

BAB IV

ANALYSIS AND DISCUSSION

A. The Liability of The Carrier (The Captain and The Shipowner) Against the Loss of Passengers

1. The Liability of The Captain

Transport or transportation is people who bind themselves in a time-based or illegal agreement and other agreements to regulate the transportation of people.⁶⁶ An agreement for transportation requires the transporter to protect passengers from the moment they enter and exit the ship as well as a joint agreement between the carrier and the sender, where the carrier binds himself to transport goods and/or people from certain destinations safely. Transport or transportation in water is a transportation activity and/or transfer of passengers and/or goods by ship⁶⁷

The captain is the case of the transporter because the captain is employed by a transport company or individual to carry out the task of the manager. The captain or captain is one of the crew who becomes the highest leader on the ship and has the authority and responsibility in accordance with the provisions of the legislation.⁶⁸ The task of a captain is to be responsible

⁶⁶ Sendy Anantyo 2012, "*Pengangkutan Melalui Laut*" Tinjauan Hukum Diponegoro, Volume 1, Nomor 4, p.5.

⁶⁷ Article 1 Paragraph 3 in Law No. 17 of 2008 on Shipping.

⁶⁸ Article 1 Paragraph 41 in Law No. 17 of 2008 on Shipping.

when carrying a ship on shipping, both from one port to another port safely.

Responsibility includes the safety of all passengers or goods on board.

The captain's policies that need to be implemented include:

1. Traffic procedures,
2. Shipping lanes,
3. Route system,
4. Shipping area of ship traffic,
5. Navigation aids.⁶⁹

The reason is, when sailing, the captain of the ship reports all information through the Coastal-radio Station (SRQP) which can minimize the potential to get an accident. The captain must pay attention to passenger safety, safety equipment on board, properly manage his ship in accordance with procedures or regulations, make a seaworthy ship, responsible for safety of shipments, responsible for the safety of crew on board, comply with bro the shipowner's order as long as it does not deviate from applicable laws and regulations.⁷⁰

The responsibility of the captain of the ship is based on the provisions of Article 128 of Law Number 17 of 2008 concerning Shipping which states that:

⁶⁹ Article 117 in Law No. 17 of 2008 on Shipping.

⁷⁰ Article 138 in Law No.17 of 2008 on Shipping.

- 1) The captain and / or the sub-crew must notify the ship safety inspector if he is aware that the condition of the ship or part of his ship is deemed not to fulfill the ship's safety requirements.
- 2) The owner, ship operator and captain are obliged to assist in the implementation of inspection and testing.

This is in accordance with the case in the KM Lestari Maju accident. This happened because the ship suffered a leak in the hull of the ship. Each ship acting as the ship's leader should notify any Ship Safety Inspector Officer of his ship whatever happens in the vessel regarding the danger is the responsibility of the ship's captain or crew in accordance with Article 128 of Law No. 17 of 2008 concerning shipping.

In working relations in the field of sea transportation, we recognize three groups of people, namely shipowners or shipping companies, ship captains and crew members, either as ship officers or class officers. Each person involved in working on a ship must work well so that the purpose of the voyage is fulfilled. The three parties involved are generally bound by a certain agreement, and must have certain permits to work together in a shipping business.⁷¹ This is of course intended so that each party can work responsibly, in accordance with what has been stated in the permit or the agree-

⁷¹ Arianto, Dedy, 2014, "Evaluasi Pencapaian Standar Pelayanan Di Pelabuhan Balikpapan", *Jurnal Transportasi Laut*, Volume 16, Nomor 4, Jakarta, p. 10.

ment.⁷² So, if there is a problem in shipping caused by human error, it will be immediately known and anticipated, so that it does not cause a bigger problem.

Each ship sailing is always manned by a team consisting of several people (depending on the size of the ship), which in the law the shipping team is called the crew. The crew is a person who works or is employed on a ship by the owner or operator of the ship to carry out duties on the ship in accordance with the position listed in the certificate book. This includes the Ship Crew, namely the captain of the ship, the crew of the ship (ABK), officers and sailors. The captain of the ship is one of the crew members who becomes the highest leader on the ship and has certain authority and responsibility in accordance with the provisions of the legislation.

