado), vol. 2, lib. 5, tit. 7, ley 3, p. 1123.

<sup>52</sup> Pegas, *Resolutiones forenses practicabiles* (note 18), vol. 1, cap. 3, p. 123, n. 283: “Ratio prouenit ex natura contractus, nam qui mercedem accipit pro custodia rei, non tantum ad leuem, sed ad leuissimam culpam videtur obligari”.

<sup>53</sup> See e.g. a decision of 31.3.1656 of the Rota of Bologna, reported in the great collection of Cardinal Giovanni Battista De Luca (1614-1683), *Theatrum Veritatis et Iustitiae ...*, Venetiis, 1716, apud Paulum Balleonium, vol. 4, disc. 11, p. 13, n. 2; *Sacrae Rotae Romanae Decisionvm Recentiorvm a Pavlo Rubeo ... selectarum* (note 25), vol. 12 (1655-1658), dec. 159, p. 229, n. 22-23.

monetary reward.<sup>54</sup> Secondly, because it links *culpa levissima* to *custodia*. The two reasons are connected: without a specific (and, in principle, additional) recompense the carrier could not be saddled with a higher standard of care precisely because such a standard would substantially violate the fault-based rule. Indeed, especially among courts, it is possible to find the same explanation formulated *a contrario*: it is the *custodia* itself that entails *culpa levissima*.<sup>55</sup>

Looking at *culpa levissima* in substantive terms might well suggest its affinity with *custodia* – the main difference being just a nominal one. Abstract definitions would often seem to confirm as much. But concluding that this was the position of law courts would be rather misleading. General (and abstract) discussions do not consider a crucial point: in court, *culpa* was not examined separately from causality, especially in cases of *culpa levissima*.

The point is of extreme importance. To approach it, we might want to take a step back and look at the different definition of *culpa levissima* provided by Baldus. His approach is slightly different, and it might help us to understand the different way in which courts looked at the matter.<sup>56</sup> For Baldus, *culpa levissima* is a deviation from the very taxing standard required by the law in specific cases. This deviation consists in an omission that is likely to result in the mishap:<sup>57</sup>

leuissima culpa est deuiatio a legis dispositione in eo quod lex disponit esse diligentissimum et non est culpa, sed dicitur leuissima quia est minima in culparum genere ... enim [lex] requirit leuissimam, scilicet aliquid de contingentibus omissum quod si non esset omissum res verisimiliter salua foret

Following this approach could be more fruitful to our (chiefly, practice-oriented) purposes. Not because the law did actually explain what such a supremely high diligence was, but because the system of presumptions elaborated by jurists and courts alike did.

Baldus' definition is of particular interest because it betrays the tension between the jurists' efforts to use the language of fault inasmuch as possible and the objective features of a standard much closer to actual *custodia*. The consequence of this tension in his definition is a shift towards a presumption of causality between omission and

<sup>54</sup> On the point it is telling the contrast with the provision of Dig.4.9.5pr, which expressly spoke of liability *custodiae nomine* even if the payment of the shipmaster was not made so to undertake *custodia*: *supra*, note 31.

<sup>55</sup> See e.g. the Rota of Florence in a decision of 1579 (on the liability of the *conductor* for fire), in *Decisiones Caesarum Tam Rotae Florentinae Quam Rotae Lucensis* (note 50), dec. 111, p. 279, n. 54-55. Cf. Mascardus, *Conclusiones Probationum Omnium* (note 25), vol. 1, concl. 470, p. 764, n. 3. Cf. e.g. Pegas, *Resolutiones forenses practicabiles* (note 18), vol. 1, cap. 3, p. 126, n. 326-327.

<sup>56</sup> This, it should be added *ad cautelam*, does not mean to say that Baldus had a clear influence on the development of forensic practice on fault issues and Bartolus did not. Matter of fact, neither author seems particularly influential towards the creation of the system of presumptions used by early modern civil law courts, at least on our subject.

<sup>57</sup> Baldus, *ad Cod.4.24.6* (*Baldi de Pervasio Iurisconsulti clarissimi super Quarto et quinto Codicis* (note 37), fol. 66rb-va, n. 13). Cf. N. Jansen, *Die Struktur des Haftungsrechts: Geschichte, Theorie und Dogmatik ausservertraglicher Ansprüche auf Schadensersatz*, Tübingen 2003, p. 286; H.-J. Hoffmann (note 20), pp. 50-51; H. Dilcher (note 33), p. 83.

mishap, a presumption ultimately envisaged by the law when imposing that very high standard. What Baldus said was in its essence hardly new. Generations of civilians had already stressed the link (or at least tried hard to find one) between fault and mishap as a general principle, necessary to insist on the fault-based nature of the liability for most – possibly, all – contractual scenarios.<sup>58</sup> To our purposes, however, it provides an excellent introduction to the approach of law courts.

“Si non esset omissum res verisimiliter salua foret”, said Baldus.<sup>59</sup> Stressing the pre-existing fault of the defendant allowed to speak of a *praeordinatio* of his fault to the mishap – and so of *culpa ad casum praeordinata*.<sup>60</sup> This approach is easier to understand if we were to examine it moving from the mishap and looking backwards at the defendant’s conduct: a genuinely fortuitous accident is the accident that takes place in the absence of any prior fault of the defendant. In that case there is no such *praeordinatio* for the simple reason that there is no *culpa*. *A contrario*, the presence of some fault of sort before the occurrence of the mishap, while not proving their correlation, at least makes it possible. And in the case of *culpa levissima*, following Baldus’ approach, that correlation is established by the law not in principle but on a practical level, asking for an exceedingly high standard and requiring the defendant to prove a negative (the absence of the slightest degree of fault in an omission). Analysing *culpa* also in terms of (abstract) possibility of foreseeing and therefore anticipating an event allows to speak of a *praeordinatio* of sort – and therefore, loosely speaking, of causation.<sup>61</sup> In Baldus’ definition it is the law to impose the very high standard of *culpa levissima* in specific situations, although the term *culpa levissima* is almost entirely absent from the Roman sources.<sup>62</sup> But, as said, Baldus’ approach could be used also moving from the opposite direction: not from the imposition of *culpa levissima* onwards, so as to envisage a possible causal link with the mishap, but from the occurrence of that mishap backwards, so to presume the occurrence of some fault of sort in the defendant, possibly just in the form of a slight omission. The possibility that the mishap could have been averted if it was not for that slight omission admittedly makes for a rather weak causal link. That is why Baldus limited it only to the cases where the link was imposed by the law.

A - similarly tenuous - link was also found when the shipmaster wilfully disobeyed a specific order of the shipmaster, and then loss ensued. In that case, the disobedience pre-dated the mishap, and the faulty state of the shipmaster was presumptively associated with the occurrence of the loss. That much sufficed to speak of *culpa ordinata ad casum*.<sup>63</sup> This was not a specific exception provided for a maritime context,

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<sup>58</sup> See esp. W. Engelmann (note 33), pp. 207-214.

<sup>59</sup> *Supra*, note 57.

<sup>60</sup> W. Engelmann (note 33), p. 209.

<sup>61</sup> *Ibid.*, pp. 215-217. Proper discussions of causality (and so, of *ordinatio* of the *culpa* to the *casus*) by medieval jurists may be found on other subjects, but – rather unsurprisingly - not with regard to *culpa levissima*. Cf. *ibid.*, pp. 218-224.

<sup>62</sup> The main place where it appears is in relation to the *lex Aquilia* (D.9.2.44pr), a case dealing with liability for omission, and possibly with a rather narrow scope. See recently O. Tellegen-Couperus, *The limits of culpa levissima*, LXXVI (2008) *Tijdschrift voor Rechtsgeschiedenis*, pp. 19-25.

<sup>63</sup> R.P.D. *Matthaei Bvratii ... Decisiones* (note 49), vol. 1, dec. 5 (Rota of Rome, 3.6.1613), p. 8, n. 12:

but rather an easy adaptation of the standard case of the mandatee's wilful disregard of the mandator's instructions, which was typically considered more than sufficient to trigger the mandatee's liability in case of damage or loss.<sup>64</sup> Examined in terms of actual causation, the link would not hold. But the fact that the omission (non-compliance with orders) preceded the mishap was sufficient at least to argue for their possible correlation. If the omission both preceded the mishap and - just as Baldus had it - was likely to have caused it, then it was all the more possible to think of a causal link. What could suggest this likelihood, however, was more often the kind of mishap. And the approach of law courts was precisely this: determining the burden of proof on the basis of the kind of mishap, not on the standard of care of the defendant.

### 2.3. The approach of civil law courts: introduction

To appreciate the position of early modern civil law courts, and especially the great weight that the classification of the mishap had on the allocation of the burden of proof, we might start with a normal case of *culpa levis*: the standard case of the *conductor* outside the maritime context.

As we have seen, a "normal" *conductor* was subjected to the standard of *culpa levis*. The standard of care, as said, was very high, yet the burden of proof lay with the counterparty, the *locator*. What the *locator* had to prove was not just a slight fault in the *conductor*, but especially the causal link between that fault and the occurrence of the mishap. In other words, the counterparty had to prove that the *culpa* was *ordinata ad casum*.<sup>65</sup> The (very common) statement that *culpa* must be proven and never

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"exemplo nautae, qui tenetur de eo, quod sequitur etiam ex causa tempestatis, si nauem contra domini voluntatem portuit applicauerit". The same decision (on a dispute about a privateering agreement) may be also found in Prospero Farinacci (1554-1618), *Sacrae Rotae Romanae Decisionum recentiorum a Prospero Farinaccio J.C. Romano selectarum*, Venetiis, apud Paulum Balleonium, 1716, vol. 1, dec. 493, p. 433, n. 4.

<sup>64</sup> See e.g. Cesare Manenti (fl.1612), *Decisiones Sacri Senatus Mantuani Caesare Manento ... Authore ...*, Venetiis, apud Antonium Pinellum, 1622, dec. 54, p. 211, n. 59-60: the mandatee who acts against his orders is "in culpa inexcusabili" and is liable for any supervening *casus fortuitus*. Cf. e.g. Pier Paolo Parisio (1473-1545), *Consiliorum Petri Pauli Parisii ...* Venetiis, 1580, vol. 1, cons. 47, *fol.* 104v-107v, esp. *fol.* 106r-v, n. 38-42 and 61-63. The same scheme (pre-existing *culpa* and subsequent mishap) found application also in other subjects, always dispensing with problematic issues on causation. For liability arising from fire see e.g. a decision reported by Farinacci, *Dn. Prosp. Farinacij ... Consilia sive Responsa atque Decisiones Casarum Criminalium*, Coloniae Allobrogum, Excudebat Philippvs Gamonetvs, 1649, vol. 1, cons. 114 (Rota of Rome, 18.4.1597), *Additio a*, p. 143: "Quando constat Dominum esse in aliqua culpa praecedente incendium, quamvis illud fuerit caussatum (*sic*) posteriori culpa ipsius famuli, tunc quod Dominus teneatur de dicto incendio, etiam quod famulus culpam non commiserit in suo officio...".

<sup>65</sup> Pegas, *Resolutiones forenses practicabiles* (note 18), vol. 1, cap. 3, p. 96, n. 35: "culpa in his terminis dicitur ad casum ordinata, si ex ea poterat euenire casus". Cf. Marcantonio Savelli (c.1624-1695), *Marci Antonii Sabelli ... Summa Diversorum Tractatum ... collecta, ac propriis locis distributa a Leopoldo Josepbo Crescini*, Venetiis, Ex Typographia Balleoniana, 1748, vol. 1, lib. 1, s.v. *Casus*, p. 226, n. 5, and esp. Menochio, *Iacobi Menochii ... De Praesumptionibus, Conjecturis, Signis, et Indiciis, Commentaria ...*, Genevae, Sumptibus Leonardi Chövet et Socij, 1686, vol. 2, lib. 5, praes. 3, p. 660, n. 138: "Et etiam observandum, quod ille, qui asserit casum evenisse culpa alicujus, probare debet culpam ipsam fuisse ordinatam ad casum, et ob id quod si culpa illa commissa non fuisset, casus non contigisset."



presumed,<sup>66</sup> therefore, implied that the plaintiff had to prove both the failure of the defendant to uphold a certain standard of care, and that such a failure led to the loss or damage. Thus, ascertaining the defendant's liability meant proving that his conduct fell short of a certain standard on the one hand, and that that led to the occurrence of the damage or loss on the other.<sup>67</sup>

If the very taxing standard of *culpa levis* made relatively easy for the plaintiff suggesting some slight fault in the *conductor*, the problem was how to link that fault to the actual mishap. Law courts had a broad notion of *culpa levis*, but insisted on the need of clear and strong causality link between the *conductor's* fault and the loss or damage.<sup>68</sup> As the Roman Rota had it, "a remote cause removes the effect".<sup>69</sup> The causality link had to be either direct (the fault resulting immediately in the mishap), or at least sufficiently visible to establish a direct chain of causation.

A good example is a decision of the Roman Rota of the middle of the seventeenth century (1656), reviewing a previous decision rendered the year before by the same court. The case was a simple contract of carriage between merchant consignor (the *locator*) and muleteer (the *conductor*). The mule fell from a cliff, causing the utter loss of all that it carried. The muleteer-*conductor* argued that, being a *casus fortuitus*, he was not liable. And indeed the first decision of the Rota dismissed the merchant-*locator's* suit because, even if the defendant's *culpa* was sufficiently established, its relationship with the mishap was not. The defendant's *culpa* had to be "certain, specific, and leading [*praeordinata*] to the mishap".<sup>70</sup> On appeal, however, the merchant-*locator* was able to prove that, at the time of the mishap, the *conductor* had been 50 feet away from the mule. So he claimed that the mule had fallen off the cliff because of the *conductor's* lack of diligence.<sup>71</sup> But the court argued that the distance of the muleteer from the mule was proven only with regard to the time in which the mule died, not also before that. As such, the proof was not sufficient to establish the direct causality link between fault and mishap.<sup>72</sup> The *culpa* proven thus far was not *praeordinata* to the mishap.<sup>73</sup> The

<sup>66</sup> Pegas, *Resolutiones forenses practicabiles* (note 18), vol. 1, cap. 3, p. 99, n. 58: "Advertendum etiam est, quod culpa in casu fortuito non praesumitur, sed probanda est ab eo, qui illam imponit". Cf. e.g. Mascardus, *Conclusiones Probationum Omnium* (note 25), vol. 1, concl. 78, p. 199, n. 31.

<sup>67</sup> Pegas, *Resolutiones forenses practicabiles* (note 18), vol. 1, cap. 3, p. 99, n. 64-65: "Nec sufficit, quod testes de culpa deponentes dicant illam interuenisse in actu; debent enim declarare, in quo consistere potuit; et qualiter adhiberi remedium potuisse, ne casus eueniret ... Adeo, quod non sufficit culpam probare in genere, sed deberet probari in specie, certe, et limitate".

<sup>68</sup> The same notion did not seem to change much over the time, at least in principle. In this sense, a particularly clear decision of the Roman Rota (of 6.5.1816) may be found in the collection of Andrea Barberi, *Decisiones Sacrae Rotae Romanae coram R.P.D. Karolo ex Ducibus Odescalchi ...* Romae, apud Bernardinum Olivieri Typographum Archigym. Rom., 1836, vol. 1, dec. 13 (Romana Remissionis Mercedis), pp.56-58.

<sup>69</sup> *Ibid.*, vol. 2 (apud Dominicum Ercole, 1837), dec. 170 (3.7.1818), p. 239, n. 2: "remota causa removetur effectus".

<sup>70</sup> *Sacrae Rotae Romanae Decisionum Recentiorum a Pavlo Robeo ... selectarum* (note 25), vol. 12 (1655-1658), dec. 159, p. 229, n. 6: "allegans culpam tenetur eam justificare certam, specificam, et praeordinatam ad casum". The first decision dated 26.3.1655; the second one was rendered on 31.3.1656.

<sup>71</sup> *Ibid.*, n. 14-15.

<sup>72</sup> *Ibid.*, n. 16.