The captain of the ship must act with intelligence, thoroughness and with sufficient wisdom to carry out his duties properly. The ship captain is basically the person most responsible for everything that happens on the ship. He is required to know and understand all the characteristics of each unit on the ship in question, both those directly related to the operation of the ship and those that are only helpful in shipping⁷³ based on Law No. 17 of 2008 concerning shipping. Besides that the boat captain must understand

⁷² Fadia Fitriyanti and Ani Yunita, 2017, *Hukum Perniagaan Internasional*, Buku Ajar, Yogyakarta, p.36.

⁷³ Jabalnur, 2018, "Responsibility for Transporter and Supervisor of Sailorship on Citizen Sailing", *Jurnal Law Review*, ISSN: 2548-1762, Volume 2 Issue 2, Halu Oleo University Kendari, p.547.

correctly about the number of passengers and cargo of the ship and other items as a ship's completeness.

The captain of the ship must adhere to the usual rules and regulations to ensure the sailing capability and security of the ship, the safety of the passengers and the transportation of the cargo. He will not travel, except if his ship is to carry out the requirements, be equipped appropriately and given enough crew. The captain of the ship is obliged to give help to people who are in danger of being on board. The captain of the ship may not leave his boat during the voyage or if there is danger threatening. Duties and responsibilities of the boat captain are very large and heavy both before and during the service. Even according to international law, the captain of the ship can act for and on behalf of the flag state which has the authority to decide everything related to navigation safety and shipping security, among others: requesting permission from the coastal state in relation to the use of peaceful cross rights, entering narrow straits which matches the characteristics of the ship.

In this research, the case was a ship accident of KM Lestari Maju which serves across Bira Port, Bulukumba Regency, to Pamatata Port, Selayar Regency, South Sulawesi. KM Lestari Maju sank in front of Pa'badilang, Selayar Regency. KM Lestari Maju sank because of a leak in the hull of the ship. So captain has been negligent in carrying out its duties; He is required to know and understand all the characteristics of each unit on

the ship in question, both those directly related to the operation of the ship and those that are only helpful in shipping based on Article 117 Law Number 17 of 2008 on Shipping.⁷⁴

Based on the case, the captain of the ship has an important role in the ship, because he the one who steered the ship to the destination. The captain of the ship bears important responsibility on a ship. The task of a ship captain is to take responsibility when carrying a ship on a voyage from one port to another port safely. This responsibility includes the safety of all passengers or items on board based on Law Number 17 of 2008 concerning Shipping.

If it is seen from the Law Number 17 of 2008 concerning Shipping and Article 342 on Commercial Code, it is explicitly stated that the captain is the leader of the ship. In Article 342 on Commercial Code it is explicitly stated that the responsibility for the ship is only in the hands of the Ship Captain, nothing else. So, whatever happens on the ship is the responsibility of the Ship Captain, except for criminal acts.⁷⁵ The responsibilities of Captain are as follows:

- 1) Complete the ship perfectly;
- 2) Keeping his ship properly according to procedures / rules;
- 3) Make a seaworthy ship;

⁷⁴ Article 117 “(1) Safety and security of water transport is the condition of the fulfillment of requirements: a. kelaiklautan ship; and. b. Navigation”.

⁷⁵ Article 342 in Commercial Code (*KitabUndang-Undang Hukum Dagang*).

- 4) Responsible for shipping safety;
- 5) Responsible for the safety of the sailors who are above the head; and
- 6) Comply with the orders of the shipbuilders as long as they do not deviate from the applicable legislation

The existence of the Ship Captain is generally born from an agreement with the Shipowner which is in line with the provisions of Article 1 Paragraph (40) and (41) Law No. 17 of 2008, in that both of the above arrangements assume that in the case of running a ship by sea, it is not necessary for the ship to be led by a ship entrepreneur, who is not skilled in carrying out the ship, but the assignment can be handed over to the Captain of the ship attached to it. In connection with this as a comparison, it is also necessary to state that a Ship Entrepreneur, who runs his own ship, because he is an expert in carrying out the ship and has a diploma for the assignment, then functions as the Captain of ship.

Based on this position, Article 341 of the KUHD stipulates that the Captain of the Ship is the leader of the ship and not the owner of the ship.

The provisions of Article 343 of the KUHD state that:

“The captain shall be obligated to abide by the usual regulations and existing stipulations in order to ensure that the ship is ready to sail and it’s safety, its passengers' safety and the transportation of its cargo.”

This is because in terms of leading the ship and in terms of navigation, it is fully being the authority of the captain. The captain is burdened with the responsibility as stipulated in the second paragraph of Article 342 of the KUHD stating that:

“He shall be responsible for losses caused by him to other parties due to his deliberate action or major fault.”