<sup>73</sup> *Ibid.*, n. 17.

decision is interesting in that it offers a good example – if not an isolated one,<sup>74</sup> perhaps more explicit than others – of what this *praeordinatio* of the fault to the mishap actually meant. In principle, it was a linear relationship between fault and mishap, whereby the latter was the clear, direct and immediate result of the former.<sup>75</sup> The *ordinatio culpa ad casum* must be understood substantially in the sense of the modern *conditio sine qua non* test.<sup>76</sup> And this is why the *culpa* is not *ordinata* to the mishap if it does not lead directly to it.<sup>77</sup> The presence of another causally relevant fact (whether action or omission) occurring between faulty behaviour and mishap would bend the causality line, blurring its cause-effect dynamics. In other words, the *ordinatio culpa ad casum* presupposes an immediate (in its etymological sense of *nec mediata*) relationship between conduct and event.<sup>78</sup> The elements brought forth by the plaintiff, concluded

<sup>74</sup> See e.g. Fontanella, *Decisiones Sacri Regii Senatus Cathaloniae* (note 26), vol. 2, dec. 534, p. 504, n. 4, 7, 9 and esp. 12.

<sup>75</sup> *Ibid.*, n. 9: “quando enim culpa est imputandus casus, necessarium est, illam fuisse ad casum ordinatam, ita vt aliter non successisset, set sic quod causa, ac illa quidem immediata, culpa fuisset casus”. The same immediateness also applied in the opposite case: when the shipmaster did something to prevent the *casus* from happening. It is the case of jettison, to which the merchants had to contribute only if the shipmaster could prove the immediate causality between his conduct and the aim to avoid the danger. Cf. e.g. Casaregis, *Discursus Legales de Commercio* (note 8), vol. 1, disc. 19, p. 52, n. 17-18 (vol. 1, p. 100, in the first edition of 1719): “pro contributione exigenda a Mercatoribus probari debet, quod damnum navi causatum processerit a causa, seu facto immediate, et directe tendente ad finem evitandi illud periculum imminens ... Ideoque Doctores optime in uno convenerunt, quod si navis rumpatur, aut exarmetur ob vim ventorum, aut tempestatum, nulla debeatur Avaria, sed solum in casu, quo voluntate, et facto immediate, et directe tendente ad conservationem navis, et mercium a periculo sponte caedatur, et in mare deiciantur arbores, vel armamenta, itaut alia damna sint positive navi causata, et immediate ex facto Patroni ea sponte deliberanteis ad effectum evitandi pericula”. Cf. Josephus Gibalinus (Joseph de Gibalin, 1592-1671), *R.P. Josephi Gibalini ... De Vniversa Rerum Humanarum Negotiatione, Tractato Scientifica Utrique foro perutilis. Ex Iure Naturali, Ecclesiastico, Civili, Romano, et Gallico ...*, Sumptib. Philippi Borde, Lavrentii Arnavd, Petri Borde, et Gvlielmi Barbier, Lvgdvni, 1663, vol. 2, lib. 4, cap. 11, p. 296, n. 7: “... Quod idem dicendum erit si nauis gubernator nulla tempestate, aut necessitate adactus, sed proprio consilio directum cursum omittens, compulsus deinde fuerit iactum facere, de illo tenebitur, non assecurator, qui non se obligavit nisi ad pericula quae via ordinaria contigunt, vel si extraordinaria sunt ex necessitate, non culpa nautarum accident.”

<sup>76</sup> *Sacrae Rotae Romanae Decisionum Recentiorum a Pavlo Rybeo ... selectarum* (note 25), vol. 12 (1655-1658), dec. 159, p. 229, n. 12: “quod vt possit onerari conductor, sit necessarium probare, non potuisse casum contingere nisi culp[a] intercessisset”. Cf. e.g. Casaregis, *Discursus Legales de Commercio* (note 8), vol. 1, disc. 1, p. 6, n. 83 (vol. 1, p. 10, in the first edition of 1719): “Intellige, seu declara, quod si casus sinister evenit etiam existente culpa Institoris, Domini, ac Nautae, quae tam casui causam non dedit, itaut ea non existente nullatenus contingisset casus, assecutores tenentur, quia quoties alicuius culpa, casus, qui evenit, adscribitur, demonstrandum necessario est culpam illam ad casum fuisse dispositam, atque ordinatam, itaut nisi propter eam culpam casus nequaquam fuisset eventurus”. For a short introduction on the *conditio sine qua non* test see most recently S. Steel, *Proof of Causation in Tort Law*, Cambridge 2015, pp. 16-17. In the discussion of early modern doctrine and courts the *conditio sine qua non* test was understood in rather broad terms, which today would be considered as encompassing also contributory causation when particularly relevant as to the production (or the non-occurrence) of the result. See further H.-J. Wieling, *Interesse und Privatstrafe vom Mittelalter bis zum Bürgerlichen Gesetzbuch*, Köln-Wien 1979, pp. 45-51.

<sup>77</sup> On issues of causation jurists tended to focus more on Aquilian liability, but even there the mainstream position tended to be rather strict: *ibid.*, pp. 229-232.

<sup>78</sup> As the Rota of Florence had it (in a late sixteenth century decision). “necesse est, quod ipsa culpa sit

the court, would have been sufficient to find against the *conductor* only if he was liable also for *culpa levissima*.<sup>79</sup> Which is precisely where we have to look now.

#### 2.4. *Culpa levissima*, causality and presumptions

Baldus' definition, it may be recalled, pointed to a link between the imposition of *culpa levissima* in specific cases and the likelihood that the slight fault of the defendant led to the occurrence of the mishap. That link amounted to a legal presumption of causality. The presumption was rebuttable, but it inverted the normal burden of proof to the disadvantage of the defendant. Approaching the matter from the mishap, and not from the specific cases where *culpa levissima* applied, the courts ultimately did the same. With the distinct advantage that, instead of moving from *culpa levissima*, such an approach led to it. On a practical level, this exempted the bench from explaining the precise nature of *culpa levissima*. The twist, however, was not just meant to circumvent thorny substantive issues. It was one of the consequences of the increasing common and rigid system of judicial presumptions.

If *culpa* could be construed as the violation of a certain standard, so could causation itself. The obvious difference was that, in this second case, the link was only presumptively established. But this was a necessity due to the stringent nature of the *praeordinatio* – the direct causation link that the plaintiff was supposed to prove. This led the courts to make increasingly frequent use of a series of standards not (or not directly) focused on *culpa*, but on causation itself.<sup>80</sup> Those standards were vague enough to allow (and so, encourage) a probabilistic approach on causation.<sup>81</sup> And this, in turn, ultimately led to the development of a system of presumptions.<sup>82</sup> While rebuttable in principle, their repeated application in subsequent decisions made such presumptions increasingly difficult to challenge. Common sense often became common knowledge, strengthening the weight of brocards and ultimately freeing the bench from thorny underlying issues.<sup>83</sup> Later on, the attitude of (some) civilians and,

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ordinata, ad ipsum casum, et sic immediata, non autem mediata” (Sforza degli Oddi, *Consiliorum sive Responsorum*, D. Sfortiae Oddi Pervsini ... Venetiis, 1593, apud Iunctas, vol. 1, cons. 31, fol. 94r, n. 7).

<sup>79</sup> *Sacrae Rotae Romanae Decisionum Recentiorum a Pavlo Rybeo ... selectarum* (note 25), vol. 12 (1655-1658), dec. 159, p. 229, n. 20.

<sup>80</sup> Pegas, *Resolutiones forenses practicabiles* (note 18), vol. 1, cap. 3, p. 96, n. 37-40: “Sicuti etiam dicitur ordinata ad casum, si culposus fuit praemonitus, et noluit parere ... Item dicitur culpa ordinata ad casum, si aliquis non faciat, quod diligens, seu diligentissimus paterfamilias secundum naturam contractus fecisset ... Rursus dicitur culpa ordinata ad casum, si faciat aliquid contra conventionem ... Consideratur etiam culpa ordinata ad casum, in vntente re ad alium vsum, quam ad quem sibi commodata fuit.”

<sup>81</sup> *Ibid.*, n. 36: “Vbi subdit non esse necessarium, quod culpa sit praecise ordinata ad casum, sed sufficere, quod secundum possibilitatem actus dicatur ordinata, hoc est, quod possibile sit ex illa causa effectum sequi.” The point is quite older, and can be traced back several centuries. See e.g. Petrus de Ancharano (c.1330-1416), ... *Consilia seu responsa* ... [Lugduni, J. Moylin ... Typographus] 1539, cons. 348, fol. 146r, n. 2.

<sup>82</sup> For the – complementary – discussion on the more theoretical profiles of legal presumptions in the same period see A. Giuliani, *Civilian Treatises on Presumptions, 1580-1620*, in R. Helmholz (ed.), *The Law of Presumptions: Essays in Comparative Legal History*, Berlin 2009, pp. 21-71.

<sup>83</sup> Brocards ultimately conveyed legal presumptions, even when that was not necessarily obvious. Let

eventually, of law courts towards the use of presumptions became more critical, especially in criminal law.<sup>84</sup> By contrast, on issues of damages, the use of presumptions continued to be openly invoked and relied upon, especially when the precise causality link was difficult to establish.<sup>85</sup>

With specific regard to maritime accidents, some maxims were developed by analogy with land-carriage. Clearly, leading a mule or a horse through a dangerous and unknown path is faulty, especially if there is an alternative way. The same for the ship's route.<sup>86</sup> Similarly, an old and sickly mule is no different from an old and worn ship: the carrier should not use either.<sup>87</sup> Nor should he overload them.<sup>88</sup> And if he is caught smuggling, the seizure of the merchandise is just as likely when they are on a cart as when they are in a ship.<sup>89</sup> Versatile as mules and horses can be, however, there was a limit to the extent to which general and simple rules thought for driving a cart could be used in a nautical context. When the jurists started to write specifically on maritime law, they found such parallels of limited help. This encouraged them to elaborate some presumptions of causality specifically thought for maritime commerce. This however does not mean that the whole system was the jurists' creation. Jurists, so to say, got the ball rolling first, and then explained *ex post* the whole game. But they were not at the centre of it. That place pertains to the courts.

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us take for instance an apparently non-committal maritime-related brocard: sailors are to be considered neither among the living nor among the dead. On the face of it, the brocard would have little probatory weight: it does not point to any specific conclusion in terms of liability. And yet, it was on its basis that the Court of Savona (presided by the well known jurist Hieronymus Marlianus - Girolamo Marliani, d.1611) formed its opinion as to the necessity of the actions of a shipmaster who ended up sinking his vessel in the late sixteenth century. *Decisiones Avreae, et Peregrinae ... Avctore Hieronymo Marliano ...*, Papiæ, apud Andream Vianum, 1597, dec. 91 (7.12.1578), p. 257, n. 13. The ship was leaving the port of Messina and then met with a storm. The shipmaster steered towards land and wracked the ship. In absolving the shipmaster, the court explained: "quando reus discessit a portu Messanae non potuit praevidere naufragium, et propterea si quando discessit se non tenuit in altum mare non potest dici in aliqua culpa, postea vero, quando fuit insultatus, propter imminens naufragium non potuit capere altum mare, et sic non fuit [culpa] ordinata ad casum, et cum suborta fuerit de improviso tempestas consultus fuit ab existentibus in fregata, vt se reduceret ad litus *pro evitanda periculo mortis quibus (cum essent nautae) credere debuit*" (emphasis added). For other cases where the same brocard was invoked - to the same end - in other coeval decisions see e.g. Marcus Antonius Bellonius (Marc'Antonio Bellone, fl.1580), *Decisiones Rotae Genvae de Mercatvra et Pertinentibus ad eam ...*, Venetiis [apud Franciscum Zilettum], 1582, dec. 36, fol. 114r, n. 6.

<sup>84</sup> See e.g. the classical work of B. Schnapper, *Les Peines Arbitraires du XIIIe au XVIIIe Siècle (Doctrines Savantes et Usages Français)*, XLI (1973) *Tijdschrift voor Rechtsgeschiedenis*, pp. 237-277, and XLII (1974), pp. 82-112, esp. 87-89. See also G.P. Demuro, *Il Dolo*, Milano 2007, vol. 1, pp. 132-134, on the distinction between *dolus verus* and *dolus praesumptus* - and the scope of the latter especially in Tiberio Deciani.

<sup>85</sup> E.g. de Afflictis, *Decisiones Sacri Consilii Neapolitani* (note 50), dec. 57, p. 125, n. 3. On the subject of *locatio-conductio*, one of the closest examples of the *culpa levissima* of the shipmaster was that of the *conductor* of a habitation in case of fire. See e.g. Alexander Raudensis (Alessandro da Rho, ca.1542-1627), *Decisionum Pisanarvm Alexandri Raudensis*, Mediolani, apud Hieronymum Bordonum, et Petrum Martyrem Locarnum, 1601, vol. 1, dec. 6, p. 125, n. 56.

<sup>86</sup> Cf. Pegas, *Resolutiones forenses practicabiles* (note 18), vol. 1, cap. 3, pp. 96 and 98, n. 41 and 56 respectively. See *infra*, text and notes 143-144.

<sup>87</sup> Pegas, *Resolutiones forenses practicabiles* (note 18), vol. 1, cap. 3, p. 96, n. 42.

<sup>88</sup> *Ibid.*, p. 98, n. 46.

<sup>89</sup> *Ibid.*, n. 47.

In a maritime context, presumptions of causality were introduced by jurists on the basis of Roman law sources. Such presumptions were hardly sophisticated and poorly elaborated, but their success among other jurists and courts alike led to the crystallisation of a series of typical scenarios in which the fault was presumed and presumed linked (in causal terms) with the mishap.

If we look at the development of the principle that *culpa* must be *ordinata ad casum* on the specific case of the shipmaster, probably the first jurist to deal with it (or rather, to write more than the few lines always devoted to the *locus classicus* of D.4.9.5) is the Portuguese Petrus Santerna (Pedro de Santarém, c.1460–?). Santerna states with admirable clarity that the insurer is liable for the *culpa* of the shipmaster when the latter's faulty behaviour leads to the mishap.<sup>90</sup> The problem is that he is clearly thinking of *dolus*, not *culpa*. Santerna introduces the subject of the master's fault within a broader discussion on the insurer's liability for mishaps imputable to the wrongful behaviour of the insured. During such discussion, to avoid any uncertainty as to the lack of the insurers' liability, Santerna provides three examples all pointing to intentional wrongdoing. In the first the insured manages to load some forbidden merchandise onboard; in the second, he asks that the ship sail towards a restricted or forbidden area; in the third, he does not pay the customs for his cargo.<sup>91</sup> A generous qualification of such behaviours might be *culpa lata*, but it is clear that the subject-matter is substantially *dolus*. It is only after these examples that Santerna starts discussing the insurers' liability for the *culpa* of the shipmaster. And it is significant that his conclusion - the insurer is liable - derives from the fact that the insurer is bound to bear liability for the *dolus* of a third party ("de dolo tertii provenientis"). Much unlike the merchant insured, the shipmaster is a third party in respect to the insurance policy.<sup>92</sup>

Santerna refers to some important passages in Roman and canon law sources<sup>93</sup> to apply the principle "qui occasionem damni dat, damnum dedisse videtur" to the insurance context. In Santerna's treatise the discussion about causation is entirely centered on reprisals (for the old problem of whether the shipmaster ought to be considered responsible for the reprisal if it was his past conduct that triggered the reprisal itself).<sup>94</sup> Clearly, the reasoning is applicable to other insurance matters.<sup>95</sup> But

<sup>90</sup> Santerna, *Tractatus pervtilis et quotidianus, De Assecuracionibus et Sponsionibus Mercatorum*, à D. Petro Santerna Lusitano ..., Antverpiae, apud Gerardum Spelmannum, 1554, pt. 4, *fol.* 56v-57r, n. 18-19.

<sup>91</sup> *Ibid.*, *fol.* 56v, n. 17.

<sup>92</sup> *Ibid.*, *fol.* 58r, n. 58. The only exception to this is when the insured would stand to gain something from the *dolus* of the third party (here, the shipmaster), or he even took part in the same *dolus*: *ibid.*, *fol.* 58v, n. 23.

<sup>93</sup> Esp. D.9.2.30.3 and C.23, q.5, c.8 - but surprisingly not also X.5.36.9. Cf. G.P. Massetto, *Responsabilità Extracontrattuale (Diritto Intermedio)*, in *Enciclopedia del Diritto*, XXXIX, Milano 1988, pp. 1099-1186 at 1129-30. See further, more recently, E. van Dongen, *Contributory Negligence. A Historical and Comparative Study*, Leiden 2014, pp. 150-152, and especially M. Carni, *La Responsabilità Extracontrattuale nel Diritto Canonico Medievale*, unpublished PhD thesis, Università degli Studi di Macerata, 2014, pp. 123-134, where ample literature.

<sup>94</sup> Santerna, *De Assecuracionibus* (note 90), pt. 4, *fol.* 64v-67r, n. 37-42. A different problem, discussed without solution of continuity from the middle ages to the early modern period, was whether the nationality of the shipmaster was enough to impute to his *culpa* the reprisals - and so, the ensuing loss.

Santerna is silent on a crucial point: to what extent does the same principle apply to other acts of the shipmaster.

On the problem of causality between *culpa* and *casus*, the next, and equally famed, legal writer of maritime commerce, Stracca, is hardly more exhaustive than his predecessor. Following the example set by Santerna, Stracca deals with the *culpa* of the shipmaster when discussing about reprisals, providing the classical examples on faulty behaviour of the shipmaster (sailing in wintertime or in bad weather, overloading the ship, sailing across notoriously dangerous places or trading the normal route for a new and little known one, etc.)<sup>96</sup> without further guidance on more specific and problematic issues.

Similarly unhelpful is Stracca's treatment of the fault of the shipmaster, amounting to a short a description of the main examples found in Roman law sources. What he says on the subject in his treatise *De Assecurationibus* is in effect a re-elaboration (which bears clear marks of Santerna's influence) of what written in his earlier treatise *De Nautis*. Most of part 3 of *De Nautis* is a reasoned list of cases on the shipmaster's *culpa*.<sup>97</sup> But this list is remarkably generic and abstract, with very little to offer to a law court. The principle that the *culpa* must be *ordinata ad casum* is stated or implied many times (indeed Stracca continues to repeat this mantra even when he starts part 4 of the same treatise),<sup>98</sup> but is never elaborated.

The dyad Santerna-Stracca had an enormous influence both on law courts and on later authors (whose authority in turn contributed even further to enhance the prestige of the two earlier jurists in the eyes of the bench). Their insistence on the fact that the shipmaster's *culpa* must be *ordinata ad casum* (or *causam dans*), although rather abstract and poorly explained, had a similarly significant weight. The fault of the master was a secondary point in the discussion of Santerna and Stracca alike: this would explain the remarkably simplified way in which both authors dealt with it. Simplified as it might

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One would be tempted to dismiss the subject as merely theoretical (why should the shipmaster be considered at fault if the reprisals were issued against the whole *natio*?), but in fact there are decisions on the subject well into the seventeenth century. Possibly the reason why such an issue was actually debated (and not simply dismissed) is that it required to clarify the relationship between imputability and culpability: if the reprisal occurs because of the nationality of the shipmaster, then to some extent the mishap might be considered as also imputable to him. Provided that the mishap is imputable (at least by association) to the person of the shipmaster, however, the courts would move on to examine whether the same relationship exists between mishap and conduct of the same shipmaster. An interesting example may be found in a decision of the Genoese mercantile Rota reported in De Luca, *Theatrum Veritatis et Justitiae* (note 53), vol. 8, disc. 109 (policy of 3.12.1666), p.189, n.7: "Et quamvis ego ponderarem, quod cum casus non provenerit a tempestate, vel alio accidenti naturae, minusque a pyratis, sed a classe Hispanica ratione belli cum Lusitanis, quali erat assecuratus, ideoque dici posset casus sequutus in suis odium, atque ab eius inimicis, attamen reflectendo ad veritatem agnoscebam, quod motivum non subsisteret, cum ageretur de bello publico, et nationali citra culpam assecurati".

<sup>95</sup> So much so that he hastens to clarify that the same conclusion should not be applied to jettison: Santerna, *De Assecurationibus* (note 90), pt. 4, *fols.* 67r-68r, n. 43-45.

<sup>96</sup> Stracca, *De Assecurationibus* (note 40), gl. 20, *fols.* 113v-114r, n. 3, and in particular Id., *de Nautis* (note 40), pt. 3, esp. pp. 251-258, n. 4-6, 12-21 and 25.

<sup>97</sup> Stracca, *Tractatus de Nautibus*, in Id., *Tractatus Clariss. Irrisconsulti Benvenuti Stracciae Anconitani, de Nautis, Nautibus, et Navigatione* (note 40), esp. pp. 308-311, n. 16-26.

<sup>98</sup> Id., *De Nautis*, (note 40), pt. 4, pp. 269-270, n. 2-3.

be, however, their approach soon became a topos, and those examples became the main cases where the fault of the shipmaster was considered as *causam dans* by definition. This paved the way for the fragmentation of the shipmaster's *culpa* into discrete categories, which progressively crystallised in as many presumptions.

The list of cases where the master is at fault for the mishap proved considerably successful, and it was re-elaborated by other authors, among whom the most influential (and the most quoted by the law courts) was probably Roccus. In his *De Navibus et Naulo*<sup>99</sup> he provided an ample list of cases where the shipmaster is at fault. Among them, the main ones are seven: i. grounding the ship, unless that depended on winds or other kinds of *vis maior*;<sup>100</sup> ii. sailing in bad weather, especially in wintertime;<sup>101</sup> iii. keeping the cargo onboard for a long time after arrival at destination;<sup>102</sup> iv. choosing ill-famed, incompetent or just unknown people to man the ship;<sup>103</sup> v. smuggling;<sup>104</sup> vi. using another country's flag;<sup>105</sup> vii. not defending the ship against attacks.<sup>106</sup> This list of cases was widely shared among civilians.<sup>107</sup> Similarly fortunate were the cases in which the mishap was presumed to be fortuitous - and so the shipmaster was presumed not to be responsible for it.<sup>108</sup> Among these cases, clearly based on Roman law sources,<sup>109</sup> the chief ones were, predictably enough,

<sup>99</sup> Roccus, *De Navibus et Navlo* (note 41).

<sup>100</sup> *Ibid.*, not. 55, p. 375, n. 151-153.

<sup>101</sup> *Ibid.*, not. 56, p. 375, n. 154-155; cf. also Roccus' treatise *De Assecurationibus*, in *Id.*, *Responsorum legalium cum decisionibus* (note 41), not. 38, p. 403, n. 119-120.

<sup>102</sup> Roccus, *De Navibus et Navlo* (note 41), not. 57, p. 375, n. 157-158.

<sup>103</sup> *Ibid.*, not. 62, p. 376, n. 168-169.

<sup>104</sup> *Ibid.*, not. 66, p. 377, n. 180.

<sup>105</sup> *Ibid.*, not. 66, p. 377, n. 181-182.

<sup>106</sup> *Ibid.*, not. 70, p. 378, n. 190.

<sup>107</sup> See e.g. Gibalinus, *De Vniversa Rerum Humanarum Negotiatione* (note 75), vol. 2, lib. 4, cap. 11, p. 296, n. 7: "Si nauarchus contra pactum mutauerit destinatum iter absque necessitate, lucri causa, inscio vel inuito assecuratore; si sciens mare infestum piratis, et hostibus, nolente assecuratore, illumque casum excipiente nauigauerit, si nauem non direxit ad eum portum de quo conuenerat; si nauem oneravit mercibus illicitis, quae deinde idcirco publicatae sunt; de eis omnibus non tenebitur assecurator, sed nauis dominus". Cf. Hevia Bolaño, *Laberinto de Comercio Terrestre y Naval* (note 41), lib. 3, cap. 11, p. 617, n. 3-4, and esp. cap. 12, pp. 628-634, n. 6, 9-16, 18, 23-24, 27, 29, 31; Johannes Loccenius (Johan Locken, 1598-1677), *Johannis Loccenii J.C. De Jure Maritimo et Navali Libri Tres* (3<sup>rd</sup> edn.), Holmiae, apud P. de Dobbeleer [ca.1660], lib. 1, cap. 7, pp. 63-64, n.3; Laurentius Sylvanus (Lorenzo Silvano, c.1500-c.1570), *Consilia D. Laurentii Sylvani ...*, Lvdgvni, apud Theobaldum Paganum, 1551, cons. 46, p. 333, n. 8; Parladorio, *Quotidianarum differentiarum Sesquicenturia* (note 22), diff. 132, p. 423, n. 16.

<sup>108</sup> As the Rota of Genoa had it, in such cases the shipmaster is "solutus ... ab omni obligatione". Mercantile Rota of Genoa, decision of 3.10.1674, reported in Balducci's collection, *Jacobi Balduccii, Alias Rotae Civilis Serenissimae Reipublicae Genuae ... Auditoris, Decisiones, et Res Judicatae ...*, Parmae, 1703, Typis, et sumptibus Pauli Monti, vol. 1, tit. 1 (*De Assicurationibus*) dec. 5, p. 15, n. 15.

<sup>109</sup> One of the most complete lists of the Roman law texts used by early modern jurists with regard to *vis maior* in a marine commercial context is to be found in the (vastly influential) work of Sigismundus Scaccia (1564-1634), *Sigismvndi Scacciae ... Tractatus de Commerciis et Cambio ...*, Romae, sumptibus Andreae Brugiotti, ex Typographia Iacobi Mascardi, 1619, § 1, q. 1, p. 37, n. 135. The passages quoted are D.2.11.3, D.4.9.3.1, D.13.6.18pr, D.39.2.24.4 and C.4.34.1. To these, another relevant Roman law text that should be mentioned is D.7.1.12.1 (see esp. Manenti, *Decisiones Sacri Senatus Mantuani* (note 64),

shipwreck and seastorms on the one hand, and pirates, privateers and enemies on the other.<sup>110</sup> Other important kinds of mishaps were either not mentioned or discussed perfunctorily.<sup>111</sup>

It is important to stress the role played by those cases – both those leading to liability and those excluding it. In each scenario, the mishap is either presumptively imputed to the shipmaster's fault, or presumptively considered as wholly independent from his conduct. The specific features of the kind of mishap, in other words, pre-determined both the presence of fault and its relevance towards the loss or damage. Combining causality with liability meant that it was sufficient to look at the kind of mishap to determine – at least *prima facie* – whether the defendant was liable or not. Thus, the probabilistic approach to causation allowed to allocate the burden of proof first and foremost on the basis of the kind of mishap.<sup>112</sup> The specific standard of care of the contract was in practice less important. So the shipmaster was not presumptively held liable because his standard of care was *culpa levissima*, but because of the nature of the mishap, which suggested the presence of *culpa*. This also meant that the difference between shipmaster (*conductor* under *culpa levissima*) and other kinds of *conductores* (under *culpa levis*) was less important in practice than it was in theory. The emphasis on the kind of mishap, in other words, relegated to a secondary role the specific features of contractual liability. This way, it was the nature of the mishap to determine the burden of proof in most contractual relationship. So for instance (to give just a few examples on our subject) the land-carrier who travelled in wintertime was subjected to the same presumption of fault as the shipmaster who did likewise, despite that his standard of fault was *culpa levis* and not *levissima*.<sup>113</sup> Similarly,

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dec. 54, p. 211, n. 1).

<sup>110</sup> E.g., in rough chronological order: Marliani, *Decisiones Avreae, et Peregrinae* (note 83), dec. 91 (7.12.1578), p. 257, n. 11-12; Manenti, *Decisiones Sacri Senatus Mantuani* (note 64), dec. 54, p. 211, n. 1; Hevia Bolaño, *Laberinto de Comercio Terrestre y Naval* (note 41), lib. 3, cap. 12, p. 634, n. 31; Balducci, *Decisiones et Res Judicatae* (note 108), 1703, vol. 1, tit. 1, dec. 10 (15.7.1694), p. 28, n. 19; Bartolomeo Artimini, *Raccolta delle Decisioni della Ruota Fiorentina dal 1700 al 1808, Disposte per ordine cronologico*, Firenze, presso Leonardo Marchini, 1850, vol. 10, dec. 873 (28.9.1735), pp. 314 and 319-320, n. 5-6 and 22-26 respectively.

<sup>111</sup> So for instance Stracca lists fire, but only to mention the possibility that it could spread onboard because of the fault of the crew, without elaborating any further on the issue. Stracca, *De Assecurationibus* (note 40), gl. 18, fol. 109v, n. 2.

<sup>112</sup> See e.g. Pegas, *Resolutiones forenses practicabiles* (note 18), vol. 1, cap. 3, p. 99, n. 66: “At hoc intelligendum est in his, quae regulariter sine culpa accidere solent. Sicuti vis hostium, impetus aquarum, et similia: secus in his, quae sine culpa regulariter evenire non solent, ut sunt furtum, incendium, mors non naturalis animalium, fuga seruorum ...”. Cf. e.g. Mascardus, *Conclusiones Probationum Omnium* (note 25), vol. 1, concl. 271, pp. 446-447, n. 8-9: “Limita [*scil.*, to exclude the need of full proof] ut procedant praestata in his casibus, qui sine culpa praecedente facile evenire non consueverunt, ut in furto, incendio, fuga servorum, vel aliorum, qui debuerunt custodiri secus in illis, qui sine culpa regulariter evenire solent, ut vis hostium, impetus aquarum, et similia, in quibus probata amissione, praesumitur casus, nisi culpa probetur”. See further Savelli, *Summa Diversorum Tractatum* (note 65), vol. 1, lib. 1, s.v. *Casus*, p. 226, n. 6. Cf. *ibid.*, s.v. *Conductor*, p. 370, n. 38.

<sup>113</sup> On the subject a particularly interesting decision was rendered by the Rota of Bologna (31.3.1656), because the bench refused to saddle the land-carrier with presumed fault despite that such was the expected outcome. The judges felt that, in the specific circumstances of the case, doing so would have amounted to imposing on the defendant an irrebuttable presumption of guilt, which they wanted to



overloading the mule led to the same presumed responsibility for the mishap as the overloading of the ship.<sup>114</sup> By contrast, the *institor* (in fact, some sort of junior partner) who lost the fishing tackle at sea was presumptively not at fault: unlike the wind spreading the fire on land, the wind blowing at sea pointed to a *fortuitus* mishap.<sup>115</sup> In such and many other instances, it was virtually irrelevant whether the defendant was under *culpa levissima* or *levis*. In either case he had to prove that he exercised a remarkably high level of diligence, and this in effect amounted to disproving the causal link between his behaviour and the mishap.

Coming back to later jurists' treatises, and contrasting them with the writing of medieval jurists, the compenetration between mishap and fault becomes evident.<sup>116</sup> Let us take for instance a rather banal – but revealing – observation of Anacletus Reiffenstuel (Johann Georg Reiffenstuel, 1641-1703). The defendant would not be liable for *casus fortuitus*, says Reiffenstuel, unless the *casus* is the consequence of his faulty behaviour. The faulty behaviour leading to an otherwise fortuitous accident is qualified as *culpa levissima*. So far, the argument is the same as that of medieval jurists. The standard of care, however, is not determined on the basis of the contractual relationship (and so, in abstract terms) but rather according to the kind of mishap.<sup>117</sup> And this allows to dispense with specific proof as to the actual fault of the defendant: that is (presumptively) inferred from the nature of the mishap.<sup>118</sup> The abstract rule is the same as that of the medieval commentators. Its application is not. The burden of proof now depends on the specific category of mishap, which conditions the

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avoid “cum non debeat sola formalitas ordinis pervertere substantiam iustitiae” (De Luca, *Theatrum Veritatis et Iustitiae* (note 53), vol. 4, disc. 11, p. 14, n. 6). The decision was however reported precisely because it did the opposite of what the judges were supposed to do. It seems telling that, despite the great prestige of De Luca, this decision is very seldom quoted in other cases involving land-carriers. It would seem that it remained the occasional, isolated protest against the hardening of the presumption system.

<sup>114</sup> E.g. Carocius, *Tractatus Locati et Conducti* (note 9), pt. 2, s.v. *Dolo et Culpa*, fol. 51r, n. 8. Cf. *supra*, note 88.

<sup>115</sup> De Luca, *Theatrum Veritatis et Iustitiae* (note 53), vol. 4, disc. 13, p. 16, esp. n. 3-4 and 6.

<sup>116</sup> Later jurists are here meant as practice-oriented ones. The present work purportedly avoids any reference to those learned positions that had great importance as to the development of legal thought, but not as much to legal practice. Less practice-oriented jurists also started with a careful analysis of medieval schemes on fault, but then they started moving in directions as different as those, for instance, of Molina on the one hand and Donellus on the other. See e.g. N. Jansen, *Die Struktur des Haftungsrechts* (note 57), pp. 309-10, and *ibid.*, pp. 304-5, together with H.-J. Hoffmann (note 20), pp. 85-86 respectively. A further and different direction was that taken by most humanist jurists, on whom see esp. the same Hoffmann, *ult. cit.*, pp. 83-84 and 105-108.

<sup>117</sup> Reiffenstuel, *Jus canonicum universum* (note 25), vol. 3, p. 267, n. 62-63: “*Ordinarie et regulariter loquendo; quia dantur casus, in quibus conductor etiam de culpa levissima, quin et de casu fortuito tenetur. Veluti primo, si expresse inter contrahentes conventum est de praestando damno quomodocumque, etiamsi culpa levissima ... Secundo de culpa levissima, et casu fortuito tenetur, si conductor sua culpa det causam casui fortuito, ut si in locatione v.g. convenit, Ignem non habeto, et habuit, tenebitur, etiamsi fortuitus casus admisit incendium; quia non debuit ignem habere*” (italics in the text).

<sup>118</sup> *Ibid.*, n. 69. Cf. e.g. Mascardus, *Conclusiones Probationum Omnium* (note 25), vol. 1, concl. 468, p. 760, n. 6; Menochio, *De arbitrariis iudicium, quaestionibus et causis ...*, Genevae, 1690, sumptibus Samuelis de Tournes, lib. 2, cent. 4, casus 390, p. 710, n.6.

qualification of *culpa*.

When fault is considered in isolation from the kind of mishap, early modern jurists writing on *culpa levissima* are still expected to follow the usual approach, and define it as a sort of extra-diligence. But if we were to go beyond definitions and look at the explanation provided as to its actual working, we could see fault explained in terms of (loose) causality.<sup>119</sup> Just as for the bench, so for the jurists the question ultimately is whether the mishap could be ascribed – in an approximative, probabilistic way – to the behaviour of the defendant measured against a certain standard of care. The question thus becomes not one of definitions but of their practical application, which the jurists were happy to leave to the discretion of the judge - who could naturally avail himself of conjectures.<sup>120</sup> While in principle those conjectures provided only some help in applying abstract principles, in practice they shaped the principles themselves.

With the benefit of hindsight, this outcome is hardly surprising. Setting the bar too high has often the effect of encouraging ways to get around it. Establishing the presence of fault would have not been enough to condemn the defendant. In principle, the *conductor* should be found liable if his fault both preceded and resulted in the mishap.<sup>121</sup> As such, proving the pre-existing faulty state of the *conductor* could only amount to proving that his *culpa* pre-dated the occurrence of the mishap, not also that it caused it.<sup>122</sup> To make up for that, legal presumptions both implied fault and entailed some causality link between fault and mishap.<sup>123</sup>

The nuances between *culpa levis in abstracto* and *levissima* continued to occupy much room in theoretical discussions, but had a remarkably lesser impact on the actual position of the courts. Some events are not typically triggered by anyone's fault, while others are. The specific kind of event leading to the actual loss or damage thus became

<sup>119</sup> See for instance the swift passage from definition to explanation of *culpa levissima* in the treatise of Celsus Bargalius (Celso Bargagli, 1546-1593), *Celsi Bargalii ... Tractatus ... de Dolo et Culpa ... in VI. Libros Distinctus ...*, Norimbergae, apud Joannem Danieleum Tauberum, 1700, lib. 5, cap. 4 (*De levissima Culpa*), p. 454, n. 6: “Est deviatio a legis dispositione, in eo, quod Lex disponit, esse diligentissimam, veluti non diligentissime custodire rem tuae custodiae commissam ... aut non diligentissime curare infirmum, vel aliquid de contingentibus omittere, quod si non fuisset omissum, res verosimiliter salva foret”.

<sup>120</sup> *Ibid.*, n. 7: “cum varia sit personarum condicio, certa regula in commissione levissimae culpa, non potest constitui; proinde relinquatur Arbitrio Judicis, qui ex circumstantiis, et conjecturis iudicat, in quam quis culpam inciderit.” On the point see already Benedetto Capra (Benedictus de Benedictis de Perusio, d.1470), *D. Benedicti de Benedictis de Capra ... Conclusiovm, Regylarvm, Tractatum, et Communium opinionum ...* Venetiis, 1568, vol. 1, reg. 78, fol. 96r, n. 29: “in istis non potest tradi certa theorica ... relinquendum est iudicis arbitrio, qui ex circumstantiis et coniecturis habebit iudicare in qua culpa quis fuerit.”

<sup>121</sup> Carocius' treatise on *locatio-conductio* is particularly clear on the point: *Tractatus Locati et Conducti* (note 9) pt. 2, s.v. *Casibus, et periculis*, fol. 53r, n. 8.

<sup>122</sup> *Ibid.*, fol. 53r, n. 9.

<sup>123</sup> On the point, Pacioni is perhaps clearer: the locator cannot just prove that the conductor put some heavy bags on the horse, but that the horse died *because* of that burden. To prove that, is it necessary to provide (what we might consider as) strong circumstantial evidence, such as proof that the cargo was not well secured, or that it was too heavy, and so on. Pacioni, *De Locatione et Conductione Tractatus* (note 13) cap. 12, p. 76, n. 74.

the starting point for the court's approach on the whole matter. A proper *casus fortuitus* is that which cannot be prevented because it cannot be foreseen - and so, by definition, it does not depend on any faulty behaviour (whether of a very diligent or of an extremely diligent person). If a *casus fortuitus* does occur, the burden of proof is on the counterparty: the shipmaster does not have to prove his diligence, it is the counterparty that has to prove the shipmaster's negligence. In practice, for instance, a captain would not have to explain why the ship was attacked by pirates, even if avoiding that encounter could have well been possible. By contrast, a captain would have to exculpate himself in case of theft onboard.

While a *casus fortuitus* was presumed to have occurred without any fault, by contrast, other mishaps were presumptively considered as depending on someone's fault. This is something that ought to be taken into account when thinking of the maxim that (barring *custodia* or *mora*) *culpa* is never presumed but always to be proven. It is not an inversion in the burden of proof with regard to *culpa*, but a presumption of causality that implies a similar presumption of faulty or negligent behaviour. Before looking at the standard of care applicable to the defendant in the specific situation, the court would normally look at the kind of mishap. The division of mishaps between "presumptively faultless loss" and "presumptively faulty loss" thus came *before* the division between "fault presumed" and "fault to be proven". If the *casus* was deemed to be *fortuitus*, the master would be presumed not to have been at fault, and it would be up to the plaintiff to prove otherwise.<sup>124</sup> Even if one were to insist that *culpa levissima* entailed an inversion in the burden of proof - something, in court practice, far from clear - its practical significance was minimal.

On a practical level, the priority given to the nature of the mishap did not induce the bench to disregard the standard of care required of the defendant (at least, not in principle), but to simplify its ascertaining. In a maritime context this was perhaps more evident than elsewhere: on the one hand, the judges lacked specific nautical expertise; on the other, the amount of information as to the circumstances of the mishap was often limited.<sup>125</sup> Both reasons encouraged the bench to apply a common sense judgment. Quite evidently, this approach did not necessarily follow a rigorous analysis in terms of causation, but rather looked at the conduct of the shipmaster on the basis of the kind of mishap occurred.<sup>126</sup> Whether *levis* or *levissima*, therefore, the shipmaster's

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<sup>124</sup> E.g. Marliani, *Decisiones Avreae, et Peregrinae* (note 83), dec. 91, p. 257, n. 13; Iosephus Ramonius (Josep Ramón, d.1631), *Consiliorum vna cum Sententiis et Decisionibus Audientiae Regiae Principatus Cathaloniae. Auctore Iosepho Ramonio ...*, Barcinonae, ex Typographia Stephani Liberos, Expensis Michaelis Manescal, 1628, vol. 1, cons. 39, p. 450, n. 4; Girolamo Basilico (d.1670), *Decisiones Criminales Magnae Regiae Curiae Regni Siciliae ...*, Authore D. Hieronymo Basilico ... (2<sup>nd</sup> edn.), Florentiae, Ex Typhographia Joannis Philippi Cecchi, 1691, dec. 18, p. 230, n. 7; Balducci, *Decisiones et Res Judicatae* (note 108), 1703, vol. 1, tit. 1, dec. 10, p. 28, n. 19.

<sup>125</sup> Not to mention that relying on the *culpa levissima* of one party would make sense only when the other party was not under the same degree of care. So for instance when the mishap was a collision between two ships, to apportion liability the court required clear evidence, moving from the "standard" burden of proof. See e.g. Antonius da Gama (1520-1595), *Decisiones Supremi Senatus Regni Lvsitaniae, Auctore D. Antonio De Gamma ...*, Barcinone: excudebatur apud Gabrielem Graells & Gerardum Dotil, expensis Lelij Marini mercatoris Veneti, 1597, dec. 296, p. 293.

<sup>126</sup> It goes without saying that the presumptions developed by the courts were hardly limited to a maritime context.

diligence was assessed against the nature of the mishap.<sup>127</sup> If the mishap was classified as presumptively fortuitous, ascertaining that the master followed the standard behaviour to be normally expected (which is something very different from proving a remarkably high standard of diligence) was sufficient as to reject any causal link with the mishap.<sup>128</sup>

Qualifying the mishap before moving on to the standard of care of the defendant was of great practical significance: in examining the conduct of the shipmaster, the courts would be moving from a (strong) presumption about the nature of the mishap. Thus, if the mishap was typically fortuitous, then the judges would condemn the shipmaster only in presence of clear evidence pointing to a remarkably negligent behaviour and, especially, to its direct link with the mishap.<sup>129</sup> By contrast, if the mishap fell within one of the categories where the loss was considered as presumptively caused by fault, then the judges would normally move from the assumption that it was imputable to the shipmaster's conduct. In such a case, while still in principle requiring *ordinatio culpa ad casum*, the bench often considered the mere possibility that the behaviour could have led to the mishap as sufficient to envisage causality, and so to find for the occurrence of that *ordinatio*.<sup>130</sup>

To fully appreciate the practical strength of legal presumptions, it is also important to keep in mind a rather banal fact: the growing number of commercial disputes heard by law courts made very difficult for the judges to specialise in any single branch of commercial law. This led to the increasing reliance on abstract, sometimes generic guidelines, and - crucially - their progressive crystallisation into fully-fledged legal presumptions. In turn, the growing weight of previous decisions made increasingly difficult to challenge them.

This last point, although not always fully appreciated, is of particular importance. The more decisions were rendered by a same court, the more such court would rely on its own jurisprudence. This is especially evident in the Italian case law during the seventeenth and eighteenth centuries. At first, in the second half of the sixteenth

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<sup>127</sup> Ultimately, therefore, the result was the same whether the chosen approach was the benchmark of professional diligence or the more dogmatic category of higher standards of care imposed by the law for specific kinds of obligations. Both approaches can boast illustrious pedigrees: cf. H.-J. Hoffmann (note 20), pp. 50-51.

<sup>128</sup> Among the many examples that could be made, see e.g. a case of the Genoese mercantile Rota reported in Bellonius, *Decisiones Rotae Genvae de Mercatura* (note 83), dec. 205, fol. 265r-v, n. 2, on the shipmaster's liability for the damage to the cargo following a sea storm. The court simply looked at whether the cargo was duly stored under the hatches: as that was the case, it found for the shipmaster.

<sup>129</sup> So for instance when the shipmaster's negligence appeared blatant, and - especially - its causality link with the mishap rather obvious, then the bench would find against him even if the mishap was one normally classified as fortuitous. Suffices for instance to think of failure to repair the vessel until it would eventually sink. In such and similar cases the courts had little qualms in condemning the shipmaster. See e.g. Casaregis, *Discursus Legales de Commercio* (note 8), vol. 1, p. 47, n. 7-8 (vol. 1, p. 91, in the first edition of 1719).

<sup>130</sup> E.g. Sforza degli Oddi (1540-1611), *Consiliorum sive Responsorum, D. Sfortiae Oddi Perusini ... Venetiis*, apud Iunctas, 1593, lib. 1, cons. 31 (a decision of the Florentine Rota of the late sixteenth century), fol. 95v, n. 34: "licet culpa non esset praecise necessario ad casum ordinata, sufficit tamen quod secundum possibilitatem ipsius actus dicatur ordinata ad casum, idest, quod possibile sit quod ex illa causa ille effectus secutus fuerit".

century, the particular nature of a court such as the Genoese *Rota Mercatoria* (whose judges were neither sailors nor merchants, but at least had a robust understanding of mercantile business) made its decisions particularly important for other courts to follow. In the space of a few decades, however, those other courts began to issue an increasing number of decisions on mercantile matters themselves. The more they could rely on their own jurisprudence, the less they would still base their decisions on those of the Genoese Rota to decide upon a case.<sup>131</sup>

Further, the illustrious provenance of those presumptions - many were taken from Roman law sources<sup>132</sup> - often discouraged their critical elaboration. Roman law provided, so to say, both the diagnosis and the treatment: there was little incentive to look beyond it.<sup>133</sup> So the law courts began to use their presumptions as a sort of checklist at the same time as they started to consolidate a rather strict observance of their precedents (or, at least, to find increasingly difficult, or just less expedient, departing from them). The growing appetite of court practice for presumptions encouraged jurists to invoke Roman law sources whenever such presumptions could be found. Taken out of their context, however, those sources were sometimes twisted beyond repair.<sup>134</sup> It was a vicious circle. Thus, the legacy of Roman law proved ultimately more of a hindrance than a help to the evolution of the maritime carrier's liability - and sometimes, perhaps, of commercial law at large.<sup>135</sup>

## 2.5. Burden of proof and kind of mishap

To appreciate the actual impact of presumptions on the burden of proof as to the defendant's fault, a good example on our subject comes from a decision of the Roman Rota of 1705. Because of some difficulties in fetching wheat, the ship that was supposed to carry it had to wait until winter to set sail. Upon departure, the ship was spoiled by privateers. The insurers of the wheat refused to pay alleging that the shipmaster was at fault for the late departure, and so claiming that the mishap ought

<sup>131</sup> This of course does not mean that the decisions of the Genoese Rota were entirely disregarded, but that they became progressively just one among many different authorities that could, on occasion, be invoked in support of the court's own jurisprudence. Cf. Carlo Delle Site, *La Sacra Rota Romana e le sue decisioni in materia commerciale nel XVII secolo*, unpublished PhD thesis, Università degli Studi di Milano, 2012, pp. 119-120.

<sup>132</sup> *Supra*, text and note 109.

<sup>133</sup> Of course there were also subtler examples in legal literature. Suffices to think of the position of Scaccia, *Tractatus de Commercio et Cambio* (note 109), § 1, q. 1, p. 38, n. 139-140. However, precisely because of their sophisticated nature (both in point of law and of fact), such examples were not entirely suitable to a judge not particularly expert in navigation, for their specialised nature made somewhat more difficult to apply them by analogy to other cases. This is why general and abstract cases were so popular: they were easy to follow.

<sup>134</sup> A particularly remarkable example is the treatment of Modestinus (D.27.1.10.3, esp. "quis regressus est rectam viam tenens") at the hands of Mattheus de Vicq, in his edition of the treatise on averages of Quintyn Weitsen (1518-1565), in the attempt to find a foothold in Roman sources for contemporary principles on change of route and liability of the shipmaster. Mattheus de Vicq, in *Tractatus de Avariis ... Compositus per Quintinum Weitsen ...*, Amstelodami, apud Henricum et Theodorum Boom, 1672, cap. 29, s.v. *De cursu*, p. 109, note 32.

<sup>135</sup> Clearly, the issues just mentioned in this paragraph may not be dealt with in the present work. See again G. Rossi, *The Big Divide* (note 7).

to be presumptively ascribed to the conduct of the master (since he was also the insured). The master however managed to persuade the court of his reasons for the late departure, and so he was absolved. The encounter with pirates and privateers was typically qualified as *casus fortuitus*: in principle, the shipmaster should not have proven the absence of fault in his conduct. On the contrary, it should have been up to the insurers to prove both his fault and how did such fault result in the mishap. But the defendant was already under presumptive *culpa* for late departure, since sailing in wintertime was, from Santerna onwards,<sup>136</sup> one of the traditional cases in which the mishap was presumptively ascribed to the shipmaster's fault.<sup>137</sup> The reason why such a case was considered as implying the reversal of the burden of proof (forcing the master to exculpate himself) was the strong correlation between winter navigation and the encounter with a sea-storm leading to the shipwreck. Clearly, there was no correlation between winter navigation and pirates or privateers (in fact, such unwanted encounters were less likely to happen during winter). But once the wrongful behaviour crystallised into a presumption of *culpa*, the rationale behind it was no longer much relevant. As such, in order to disprove his fault for having been attacked by privateers, the shipmaster had to explain to the court the problems he had encountered in fetching his cargo of wheat.<sup>138</sup>

By contrast, when the fault of the shipmaster did not fall within the scope of a specific presumption, law courts were rather strict in requiring the plaintiff to prove a clear and direct causality link between fault and mishap. So, for instance, less than two years after the above decision, the same Roman Rota absolved another shipmaster whose vessel had been spoiled by pirates. In this case, the alleged fault of the master was the failure to procure sufficient licence to export the cargo. The causal link between the lack of valid licence and the aggression by pirates was the same as that between sailing in wintertime and being attacked by privateers - none. But the difference lay in that, unlike winter navigation, the lack of licence (so long as it did not amount to smuggling) was not one of the consolidated categories where the fault of the master was presumed.<sup>139</sup>

If the presence of a presumption of causality had clear and strong consequences as to the defendant's probatory position, one would expect fault to acquire a more central role in the absence of such presumptions. In case of a mishap not falling in any of the categories where fault was presumed or presumptively excluded, therefore, one might reasonably expect to find more elaborate discussions on the actual *culpa levissima* of the shipmaster. That, however, is not necessarily the case. Let us take for instance the case of the change of route. In principle, especially in Mediterranean policies, it

<sup>136</sup> Santerna, *De Assecurationibus* (note 90), pt. 3, *fol.* 35v-36r, n. 46-48.

<sup>137</sup> Further, delaying departure was itself – at least presumptively – faulty behaviour. As Pegas had it, doing so was contrary to the “*stylus viagii*”. Pegas, *Resolutiones forenses practicabiles* (note 18), vol. 1, cap. 3, p. 96, n. 43.

<sup>138</sup> *Sacrae Rotae Romanae Decisiones nuperrimae ...* Romae, apud Simonem Occhi, 1763, vol. 9 (1705-1706), dec. 82 (29.4.1705), esp. pp. 129-130, n. 6.

<sup>139</sup> *Sacrae Rotae Romanae Decisiones Coram R.mo P. Domino Cyriaco Lancetta ...*, Romae, Typis, et sumptibus Hieronimi Maynardi, 1732, vol. 2, dec. 481 (4.4.1707), p. 282, n. 7.

was customary to grant broad discretion to the shipmaster as to the route to follow.<sup>140</sup> As such, only an extravagant route could be qualified as change of voyage - triggering therefore the termination of the policy -,<sup>141</sup> not to mention that the burden to prove as much would lie on the plaintiff.<sup>142</sup> On a practical level, the main issue was whether the change of route made the navigation more dangerous: if the shipmaster changed route, avoiding the one routinely followed by similar vessels, and met with an accident along the new route, should the loss or damage be presumptively imputed to him? On the point there was no specific reference in Roman law, but trading the ordinary route for an unknown one was generally considered faulty behaviour of the *conductor* in land-carriage.<sup>143</sup> Sea-trade therefore followed suit.<sup>144</sup> Even so, changing route was sometimes necessary at sea, much more than it was on land. So, beginning with Santerna and Stracca,<sup>145</sup> many jurists insisted on the fact that the master was not at fault when the change of voyage was due to some necessity.<sup>146</sup> But that was not the same as saying that, unless the necessity was proven beyond doubt, then the shipmaster was presumptively liable for the mishap. Further, the distinction between necessity and utility is a fine one, and no jurist sought to distinguish the two fully - provided that it was possible at all. The boundaries between necessary, prudential, and potentially beneficial change of voyage remained blurred.

If the *culpa levissima* of the shipmaster entailed the inversion of the burden of proof, then in case of mishap following the change of route, one would expect the courts to

<sup>140</sup> A widespread custom was to add in the insurance policy the clause allowing the ship to proceed in any direction (“to the left, right, north and south, back and forth, once or more times”). Given this kind of discretion, only an extravagant route would trigger a clear change of voyage - and therefore the termination of the policy.

<sup>141</sup> The issue is discussed in some lengths in Casaregis, *Discursus Legales de Commercio* (note 8), vol. 2, disc. 69, pp. 216-223 (vol. 2, pp. 103-104, in the first edition of 1719), where ample sources.

<sup>142</sup> See esp. Bellonius, *Decisiones Rotae Genvae de Mercatvra* (note 83), dec. 3, fol. 18r, n. 11. Indeed the few known cases in which the mercantile Rota of Genoa avoided the policy because of the change of voyage were rather adamant scenarios where the shipmaster had just decided to change the voyage agreed upon with a wholly different one (*ibid.*, dec. 40, fols. 120v-121r, n. 1-2, and esp. dec. 63, fol. 138v, n. 1-3). See also Johannes Wamesius (Jean Wamese, 1524-1590), *Responsorum sive Consiliorum ad ius forumque civile pertinentium*, Antverpiae, apud Henricum Aertssens, 1651, cent. 4, cons. 24 (undated, but on an insurance policy of December 1566), pp. 64-65, n. 5-6 and 8.

<sup>143</sup> E.g. Pacioni, *De Locatione et Conductione Tractatus* (note 13), cap. 12, p. 77, n. 82: “adscribitur etiam culpae conductoris ad vecturam, si mutavit viam solitam, et iuit per insolitam, ita vt inde aliquod infortunium successerit, vti si inciderit in Latrones, qui animal conductum abstulerint, vel animal corruens obierit”.

<sup>144</sup> See - *inter multos* - that veritable collection of common places that is the treatise of Julius Ferretus (Giulio Ferretti, 1480-1547), *Iulii Ferretti ... De Iure, et Re Nauali ...*, Venetiis, apud Franciscum de Franciscis Senensem, 1579, lib. 12, fols. 123v-124r, n. 118. Ultimately, such presumptions were the application to a particular context of other and similarly generic presumptions thought for “standard” *locatio-conductio* situations: see e.g. Savelli, *Summa Diversorum Tractatum* (note 65), lib. 1, s.v. *Conductor*, p. 372, n. 59. Northern European writers were no different: see e.g. Loccenius, *De Jure Maritimo et Navali Libri Tres* (note 107), lib. 1, cap. 7, n. 3, pp. 63-64.

<sup>145</sup> Santerna, *De Assecurationibus* (note 90), pt. 3, fols. 37v-38r, n. 54; Stracca, *De Assecurationibus* (note 40), gl. 14, fol. 99r-v, n. 3.

<sup>146</sup> See for all Hevia Bolaño, *Laberinto de Comercio Terrestre y Naval* (note 41), lib. 3, cap. 14, p. 657, n. 22; Weitsen, *Tractatus de Avariis* (note 134), cap. 29, pp. 106-107, and esp. cap. 30, p. 111; Loccenius, *De Jure Maritimo et Navali Libri Tres* (note 107), lib. 2, cap. 5, p. 178, n. 10.

ask the master to disculpate himself. Much on the contrary, reading early modern decisions on maritime litigation, one is struck by the conspicuously rare occasions in which the court actually condemned the shipmaster for such changes.<sup>147</sup> In the vast majority of cases the master was acquitted - without any particular effort of the defendant in exculpating himself. By and large, law courts were inclined to accept his explanation for the events. This was not because the courts progressively relaxed the standard of care of *culpa levissima*, but rather because the change of route never crystallised into one of the categories of presumed *culpa ad casum ordinata*. The shipmaster might have been considered presumptively at fault, but there was no similar presumption about the causal link between that fault and the mishap. If the decision to change the route – not due to some necessity – depended on the free will of the defendant, then such a will could be construed as *culpa casum dans* only if leading directly to the mishap.<sup>148</sup> The focus on causality attracted within it also the issue of fault. As a result, the burden of proof on fault was not kept distinct from that on causation. Having to prove the immediate causal link between the defendant's conduct and the ensuing loss, the plaintiff was implicitly also expected to prove the defendant's fault, or at least to advance strong arguments in that direction. When the behaviour of the defendant did not match any of the typical conducts likely leading to mishap, in other words, the need of direct causality between faulty behaviour and loss required to prove them both.<sup>149</sup> Thus, if the *culpa* of the defendant had to be the *causa immediata* of the mishap, the courts in effects required the plaintiff to prove a sort of *culpa immediata* in the defendant.

To sum up, the classification (and crystallisation) of different kinds of mishap into discrete categories, where the fault was presumed and presumedly held as cause of the

<sup>147</sup> One of such - very rare – occasions is a decision of the Senate of Lisbon of 30.8.1679, which sustained the decision of the lower court (of 21.1.1679) and confirmed the condemnation of the shipmaster. In that case, however, the shipmaster did not (or could not) provide any plausible explanation for his actions. Pegas, *Resolutiones forenses practicabiles* (note 18), pt. 1, cap. 3, pp. 96-97, n. 43.

<sup>148</sup> So for instance on 23.9.1620 the *Regia Audientia* of Barcelona quashed the decision of the lower court (the mercantile consulate of Cagliari), which had found for the insurers, and condemned them to pay for the loss. For the *Audientia*, the decision to change route (i.e. arriving in Tarragona instead of Valentia) was not the *causa immediata* of the mishap (the encounter with some Mauritanian pirates). Ramonius, *Consiliorum una cum sententiis* (note 124), vol. 1, 1628, cons. 39, esp. pp. 450-451, n. 4-6. The issue was also about whether the change of route for the second leg of the journey (Portupalla to Barcelona and thence to Valencia) would terminate the insurance, and the Barcelona court argued that, since Tarragona was in the way from Barcelona to Valencia, the change of route entailed simply a shortening and not a change of the voyage. Shortly thereafter, the highest court (the *Supremum Aragonum Concilium*) confirmed the appellate decision (*ibid.*, pp. 454-455). The case is also amply discussed in Casaregis, *Discursus Legales de Commercio* (note 8), vol. 1, disc. 67, pp. 211-215 (vol. 2, pp. 95-100, in the 1719 edition).

<sup>149</sup> Ramonius, last note, cons. 39, p. 450, n. 4 and 6: “etiamsi magister nauis iussu domini mercium, vel eius institoris Tarraconam tantum accedere decreuisset, ibique exonerare merces, earum iactura, nec nautae, nec dominis est imputandis, neque propterea assecutores absoluendi sunt, quoties enim alicuius culpa casus qui evenit adscribitur, necessario demonstrandum est culpam illam ad casum qui evenit fuisse dispositam atque ordinatam, ita vt nisi propter eam culpam casus haud quaquam fuisset eventurus ... cum igitur praetensum mandatum accedendi Tarraconam non sit causa immediata submersionis atque naufragij, et eo sequato nihilominus casus euinisset eodem modo quo fuit subsequutus, quia eadem, et non alia nauigatione nauis fuisset profectura, si nulla Tarraconae vrbis habita cogitatione Valentiam petijsset, calumniosa est assecuratorum exceptio”.



mishap, strongly encouraged thinking of fault and causation together. If their combined analysis led to the aggravation of the burden of proof of the defendant where the case fell within one of such kinds of mishap, it also alleviated his probatory onus when that was not the case.

## 2.6. A practical note: how to prove the mishap

To conclude this short analysis on the liability of the shipmaster in early modern civil practice, having stressed the importance of the qualification of mishaps into presumptively fault-based and faultless categories, we might want to spend some words on what did actually happen in case of mishap.

Following a mishap, the master had to report it before the closest court to the place where the mishap took place. In most cases, this meant that the court had no jurisdiction on any litigation related to the mishap. Nonetheless, the mishap had to be duly reported and (to some extent) proven before the local judges. If satisfied as to the evidence brought forth, the local court would qualify the mishap as a *casus fortuitus*, for which the shipmaster would - at least, presumptively - not be considered responsible.<sup>150</sup> In a typical scenario, the court would be hundreds of miles away from the place where the charter-party (and the possible insurance policy) was made. So, proving the mishap before a *iudex incompetens* meant that any counterparty (especially merchant consignor and/or insurers) would not be notified - unless of course the court were close enough to the place of their residence.<sup>151</sup> Nonetheless, the attestation of the court as to the occurrence - and, crucially, the nature - of the mishap was perfectly valid, and it would be used in any future litigation on that case (and so, in any

<sup>150</sup> The practice is attested with remarkable uniformity. Just to give some examples (hardly exhaustive - the list would be much longer), for the Council of Flanders see a *consilium* of Wamesius, *Responsorum sive Consiliorum* (note 142), 1651, cent. 4, cons. 24, p. 65, n. 4 (on an insurance policy of December 1566). For the position of the Neapolitan *Sacro Consiglio* see Hector Capycius Latrus (Ettore Capecelatro, 1580-1654), *Decisiones Novissimae Sacri Reg. Cons. Neap. ...* Neapoli, 1640, typis Iacobi Gaffari, sumptibus Io. Dominici Bove, dec. 60 (16.11.1637), p. 258, n. 2-3. For the Rota of Florence see Artimini, *Raccolta delle Decisioni della Ruota Fiorentina dal 1700 al 1808* (note 110), vol. 2, 1837, dec. 197 (28.1.1708), p. 955, n. 21-23, and vol. 3, 1838, dec. 205 (10.5.1709), pp. 24-25, n. 11. These two decisions are also reported in Jacobus de Comitibus (Giacomo Conti, 1668-1738), *Iacobi de Comitibus ... Decisiones Inclitae Rotae Senensis et Florentinae ...*, Florentiae, ex Typographia Bonducciana, vol. 2, pt. 1, 1725, dec. 61, pp. 6-7, n. 21-23, and dec. 64, p. 27, n. 11 respectively. For Rome see *Sacrae Rotae Romanae Decisionum Recentiorum a Joanne Baptista Compagno J.C. Romano selectarum*, Venetiis, apud Paulum Balleonium, 1716, vol. 19, pt. 1 (1677-1678), dec. 369 (20.5.1673), p. 428, n. 15-16; *ibid.*, vol. 19, pt. 2 (1673-1683), dec. 447 (13.6.1674), p. 50, n. 2; *Sacrae Rotae Romanae Decisiones nuperrimae* (note 138), vol. 1 (1684-1686), dec. 239 (4.7.1685), p. 375, n. 4; *Decisiones Sacrae Rotae Romanae coram R.P.D. Ansaldo de Ansaldis ...*, Romae, Typis Reu. Camerae Apostolicae, 1711, dec. 41 (28.4.1698), p. 245, n. 5. For the mercantile Rota of Genoa see Balducci, *Decisiones et Res Judicatae* (note 108), vol. 1, tit. 1, dec. 7 (21.3.1697), p. 18, n. 2-3. Cf. Stracca, *De Assecurationibus* (note 40), gl. 28, *fol.* 121v-122r, n. 2; Hevia Bolaño, *Laberinto de Comercio Terrestre y Naval* (note 41), lib. 3, cap. 12, pp. 634-635, n. 32; Roccus, *De Navibus et Navlo* (note 41), not. 95, p. 383, n. 244. For an overview of the later practice (mainly, second half of the eighteenth century) see Domenico Azuni (1749-1827), *Dizionario Universale Ragionato della Giurisprudenza Mercantile del Sig. Senatore D<sup>n</sup>. D. A. Azuni ...*, vol. 3 (2<sup>nd</sup> edn.), Livorno, Glauco Masi, 1822, s.v. *Naufragio*, p. 101, n. 16.

<sup>151</sup> See esp. *Sacrae Rotae Romanae Decisionum Recentiorum a Joanne Baptista Compagno ... selectarum* (note 150), vol. 19, pt. 1 (1677-1678), dec. 369 (20.5.1673), p. 427, n. 12-13, and Savelli, *Summa Diversorum Tractatumum* (note 65), vol. 1, lib. 1, s.v. *Assecuratio*, p. 163, n. 11, and s.v. *Casus*, pp. 226-227, n. 6.

dispute with the same merchant consignor or insurers not notified of the depositions taken before that court). Indeed, far from challenging the competence of a court to issue such an attestation, the plaintiff might challenge the fact that the court was not the closest to the actual place of mishap, but just a relatively close one. Although the accusation was typically dismissed (for the simple reason that the survivors of a shipwreck could not be expected to be too choosy as to where exactly to go once landed ashore),<sup>152</sup> the fact that it was levied would seem to confirm the validity of such attestations, and especially their actual role in exonerating the master. Thus, the attestation ultimately fed into the system of presumptions elaborated by the courts. Indeed, it is not only attested for maritime carriage law but also for land carriage, and even for the simple hiring out of mules that died along the way.<sup>153</sup>

In evaluating the evidence and qualifying the mishap, the court enjoyed remarkable discretion. This qualification process did not encompass just the most obvious scenarios - for instance, deciding on whether a pirate attack did effectively take place or not.<sup>154</sup> It could well extend to somewhat more sophisticated questions (with considerable impact on related issues, especially on insurance), such as whether the mishap was to be considered as utter loss of the vessel or only serious damage to it,<sup>155</sup> or whether the ship became unseaworthy during the navigation or it was such *ab initio*.<sup>156</sup>

<sup>152</sup> E.g. *Sacrae Rotae Romanae Decisiones nuperrimae* (note 138), vol. 1 (1684-1686), dec. 239 (4.7.1685), p. 375, n. 5-7; Balducci, *Decisiones et Res Judicatae* (note 108), vol. 1, tit. 1, dec. 8 (28.6.1697), p. 20, n. 8-10. The point is particularly clear in the decision of the Florentine civil Rota of 28.1.1708, reported in Artimini, *Raccolta delle Decisioni della Ruota Fiorentina dal 1700 al 1808* (note 110), vol. 2, 1837, dec. 197, p. 955, n. 23, and in *Iacobi de Comitibus ... Decisiones Inclitae Rotae Senensis et Florentinae* (note 150), vol. 2, pt. 1, 1725, dec. 61, p. 7, n. 23, where the shipmaster should have in theory approached the authorities in Malaga (for the shipwreck happened in the open sea near that city) but he was able to reach the shore only in proximity to Cadiz.

<sup>153</sup> Ripoll, *Variae iuris resolutiones* (note 49), cap. 12, p. 392, n. 125-128. In such a case the *conductor* had to explain the mishap to the court and, where possible, to produce witness testimony as to the fortuitous nature of the mishap.

<sup>154</sup> E.g. *Sacrae Rotae Romanae Decisiones nuperrimae* (note 138), vol. 3 (1690-1692), 1752, dec. 279 (13.6.1692), p. 356, n. 3.

<sup>155</sup> See for instance a lengthy dispute taking place before the Neapolitan *Sacro Consiglio* starting in the early 1620s and concluding only with a decision of 29.1.1634, reported in Giovanni Francesco Sanfelice (1566-1648), *D.D. Joan. Franc. Sanfelicii ... Decisionum Supremorum Tribunalium Regni Neapolitani*, Neapoli, sumptibus Nicolai, et Vincentij Rispoli, 1733, vol. 2, dec. 162, pp. 8-9. See also a decision of the Florentine civil Rota of 16.12.1678, in *Decisiones Inclitae Rotae Florentinae* (note 29), dec. 25, pp. 138-139, n. 8-9. A subject where the bench had particularly broad discretion was that of insurance after loss, for the court was called to pronounce on whether the insured had knowledge of the mishap prior to the signature of the policy - which would lead to the invalidity of the insurance. See esp. a decision of the Genoese mercantile Rota on the validity of a reinsurance policy (of 17.11.1668 - the original policy was of 7.4.1668), where the bench claimed to possess a particularly broad discretion in evaluating the facts of the case. The decision is reported by Flaminio Armenzani, *Decisiones Almae Rotae Civilis Ser.<sup>mo</sup> Reipublicae Genvensis Cum aliquis Lucensibus, Avctore Excell.<sup>mo</sup> D. Flaminio Armenzani ...*, Aesii, ex Typographia Episcopali, apud Claudium Percimineum, 1679, dec. 31, p. 108, n. 2-3.

<sup>156</sup> A particularly detailed example can be found in a decision of the Florentine Rota of the late eighteenth century, in *Selectae Almae Rotae Florentinae Decisiones*, Florentiae, ex Typographia Jacobi Gratiolii, vol. 1, pt. 1, 1790, dec. 46 (15.7.1785). A ship insured for the voyage London-Salonicco became unseaworthy near Algarve. The shipmaster went before the local consulate (of Villanova de Portiman), which examined three sailors and the pilot of the ship, as well as the shipmaster of another

To reach its decision, the court would normally hear the deposition of some members of the crew or passengers onboard (two at least, possibly three),<sup>157</sup> or other witnesses.<sup>158</sup> For obvious reasons of impartiality, whenever possible passengers were preferred to members of the crew.<sup>159</sup> By the same token, the deposition of the shipmaster himself was normally discouraged (as he had all the incentive to have the mishap qualified as *casus fortuitus*).<sup>160</sup> Nonetheless, in absence of other witnesses, the notoriety of the mishap would typically corroborate the shipmaster's deposition.<sup>161</sup> The requirement that the court be close to the place of the mishap had a clear logic: in many cases, its proximity was sufficient to ensure the presence of some witnesses of the mishap, or at least of flotsam and shipwrecked survivors.<sup>162</sup> Failing that, and

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vessel as impartial eyewitness of the mishap. Satisfied by their depositions, the consulate agreed with the shipmaster's account and stated that the ship, being initially seaworthy, had become unable to continue her voyage only after departure (thereby confirming the validity of the insurance policy), *ibid.*, pp. 453-455. Nonetheless, the insurers declined their liability and were absolved by the court of Leghorn (the *Tribunale del Governo di Livorno*) on 11.3.1784. The insured appealed before the Consuls of the Sea (*Consoli del Mare*) of Pisa, who quashed the first decision and, relying on the report of the Consulate of Villanova, condemned the insurers. The Consuls' decision was then upheld by the Florentine Rota with a long and detailed decision. Its interest lies mainly in the fact that the local court which ruled on the qualification of the mishap (the Consulate of Villanova) had not provided for an expert examination (*peritia*), which in doubtful cases (such as the present one) was customary. Therefore, all that the impartial eyewitness (the shipmaster of another vessel) was able to say was that the vessel was indeed unseaworthy, but not whether the unseaworthiness was supervening or the ship was in no condition of sailing from the very beginning. Nonetheless, the Villanova Consulate pronounced for a specific kind of mishap (supervening unseaworthiness of the vessel), and the Florentine Rota found that the first decision (that which sided with the insurers) could not have ignored or even questioned the soundness of the Consulate's judgment (*ibid.*, esp. pp. 464-470).

<sup>157</sup> E.g. Roccus, *De Navibus, et Navlo* (note 41), not. 95, p. 383, n. 245. For Florence see Artimini, *Raccolta delle Decisioni della Ruota Fiorentina dal 1700 al 1808* (note 110), vol. 2, 1837, dec. 197 (28.1.1708), pp. 953-4, n. 20; de Comitibus, *Decisiones Inclitae Rotae Senensis et Florentinae* (note 150), vol. 2, pt. 1, 1725, dec. 61, p. 6, n. 20. For Rome see esp. *Sacrae Rotae Romanae Decisionum Recentiorum a Joanne Baptista Compagno ... selectarum* (note 150), vol. 19, pt. 1 (1677-1678), 1716, dec. 369 (20.5.1673), p. 428, n. 18-19 and n. 26-27. For Naples cf. in particular Capycius Latrus, *Decisiones Novissimae Sacri Reg. Cons. Neap* (note 150), dec. 60 (16.11.1637), p. 258, n. 4.

<sup>158</sup> Again, when possible, two or three at least: *Sacrae Rotae Romanae Decisiones nuperrimae* (note 138), vol. 1 (1684-1686), 1751, dec. 239 (4.7.1685), pp. 374-375, n. 3.

<sup>159</sup> See esp. De Luca *Theatrum Veritatis et Justitiae* (note 53), vol. 8, disc. 111, p. 192, n. 2: "quamvis in hac materia probationum, certa, et determinata regula dari non valeat cum sit reposita in Judicis prudenti arbitrio, ex facti qualitate, ac singulorum casuum circumstantis regulanda; Potissime circa fidem nautis praestandam, an agant de se exonerando, vel etiam de exculpando ducem, seu dominum navis, cujus sunt famuli, cum similibus circumstantiis, quae possint eorum fidem minuere, et an sit species probationis quae etiam per alios testes non suspectos haberi valeat".

<sup>160</sup> On the point see in particular a very widely quoted decision of the late sixteenth century rendered by the Genoese mercantile Rota, reported in Bellonius, *Decisiones Rotae Genvae de Mercatura* (note 83), dec. 3, fol. 19r, n. 17.

<sup>161</sup> Lorenzo Cantini and Domenico Nenci, *Tesoro del Foro Toscano, ossia Raccolta delle Decisioni del Supremo Consiglio e delle Regie Ruote Civili delle Prime Appellazioni di Toscana*, Florence, Stamperia del Giglio, vol. 14, 1825, Rota of Pisa, dec. 4 (24.8.1833), pp. 26-27, n. 1.

<sup>162</sup> See esp. Bellonius, *Decisiones Rotae Genvae de Mercatura* (note 83), dec. 3, fol. 19r, n. 17, and *Sacrae Rotae Romanae Decisionum Recentiorum a Joanne Baptista Compagno ... selectarum* (note 150), vol. 19, pt. 1 (1677-1678), 1716, dec. 369 (20.5.1673), p. 428, n. 25; Wamesius, *Responsorum sive Consiliorum* (note 142), cent.

probably on the basis of maritime customs, the simple notoriety of the event was often deemed sufficient.<sup>163</sup> The mishap had to be proven within one year from its occurrence.<sup>164</sup> If the shipmaster was not able to prove the mishap within one year, the most obvious (non-culpable) reason was that he was dead. Hence, in the absence of news for a year and one day, a ship was customarily presumed lost.<sup>165</sup>

The attestation of the court as to the nature of the mishap was not just important for the liability of the shipmaster towards the merchant who suffered some damage or loss, but also for the liability of other merchants both towards each other and in respect of the shipmaster himself. If the court pronounced for the fortuitous nature of the mishap, then anything done to limit the extent of the mishap was implicitly justified. Being justified, such actions could not give raise to contractual liability (of the shipmaster *qua* carrier) but at the most to equitable compensation. It is the case of general averages. General averages focus on the redistribution of the loss suffered while seeking to limit the damage that can be reasonably foreseen for *vis maior*.<sup>166</sup> The typical example is jettison. To save both hull and part of the cargo during a tempest, it often happened that some merchandise were thrown overboard, thereby lightening

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4, cons. 24, p. 64, n. 1 (undated, but on an insurance policy of December 1566).

<sup>163</sup> On the subject, some important decisions were rendered by the Florentine Civil Rota. Among them it suffices mentioning de Comitibus, *Decisiones Inclitae Rotae Senensis et Florentinae* (note 150), vol. 2, pt. 1, 1725, dec. 61, pp. 5-6, n. 17-19, and Artimini, *Raccolta delle Decisioni della Ruota Fiorentina dal 1700 al 1808* (note 110), vol. 2, 1837, dec. 197 (28.1.1708), pp. 952-953, n. 17-19. Probably the clearest author on the point (not least because of his terse and succinct style) was a member of the Rota itself, the influential Ansaldo de Ansaldi (1651-1719), in his *De Commercio et Mercatura Discursus Legales ...* Romae, ex Typographia Dominici Antonij Herculis, 1689, disc. 70, p. 429, n. 16: “in hac materia ob locorum distantiam et celeritatem tristis euentus non solum admittantur Nautarum depositiones, sed etiam aliae probationes naturales publicae vocis, et famae, cum similibus, remota quacumque scrupolositate legis Ciuilis”. See further Scaccia, *Tractatus de Commerciis et Cambio* (note 109), § 1, q. 1, pp. 42-43, n. 158; Loccenius, *De Jure Maritimo et Navali Libri Tres* (note 107), lib. 3, cap. 11, p. 333, n. 7.

<sup>164</sup> Mascardi, *Conclusiones Probationum Omnium* (note 25), vol. 3, concl. 1092, p. 214; *Sacrae Rotae Romanae Decisionum Recentiorum a Joanne Baptista Compagno ... selectarum* (note 150), vol. 19, pt. 1 (1677-1678), 1716, dec. 369 (20.5.1673), p. 428, n. 14; *Sacrae Rotae Romanae Decisionum Recentiorum a Joanne Baptista Compagno ... selectarum* (note 150), vol. 19, n. 2 (1673-1683), 1716, dec. 447 (13.6.1674), p. 50, n. 2; Artimini, *Raccolta delle Decisioni della Ruota Fiorentina dal 1700 al 1808* (note 110), vol. 2, 1837, dec. 197 (28.1.1708), p. 955, n. 24; Savelli, *Summa Diversorum Tractatum* (note 65), vol. 1, lib. 1, s.v. *Casus*, p. 227, n. 6.

<sup>165</sup> See e.g. British Library, MSS Harleian 5103, art. 92, and Additional 48023 [art. 100] (both attesting the late-sixteenth century London customs); the Ordinances of the Burgos Consulate of 1538, ord. 67; the Ordinances of the Consulate of Bilbao of 1560, ord. 32; the famed *Guidon de la Mer* of Rouen (*Guidon, Stile et Vsançe des Marchands Qui mettent à la Mer*, Roven, Mesgissier, 1619), cap. 7, p. 38; the Rotterdam *Keur* of 12.3.1604, s. 14; the Antwerp *Compilatae* of 1608, pt. 4, tit. 11, sec. 7, art. 245. See further Johann Van Niekerk, *The Development of the Principles of Insurance Law in the Netherlands from 1500 to 1800*, Cape Town 1998, vol. 2, pp. 1030-1031. At the close of the middle ages, the length of this presumption is often attested as half the period – only six months. The first Ordinances to provide on the matter were those of Barcelona of 1452 (ord. 10); the same is provided in the Ordinances of the same city of 1458 and 1484 (ord. 22 and 23 respectively). The shift from the six-month to the one-year period is particularly clear with regard to Antwerp customs, as it is attested in Wamesius, *Responsorum sive Consiliorum* (note 142), cent. 4, dec. 24, n. 4, p. 65. Other insurance customs, such as the Florentine ones, continued to apply the six-month rule for a long time.

<sup>166</sup> Cf. G. Rossi, *Insurance in Elizabethan England: The London Code*, Cambridge 2016, pp. 137-140.

the ship. The owner of the merchandise thrown overboard was compensated by the others (both shipmaster and other merchants) by way of general average (often also called “gross” or “common” average, so as to distinguish it from “petty” ones – i.e. those damages not made to save the rest of the cargo and the ship).<sup>167</sup> The same of course applied to the ship, for instance if her master decided to cut loose the anchor so to lighten the hull. In all such cases, the damage could be qualified as a general average only if the mishap was due to *vis maior*, and not to the behaviour of the shipmaster.

This made the stance of law courts all the more important: the courts had both to decide on the occurrence of *vis maior* and also to pronounce on the causal link between that *vis maior* and the shipmaster’s conduct. As we have abundantly seen in these pages, a mishap may well be fortuitous in abstract terms, but still depend on the conduct of the shipmaster. Sailing towards a tempest is not the direct cause of the shipwreck (or of the jettison of part of the cargo to avoid as much), but it may well be considered as its precondition, and so *culpa ad casum praeordinata*. The problem of indirect causality, in other words, could well affect the qualification of a mishap – from fortuitous (and so, *vis maior*) to negligent, and even fraudulent. Thus, the role of law courts, and their increasing analysis of mishaps in terms of causality, had far-reaching consequences both for sea-carriage law, insurance law, and general averages.

### 3. The shipmaster’s liability in common law

The early modern position of common law courts on the liability of the maritime carrier can perhaps be summed up more shortly, both because most records come from a single court - the King’s Bench<sup>168</sup> - and because most scholarly works on the subject began to appear only at a later stage, particularly during the eighteenth century. As it is often the case, the interaction between courts and jurists so typical of early modern civil law (which sometimes means, the forest of legal treatises growing side by side with the collections of court decisions) is not nearly as pronounced in early modern common law. This makes our task somewhat easier, or at least shorter.

#### 3.1. Carriage, bailment and strict liability

If the shipmaster’s liability in civil law was shaped after the liability of the *conductor* (although in the rather aggravated terms provided for *nautae*), in common law the starting point is the contract of bailment, from which carriage law stemmed. Looking at the main features of bailment, the civil lawyer might probably find some similarities with *locatio-conductio*, and others with *depositum*.<sup>169</sup> As it happens, sometimes the

<sup>167</sup> *Ibid.*, p. 138, text and note 7.

<sup>168</sup> The present article does not take into account records coming from the Admiralty. The reason is twofold. On the one hand, one of the main purposes of this work lies in comparing the approach of civil law and common law courts, and the Court of Admiralty did not follow the common law. On the other, and moreover, the jurisdiction of the Admiralty was increasingly restricted during the early modern period. Most cases on the liability of the carrier for damages or loss were not (or rather, no longer) within its remit.

<sup>169</sup> In effect, the list of possible Roman law contracts resembling one or another feature of bailment is longer (although not particularly sound): see esp. *Coggs v Barnard* (1703), 2 Raym. 909, 912-919 (*per*

practical outcome of a case was not particularly different between the two legal systems. So for instance in both common and civil law the carrier could not be held responsible (at least in principle) for the money hidden within the cargo unbeknownst to him.<sup>170</sup> Equally, in both systems the carrier was under strict liability for anything received sealed but delivered open at destination.<sup>171</sup> The similarities however fall short of the main issue – the standard of care. Unlike the carrier-*conductor*, the carrier-bailee was under strict liability.

The reason for the strict liability of the bailee – and so, also of the carrier - derives from one of the many twists in the forms of pleading, which led bailment to acquire increasingly proprietary features, especially during the sixteenth century. Ultimately, this process depends on the conflation of the liability in trespass on the case (until the fifteenth century, of clear tortious nature) and in contract. The first was based on fault, the second was strict. These two approaches came to be both applicable for bailment. So long as the nature of the action on the case remained tortious, the two profiles could be kept distinct. At least, they would not collide in court: the form of action would determine the nature of the defendant's liability. So if the (defendant whom we might consider in abstract terms as a) bailee was sued in an action upon the case, the

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Holt CJKB). According to the terms of the bailment, the contract may be equiparated to: *i. depositum*, if the bailee keeps the bailed goods for the use of the bailor only; *ii. commodatum*, if the bailee enjoys the use of the bailed goods without payment; *iii. locatio-conductio* (or rather, *locatio rei*), if on the contrary the bailee has to pay for their use; *iv. pignus*, if the bailed goods are kept as pledge (though on the point Holt's reasoning is somewhat wanting); *vi. mandatam*, if the bailee acts gratuitously upon commission of the bailor. In the case that interests us the most - the fifth one, that of the bailee as a carrier paid for his job - Holt does not venture in Roman law parallels (or at least the very accurate report of Raymond does not say as much). Holt describes the undertaking of the bailee in the same way as one would expect of the *conductor* in *locatio operis*, but with the (common law) twist of the division between public carriers and private individuals. Either for this reason or because the general scheme of *locatio-conductio* was already used for a different kind of bailment, Holt does not venture in Roman parallels for this kind of bailment. Cf. esp. D.J. Ibbetson (ed.), William Jones, *An essay on the Law of Bailments*, Bangor 2004, pp. 98-102; J. Getzler, *Duty of Care*, in P. Burks and A. Pretto (eds.), *Breach of Trust*, Oxford 2002, pp. 41-74, at 46-50.

<sup>170</sup> See for instance a decision of the Piedmont Senate of 20.3.1613, reported by Thesauro, *Quaestionvm Forensivm* (note 15) lib. 3, q. 61, p. 49. In this case, a muleteer received some merchandise to transport, but in one of the parcels there were 300 *duplae* hidden. The merchandise were stolen and the muleteer was condemned to pay their value (since he was negligent in leaving them in the staple instead of storing them in his house), but he was not also condemned for the money. The same, at least in principle, applied in common law. For instance, a few years after the decision of the Piedmont Senate, in 1648 a dispute was heard by the King's Bench. The plaintiff entrusted to the carrier a box, without telling him that there were a hundred pounds inside. The box was stolen, and the plaintiff sued the carrier for the whole amount. Although Roll CJKB instructed the jury not to consider the carrier responsible for the money, the jury gave a verdict for £97 all the same. The difference of £3 is easily explained: it was the carrier's freight. Even the reporter, Aley, seems dismayed by the outcome - "quod durum videbatur circumstantibus". *Kenrig v Eggleston*, Aley 93; 82 ER 932 (1648). See further e.g. R. Kaczorowski, *The Common-Law Background of Nineteenth-Century Tort Law*, LI (1990) *Ohio State Law Journal*, pp. 1127-1200, at 1139-1140. See however a brief but contrary statement in *Morse v Slue* (1672-73), 3 Keb. 72, 135.

<sup>171</sup> E.g. Ferretti, *De Iure, et Re Nauali* (note 144), lib. 1, fol. 19v, n. 133; *Titchburne v White* (1718), 1 St. 145; 93 Eng. Rep. 438. Cf. R. Kaczorowski (note 170), p. 1140; J. Pagan, *English Carriers' Common-Law Right to Reject Undeclared Cargo: The Myth of the Closed-Container Conundrum*, XXIII (1982) *William & Mary Law Review*, pp. 791-833 at 807-808.

bench would qualify his liability as fault-based. If he was sued on, say, *detinue*, then he would be strictly liable. During the sixteenth century, however, the nature of the liability of the action on the case progressively changed, as the action on the case was increasingly applied for contractual non-performance. Gravitating towards contractual liability, the action on the case (especially in the predominant form of *assumpsit*) came to acquire the strict liability of contract. At this point, the different forms of action did not result in different standards of care on the bailee, not to mention that the procedural advantages for the plaintiff in suing on *assumpsit* (and the increasing propensity of the bench – especially the King’s Bench – to accept it for a variety of different situations) led to its widespread use for most situations involving bailment.<sup>172</sup>

The increasingly proprietary features of bailment meant that the bailor was progressively allowed to bring a writ in the form of *debet* only for monetary obligations. For specific goods bailed, the writ had to take the form of *detinet*.<sup>173</sup> The point is important, because if the bailor’s allegation was *detinet*, then the bailee’s defence had to be shaped as *non detinet*.<sup>174</sup> If the bailee did receive the thing but lost or damaged it for reasons not imputable to him – chiefly, *vis maior* - it would be considerably easier for him to shape his counter-pleading in the form of *non debet*. The moment this was no longer allowed, strict liability began to creep in the picture – whether or not the outcome was deliberate.

This could already be seen in the mid-fifteenth century with *Marshal’s* case (1455), a landmark case on the liability of the bailee in case of accident,<sup>175</sup> which would ultimately have important repercussions on the scope of the shipmaster’s liability for *vis maior*. The prisoner of a galley (the galley of the Marshalsea prison - that is, the marshal of the King’s Bench) was freed by a mob. As the galley’s obligation was construed in terms of bailment, his position was that of a bailee. In principle, the galley-bailee had recourse against English subjects who broke into the prison (for they were subjected to English jurisdiction), but not against enemies of the king (for they lay outside the boundaries of English jurisdiction). As the bailee had recourse against an armed mob but not against enemies, he was liable in case of robbery but not of enemy attack. Hence, and much unlike in civil law, the carrier could not invoke *vis maior* in case of robbery.

In 1601 *Southcote v Bennet* strengthened the strict liability of the bailee: to keep and to keep safely, it was held, are one and the same thing.<sup>176</sup> The bailee was strictly liable (the issue was theft) not just if he specially warranted to keep the goods at his own

<sup>172</sup> For a detailed reconstruction of this process see D.J. Ibbetson (note 169), pp. 74-95.

<sup>173</sup> D.J. Ibbetson, *A Historical Introduction to the Law of Obligations*, Oxford 1999, p.35

<sup>174</sup> S.F.C. Milsom, *Historical Foundations of the Common Law* (2<sup>nd</sup> edn.), Oxford 1981, pp. 262-263 and 268.

<sup>175</sup> YB Hil. 33 Hy. VI, p. 3, f. 1: see S.F.C. Milsom (note 174), p. 268; O.W. Holmes, *Common Carriers and the Common Law*, III (1879) *American Law Review*, pp. 609-631 at 611-612; D.J. Ibbetson, *Fault and absolute liability in pre-modern contract law*, XVIII (1997) *Journal of Legal History*, pp. 1-31 at 13-14.

<sup>176</sup> 4 Co. Rep. 83*b*; Cro. Eliz. 815. On this landmark case see e.g. D.J. Ibbetson, *An essay on the Law of Bailments* (note 169), pp.90-91; Id., *Fault and absolute liability* (note 175), pp. 17-18; On the different reports of this case see J. Pagan (note 171), p. 803, note 47, where vast literature.

peril, but unless he explicitly excluded as much.<sup>177</sup> The most likely reason for this - otherwise curious - association between keeping and keeping safely probably lies in that both kinds of undertaking were oral (as it is well known, at common law a written contract needed a sealed bond), and so juries might have found rather difficult to distinguish between them.<sup>178</sup> After *Southcote's* case the strict liability of the bailee became consolidated,<sup>179</sup> and subsequent case law did not add much to the point.<sup>180</sup>

While further decisions proved that the rule in *Southcote's* case was not necessarily as draconian as it might appear,<sup>181</sup> when applied to a maritime context, however, it was. A pivotal case in this respect was *Morse v Slue* (1672-73).<sup>182</sup> A ship bound to Cadiz was still mooring on the Thames when part of the cargo got stolen. The ship was remarkably well watched, and no fault whatsoever could be found against her master. Relying on *Southcote's* case, the plaintiff insisted that the shipmaster is a public carrier

<sup>177</sup> This way, *Southcote's* case might have inverted the logic of some previous cases, especially *Mosley v Fosset* (1598), Moo. 543, which established that the bailee is answerable for theft only with a “special assumpsit” (i.e. specific undertaking to vouch for the thing). To what extent did *Mosley v Fosset* amount to fault-based liability in practice, however, is hard to say, since the bench might have been inclined to agree to infer such a “special assumpsit” from the presence of consideration: if the bailee was paid for keeping the goods, then he would be answerable for theft. The case however was discontinued, with the consent of the plaintiff, after Michaelmas 1600: D.J. Ibbetson, *An essay on the Law of Bailments* (note 169), p. 89, note 68.

<sup>178</sup> D.J. Ibbetson, *Coggs v Barnard*, in C. Mitchell and P. Mitchell (eds.), *Landmark Cases in the Law of Contract*, Oxford 2008, pp. 1-22 at 8. The old explanation of Beale, that the judgment for the plaintiff was only provisional, does not appear convincing – and indeed is nowadays not even taken much into account. Beale thought that the judgment was given “nisi aliquid dicatur in contrario die veneris proximo”. On the basis of the 3<sup>rd</sup> edition of Raymond's Reports (2 Raym. 911*n*), Beale then argued that says that the final judgment was entered in favour of the defendant. J. Beale, *Carrier's Liability: Its History*, XI (1897) *Harvard Law Review*, pp. 158-168 at 162. Cf. Id., *Southcott v. Bennett. Queen's Bench, Pasch. 43 Eliz.* (1601), XIII (1899) *Harvard Law Review*, pp. 43-47 at 45-47. For Beale, the strict liability of the carrier was only a later development, taking place under Mansfield CJKB (Beale, *Carrier's Liability, loc. cit.*, pp. 162-163). Apart from being rather speculative and ignoring several other cases taking place before Mansfield himself, the thesis could hardly explain why at the eve of the eighteenth century did Holt CJKB take so much pain in detaching himself from *Southcote's* case in order to insist on the fault-based liability of the non-professional carrier in *Coggs v Barnard* (discussed in the main text). As Holt saw it, the main obstacle to avoid the strict liability of any carrier – whether or not professional – was precisely the strict liability imposed by *Southcote's* case.

<sup>179</sup> See esp. *Rich v Kneeland* (1613), Hob. 17; more accurately Cro. Jac. 330 (discussing whether the plaintiff's assent as to the delivery was material, but in effect focusing on whether a common bargeman was under strict liability without special promise). Cf. *Robinson v Dunmore*, 2 Bos. & Pul. 417.

<sup>180</sup> Except perhaps that when the bailee was a professional carrier there was no need to show consideration (for that was presumed): see esp. *Nicholls v More* (1661) 82 ER 954. Cf. D.J. Ibbetson, *Coggs v Barnard* (note 178), p. 17. This last point may be contrasted with what said for the civil law liability of the carrier (with the exclusion of the sea-carrier), who may be saddled with *culpa levissima* only if he both expressly vouched to keep the thing safe and received extra payment for that: *supra*, text and note 52.

<sup>181</sup> See esp. *Williams v Hide* (1628), Palm. 548. In that case the bailed horse was dead, and the King's Bench found for the bailee. That however did not amount to full denial of his strict liability – had the horse been stolen, even in a robbery, the bailee would have likely been charged with the loss.

<sup>182</sup> 2 Lev. 69; 2 Keb. 866; S.C. Raym. 220; 1 Mod. 85; 1 Vent. 190, 238; 3 Keb. 72, 112, 135; 1 Danv. 12; 1 Roll. Abr. 2, pl. 2, 3; Cro. Jac. 262, 330; 1 Sid. 36, 245. The importance of the case warrants looking at several different reports, none of which, alone, seems to provide a full picture.



and, as bailee, he is under strict liability.<sup>183</sup> The main defence of the shipmaster amounted to insisting on his fault-based standard of care: in maritime law, he claimed, there is only an action on “wilful neglect” (which of course he denied).<sup>184</sup> Further, the defendant insisted, the shipmaster should be considered as the shipowner’s servant. The merchant therefore would have no action against him, but only against the shipowner.<sup>185</sup> The bench agreed that the shipmaster is not liable for *vis maior* (not even in presence of a special undertaking). Nonetheless, as we have seen, robbery did not amount to *vis maior*. Moreover, the bench held, a shipmaster is far from being an ordinary servant: he is more alike to a “goaler, who is chargeable for escapes”. The reference to the *Marshal’s* case is clear: indeed, continued the bench, neither theft nor robbery could be invoked to lift the shipmaster’s liability, “unless in case of common enemies” (i.e. enemies of the king).<sup>186</sup> An important element, that we will see also in other landmark cases on our subject, is that the strict liability of the shipmaster as carrier (and so, ultimately, as bailee) is affirmed in practice but not stated in general terms. The language of the pleading is still framed in terms of fault. So for instance the bench observed that, although the ship was guarded, considering both the specific merchandise loaded onboard and the dangers that could materialise in such a dangerous place, the number of guards should have been higher.<sup>187</sup> This language would seem to imply negligence. However, the court continued, “if the carrier is robbed by a hundred men, he is never the more excused.”<sup>188</sup> Similarly, if we look at the treatise of Charles Molloy (first published in 1676, and so three years after *Morse’s* case), the author introduces the shipmaster’s liability observing how “the Law looks upon him as an Officer, who must render and give an account for the whole charge when once committed to his care and custody, and upon failer to render satisfaction, and therefore if misfortunes happens, if they be either through negligence, wilfulness, or ignorance of himself or his Mariners, he must be responsible”.<sup>189</sup> While there was

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<sup>183</sup> See esp. 3 Keb. 72, 112-113. The plaintiff further referred to the status of public officer of the shipmaster (who “hath his office by publick law not by a private command”), although on somewhat questionable basis. The plaintiff referred especially to the Safe Conducts Act of 1414 (2 Hen. 5, c. 6), providing for the establishment of the office of Conservator, who had to ensure the shipmasters’ compliance with the safe conducts for any prize taken. The shipmaster had to come back to the port after taking any prize, unless forced to go elsewhere by storm, wind or enemies “Force of Wind, Tempest, or of Enemies” (*ibid.*) - incidentally, the same causes exonerating the carrier. The statute was however suspended in 1435 (14 Hen. 6, c. 8), and then repealed a few years thereafter (20 Hen. 6, c.11). Cf. *Statutes of the Realm*, vol. 2, pp. 178-181, 294 and 323 respectively.

<sup>184</sup> 1 Vent. 190, and esp. 3 Keb. 113, 113-114.

<sup>185</sup> 3 Keb. 113-114. The reference to the shipowner was also used to insist that the merchant cannot be in a better position towards the shipmaster (insisting on the latter’s strict liability) than the shipowner is for the ship’s furniture (for which the shipmaster is liable only for negligence). The bench replied that the shipmaster is not a mere servant, and that the merchant has a direct action against him. On the subject see further esp. *Ellis v Turner* (1800), 101 ER 1529.

<sup>186</sup> 1 Vent. 238-239; 3 Keb. 135. 1 Mod. 86 and 2 Lev. 68 are less specific (the latter in particular provides just a short summary).

<sup>187</sup> See esp. 1 Vent. 239.

<sup>188</sup> *Ibid.*

<sup>189</sup> Charles Molloy (1646-1690), *De Jure Maritimo et Navali*, London, Printed for John Bellinger ... George Dawes ... and Robert Boulter Bellinger, 1676, lib. 2, cap. 2, p. 197.

little doubt as to the strict nature of the master's liability,<sup>190</sup> the language used was still framed in terms of *culpa*.

The same ambiguity may be found in one of the – few – cases where the shipmaster was excused, *Jefferyes v Legendra* (1690). A ship leaving from London to Naples was supposed to sail in a convoy, but soon thereafter the force of wind separated her from the other vessels. This resulted in her capture at the hand of the French. While the actual loss was due to the enemies of the king, the event depended on the ship's departure from the convoy. The question was therefore whether the shipmaster was liable for that. Winds clearly fall beyond human control, so the master was eventually discharged. But in agreeing with Hold CJKB, the puisne judges remarked how the master had done his outmost in the circumstances, and therefore it was not his fault if the ship had lost the convoy.<sup>191</sup> Thus, if both in condemning and in absolving the carrier the bench was seemingly speaking in terms of fault, at the basis of its decisions there was strict liability, which could be avoided only in case of *vis maior*.

### 3.2. Common carriers and *culpa levissima*

At first sight, the use of fault language in a strict liability scenario might seem to have been encouraged by the similarity with the civilian tradition, especially the *culpa levissima* of the shipmaster. In fact that was a similarity found *ex post*, which entailed no influence of civil law ideas on a substantive level.

Let us take for instance the landmark case of *Coggs v Barnard* (1703).<sup>192</sup> On the face of it, the case was rather banal: a land carrier agreed to move a barrel of brandy for the plaintiff from a cellar to another in London but spilt most of its content. After that the jury found for the plaintiff, the defendant raised a motion in arrest of judgment, on the basis of both the plaintiff's lack of proof as to consideration<sup>193</sup> and, crucially, the nature of his liability - which, the defendant alleged, was not strict but based on negligence.<sup>194</sup> What makes important this case is that the bench (especially, it would seem, the puisne judges) agreed that the rule in *Southcote's* case (i.e. the strict liability of the bailee) was too harsh. The judges therefore sought to depart from the previous and, by then, well established position. They did so by distinguishing between private and public (or common) carrier:<sup>195</sup> only the latter should be saddled with strict liability.

<sup>190</sup> Indeed, continues Molloy, "he that is *Exercitor Navis* must answer the damage, for that the very lading of the goods aboard the Ship does Subject the Master to answer the same" (*ibid.*, emphasis in the text).

<sup>191</sup> 3 Lev. 320, Salk. 443, 4 Mod. 58, and esp. Show 320.

<sup>192</sup> 2 Raym. 909, 2 Salk. 735. See esp. D.J. Ibbetson, *Coggs v Barnard* (note 178), pp. 1-22, and Id., *An essay on the Law of Bailments* (note 169), pp. 95-103.

<sup>193</sup> One of the issues in the case was whether the carrier was a professional one or not: only if he was could consideration be presumed.

<sup>194</sup> D.J. Ibbetson, *Coggs v Barnard* (note 178), pp. 3-4. The complex and important reasoning of Holt CJKB may be read in William Jones, *An Essay on the Law of Bailments*, Philadelphia, Hogan and Thompson, 1836, Appendix, pp. 113-126.

<sup>195</sup> On the distinction between or public and private carriers and, especially, their different liability see J. Oldham, *English common law in the age of Mansfield*, Chapel Hill 2004, pp. 283-287.

Stressing the difference between “lay” bailee and professional carrier, the bench justified the fault-based liability of the former at the price of reaffirming the strict liability of the latter. To that end, the *culpa levissima* of the *nautae* was highlighted (especially by Holt CJKB) and, with it, the old “presumption of dishonesty” of the professional carrier - especially the shipmaster.<sup>196</sup> The Roman triad *nautae caupones stabularii*, however, was not invoked to bring the position of public carriers at common law closer to Roman law. Rather, the parallel was drawn only to loosen the stringent standard of care for non-professional carriers, and so to reconcile the dichotomy between contractual (strict liability) and tortious (fault-based) approaches to bailment.<sup>197</sup>

The bench’s reliance on the *culpa levissima* of the *nautae* in *Coggs v Barnard* is hardly an isolated case. Similar references abound in early modern English case law, especially to justify the hardening of the bailee’s liability in a maritime context. An instance where that is particularly evident is the coeval case of *Lane v Cotton* (1701), where the rationale for the strict liability of the shipmaster is explained, again, as deriving from the old presumption of dishonesty that informed the medieval civilians’ approach to the subject.<sup>198</sup> Moving forward of a few decades, another significant case is *Dale v Hall* (1750). There, a plaintiff was able to move for new trial because the judge allowed the shipmaster to give evidence that he had done all that could be done to avoid the damage.<sup>199</sup> “A promise to carry safely, is a promise to keep safely,” concluded Lee CJKB ruling against the admissibility of the evidence for the shipmaster.<sup>200</sup> The bench

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<sup>196</sup> As Holt CJKB put it, the (professional) carrier was bound “to carry goods, against all events but acts of God and of the enemies of the King. For though the force be never so great, as if an irresistible multitude of people should rob him, nevertheless he is chargeable ... for else these carriers might have an opportunity of undoing all persons that had any dealings with them, by combining with thieves etc. and yet doing it in such a clandestine manner, as would not be possible to be discovered. And this is the reason the law is founded upon in that point” (2 Raym. 909, 918). Cf. Jones, *An Essay on the Law of Bailments* (note 194), Appendix, pp. 113-126.

<sup>197</sup> The true influence of Roman law seems to have been not on the carrier’s liability, but on that of the normal bailee undertaking to do something (as in the present case) without consideration. The Roman contractual scheme invoked by Holt CJKB was that of *mandatum*, but its standard of liability was clearly different (and much lower) than that applicable in common law. The high judge however was able to mediate his reliance on Roman law through a pillar of the common law of old, Bracton (whose views on the point were substantially the same as those in Justinian’s Institutes), stressing further how, despite the antiquity of the source, Bracton’s (i.e. Justinian’s) position was in accordance with natural reason. Cf. D.J. Ibbetson, *Coggs v Barnard* (note 178), pp. 18-20.

<sup>198</sup> “And though one may think it a hard case that a poor carrier who is robbed on the road, without any manner of default in him, should be answerable for all the goods he takes, yet the inconveniency would be far more intolerable if it were not so, for it would be in his power to combine with robbers, or to pretend a robbery or some other accident, without a possibility of remedy to the party; and the law will not expose him to so great a temptation, but he must be honest at his peril. And this is the reason of the civil law in this case, which though I am loth to quote, yet inasmuch as the laws of all nations are doubtless raised out of the ruins of the civil law ... it must be owned that the principles of our law are borrowed from the civil law, therefore grounded upon the same reason in many things” (12 Mod. 472, 482, *per* Holt CJKB). The point is probably even clearer in *Salk*. 17, 18: “it is a hard thing to charge a carrier; but if he should not be charged, he might keep a correspondence with thieves, and cheat the owner of his goods, and he should never be able to prove it.”

<sup>199</sup> 1 Wils. K.B. 281; 95 ER 619. Cf. J. Oldham (note 195), pp. 286-287.

<sup>200</sup> 1 Wils. K.B. 281, 282.

did not say openly that the shipmaster was under strict liability, but made sure to leave no alternative. Yet, again, the language used was framed in terms of negligence. So, as William Selwyn (1775-1855) put it when commenting on this case, “whatever was not excused by law, was to be deemed a negligence in the carrier”.<sup>201</sup>

Despite the tendency of some Continental scholars to derive the common law position from the civil one,<sup>202</sup> however, the actual link would seem rather weak. As it happens with the overwhelming majority of references to civil law in early modern common law, that was an *ex post* parallel, where civil law was merely invoked to strengthen the intellectual position of English law, not to provide a legal (or just logical) basis for it. It does not seem fortuitous that, in the period when bailment was increasingly drifting towards strict liability, the same parallel with civil law was made by Christopher St German (1460-1540) in his *Doctor and Student*. But St German did so for the very opposite reason: to make the bailee (just as any other consignee) responsible only for his fault.<sup>203</sup>

A rather emblematic instance where the liability of the shipmaster was established despite the clear absence of any responsibility (in causal terms) for the mishap is *Forward v Pittard* (1785), a case of an accidental fire onboard that could not be ascribed in any way to the shipmaster. The counsel for the plaintiff relied on what Holt CJKB said in *Coggs v Barnard* to make a simple point: the (common) carrier is a kind of bailee saddled with strict liability. More interesting is the position of the counsel for the defendant: he recalled other decisions,<sup>204</sup> framed in the language of fault, to insist that the shipmaster’s liability is based on negligence.<sup>205</sup> The bench, needless to say, found for the plaintiff. The defendant, it should be noted, had a point: the language used in previous decisions was indeed framed in terms of negligence. Nonetheless, the rationale of those decisions was clearly based on strict liability. Whether the language employed by the court was of strict liability or of fault, therefore, it counted for little. The valiant attempts of the defendant to insist that the act of God - which would clearly fall beyond the scope of the carrier’s liability - is not limited to very specific cases but could be invoked for any mishap lying outside the carrier’s control did not persuade much the bench, nor did it help the parallel with the civil law (a parallel implying that *culpa levisima* was still a fault-based standard). The famous statement of Mansfield CJKB in that case left little margin to discussion: “A carrier is in the nature of an insurer.”<sup>206</sup> It is precisely because of such insurer-like nature that the carrier is

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<sup>201</sup> William Selwyn, *An Abridgement of the Law of Nisi Prius* (4<sup>th</sup> edn.), London, printed for W. Clarke and Sons, 1817, p. 380.

<sup>202</sup> E.g. R. Zimmermann, *The Law of Obligations* (note 32), p. 524, and H. Wicke, *Respondeat Superior. Haftung für Verrichtungsgehilfen im römischen, römisch-höllandischen, englischen und südafrikanischen Recht*, Berlin 2000, pp. 175-176 (the first author relying especially on *Lane v Cotton*, the second on *Coggs v Barnard*).

<sup>203</sup> Christopher St German, *The Dialogue in English, betweene and Doctor of Divinity and a Student in the Laws of England*, London, printed by the Assignes of John More, 1638, lib. 2, cap. 38, fols. 129r-130r (St German’s *Dialogue* was originally written around 1530). Cf. D.J. Ibbetson, *Coggs v Barnard* (note 178), p. 8. It does not seem fortuitous that St German’s *Dialogue* was one of the main arguments invoked by the shipmaster in *Morse v Slue*, 3 Keb. 72, 114.

<sup>204</sup> In particular *Rich v Kneeland*, *supra*, note 179.

<sup>205</sup> 1 T.R. 27, 29-32.

<sup>206</sup> *Ibid.*, 33-34.

answerable beyond his negligence - and so, for strict liability. The only exceptions to such strict liability are those events beyond human control.<sup>207</sup> The liability of the shipmaster was therefore affirmed on the basis that the fire onboard did not arise from a lightning, and so it could not be considered as an event beyond human control.<sup>208</sup> In the eyes of a civil lawyer, Mansfield's list of events triggering *vis maior* might appear a little puzzling: the king's enemies were listed together with natural events,<sup>209</sup> whereas robbery was left outside. In fact, both the association between natural events and king's enemies and the exclusion of robbery may be explained thinking of the formation of this doctrine, going back to the already mentioned *Marshal's* case. Similarly, the year before *Forward v Pittard*, the same Mansfield found against the shipmaster whose vessel was attacked by robbers on the Thames. Clearly the carrier could not resist to them, and yet that was not sufficient as to exonerate him - they were not enemies of the king. *Dura lex sed lex*, concluded Mansfield.<sup>210</sup>

Mansfield's restatement of the carrier's liability, especially in *Forward v Pittard*, clarified the bottom line, moving away from the traditional fault language and pointing straight to strict liability. But it did not add much in substantive terms. The boundaries of the shipmaster's liability remained those set by *Southcote's* case. Neither did the law allow the carrier to set the terms in which he would carry. This possibility (theoretically still allowed in earlier times for bailment in general - suffices to think of *Southcote* itself) was probably excluded - at the very latest - with *Coggs v Barnard*. As a result, the carrier was also denied the possibility of lowering his standard of care even by specific agreement. This prohibition continued well into modern times. So for instance, in *Harris v Packwood* (1810) the bench set aside the waiver of liability, agreed

<sup>207</sup> *Ibid.*, 33: "It appears from all the cases for 100 years back, that there are events for which the carrier is liable *independent of his contract*. [...] there is a further degree of responsibility by the custom of the realm, that is, by the common law; a carrier is in the nature of an *insurer*. It is laid down that he is liable for every accident, except by the act of God, or the King's enemies. ... [I]o prevent litigation, collusion, and the necessity of going into circumstances impossible to be unravelled, the law presumes against the carrier, unless he shews it was done by the King's enemies, or by such act as could not happen by the intervention of man, as storms, lightning, and tempests" (emphasis in the text). Although the point is not often to be found in English case law, it is clear that a natural event cannot be invoked to discharge the shipmaster, where he put himself in the condition to suffer from it. Cf. e.g. *Williams v Grant*, 1 Conn. Repr. 487. The earliest work where I could find the point clearly explained is the Appendix to the first American edition of Jones' *Essay on the Law of Bailments* (note 194), pp. 20-21. See further J. Oldham (note 195), pp. 287-288.

<sup>208</sup> 1 T.R. 27, 34: "In this case, it does not appear but that the fire arose from the act of some man or other. It certainly did arise from some act of man; for it is expressly stated not to have happened by lightning. The carrier therefore in this case is liable, inasmuch as he is liable for inevitable accident."

<sup>209</sup> Cf. e.g. J. Beale, *Carrier's Liability* (note 178), pp. 168-169.

<sup>210</sup> "At first the rule appears to be hard, but it is settled on principles of policy, and, when established, every man contracts with reference to it, and there is no hardship at all", *Barclay v Cuculla y Gana* (1784), 3 Doug. 389. The outcome is no different if the damage derives from a third party, without any possible contributory negligence of the carrier. The same year as *Forward v Pittard*, for instance, the same Mansfield CJKB found against the carrier despite that the collision was due to an anchor not fastened to a buoy - and so, not visible. It may be noted that the marine custom was to sail between anchor and vessel, because going around was considered more dangerous. So the shipmaster did exactly what he was supposed to do. And the damage was not foreseeable, neither was it avoidable. *The Company of the Proprietors of the Navigation from the Trent to the Mersey v Wood*, 4 Doug. 286; 99 ER 884 (1785).

between the parties, on items beyond a certain value.<sup>211</sup> Similarly inadmissible was found the shipmaster's express notice to limit the scope of his liability, because that would clash with his responsibility as common carrier. So, in *Lyon v Mellis* (1804) the shipmaster was found liable to pay in full for the loss, despite the fact that the charter-party clearly warned the merchant consignee of the poor conditions of the vessel, for which the shipmaster declined responsibility.<sup>212</sup>

#### 4. Conclusion

Despite the the insistence of common law courts (in effect, mostly of the King's Bench) on the similarity between the carrier's liability in England and the *culpa levissima* of the civilians, the position of the two legal systems was different, in two fundamental ways. First, as to the standard of care expected of the shipmaster. In England, the shipmaster was saddled with strict liability – so strict, indeed, that it went even beyond the Roman law *custodia*. On the Continent (especially the Italian and Iberian peninsulae), the shipmaster was under *culpa levissima*, interpreted as a very high – but in principle fault-based - standard of care. Only in some specific cases did that standard of care entail the inversion of the burden of proof. Secondly, and crucially, the difference between the two approaches also encompassed causation. The almost absolute liability of the master in England normally dispensed with issues of causation. By contrast, the emphasis of civil law judges on the need of direct causation between master's conduct and mishap shifted the focus from fault to causation. Since most of the legal presumptions on sea-carriers were based on the kind of mishap, fault (or, at least, fault leading to the mishap - *culpa causam dans*) depended on the specific way in which the ship and her cargo were damaged or lost. Although rebuttable in principle, only seldom did a court detach itself from such presumptions - and so, from a predetermined outcome. Thus, most of the times liability was allocated on the basis of a rigid application of abstract causality schemes. The distinction between *culpa levis* and *culpa levissima* continued to apply, but it was increasingly an *ex post* explanation for a rather different mechanism. When applicable, *culpa levissima* amounted to the inversion of the burden of proof. The reason, however, was not that the standard was higher than *culpa levis*, but that the specific case before the court fell within a specific presumption of causality. By contrast, where the mishap was presumptively qualified as fortuitous, or it did not fall in either group of presumptions, then the approach of the courts was substantially the same as *culpa levis* (regardless of the aggravated liability theoretically applied to the shipmaster). In both cases it was the kind of mishap to determine the actual standard of care expected of the shipmaster.

If it is very rare to find a Mansfield among coeval Italian judges, that is hardly due to the inferior quality or learning of Continental courts. It is largely the consequence of the increasingly ossified structure of the decision-making process. The unspoken truth (sometimes masked under the stereotype of a stale, late *mos italicus*) is that early modern civil law courts were often tied (or rather tied themselves) to their precedents considerably more than common law courts. In such an environment, the grip of an

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<sup>211</sup> 3 Taunt. 264, *per* Laurence J.

<sup>212</sup> 5 East 428; 102 ER 1134, *per* Ellenborough CJKB.

unflexible tradition (or rather, the hardening of the *stylus curiae* into semi-binding precedents) became increasingly difficult to avoid, and abstract presumptions progressively harder to disprove.