Based on the analysis of the author, from the case of the sinking of KM Lestari Maju in front of Pa'badilang, Selayar Regency based on Law No. 17 of 2008 on Shipping, Article 342 of Commercial Code and Article 1365 of the Civil Code, it is the responsibility of the Captain, so the captain must be responsible for the safety of passengers and goods.

KM Lestari Maju sank due to a leak in the hull, the ship has a problem, where water enters the lower floor deck, and the ship was allegedly hit by waves on the ship's body while in the middle of sea. Based on the previous explanation it is known that the ship is not sea-worthy or does not meet the standards of sailing (kelaiklautan), thus causing a boat accident that causes many victims. If we examine the important role of the captain of the ship is to determine whether the ship was feasible or not, based on Article 117 in Law No. 17 of 2008 on Shipping.

“The skipper who sail the ship while the concerned know that it is an unseaworthy vessel referred to in Article 117 paragraph (2) shall be

punished with imprisonment of three (3) years or a fine of not more than Rp400.000.000,00 (four hundred million rupiah).”⁷⁶

They should also know that passengers are entitled to compensation which shall be provided due to negligence during the operation of the transport operation. There are two reasons for the emergence of compensation, namely compensation for breach of contract (Wanprestasi) and compensation due to unlawful acts (PMH). Compensation for breach of contract (Wanprestasi) is regulated in book III of the Civil Code, which starts from Article 1246 until 1252 of the Civil Code. Whereas compensation due to Unlawful Acts (PMH) is regulated in Article 1365 of the Civil Code.⁷⁷

The prosecution of losses is based on the provisions of Article 1365 of the Civil Code. he must prove the elements in the article which can be described as follows:⁷⁸

- 1) the act is against the law, which means it is contrary to the legal obligation that it should do;
- 2) cause losses, meaning that there is a loss as a result of certain actions in the transportation of said goods;

⁷⁶ Article 302 in Law No. 17 of 2008 on Shipping

⁷⁷ Article 1247 “The debtore only required to reimburse the costs, damages and interest, which was originally expected or foreseeable at the time of engagement is held, unless the non-fulfillment of the engagement is caused by the deceit was doing. (WANPRESTASI). Article 1365 “A party who commits an illegal act which causes damage to another party shall be obliged to compensate therefor” (PMH) Book III of the Civil Code

⁷⁸ Man Suparman, S, *Aneka Hukum Dagang*, Alumni, Bandung, 2004, p.35.

- 3) damage and / or destruction of goods transported or with the loss of the passenger there is an element of error, meaning that it is intentionally done to harm the other party. Where this error includes the element of negligence which also causes harm to others;
- 4) the existence of a causal relationship between losses incurred and actions taken, meaning damage, destruction, or the presence of defects in cargo due to certain actions during the shipping process

The parties concerned can submit claims formally and in writing to the transporting party with proven documents, but usually the settlement of claims is based on the principle of family and deliberation. However, in this case, it also does not rule out the possibility of compensation in the form of repairs to goods that have suffered accidents so that it can be assumed that the transporter has made compensation payments. Ship accident as referred to in Article 245 is the responsibility of the skipper unless it can be proved otherwise.⁷⁹

2. The Liability of The Carrier (The Shipowner)

Shipowners are individuals or companies that own ships and to comply with applicable laws and regulations, so they can claim that the ship belongs to an individual or company. Shipowners have to fulfill ship safety re-

⁷⁹ Article 249 Law No. 17 of 2008 on Shipping

quirements, prevent water pollution from ships, manning, loading lines, loading, welfare and health of passenger ship crew, ship legal status, safety management and pollution prevention from ships, and send safety management to sailing in certain waters.⁸⁰

Shipowners can also be said as business entities or private companies that fulfill consumer desires, because they are individuals or companies, in the form of legal or non-legal entities established and domiciled or involved in activities within the jurisdiction of the Republic of Indonesia, carrying out various types of activities business in the economic sector through contracts, both individually and collectively.⁸¹

Rights and obligations in the transport agreement are generally not written, but are supported by transport documents, so the obligations and rights of the parties are usually written on the document. The reason for the transportation agreement is not made in writing because the obligations and rights of the parties are determined based on the consensual principle, where this principle does not require that the form of the transport agreement in writing but is considered sufficient but also must be specify with transport documents.

If the rights and obligations are not formulated in the document, then the provisions of the Transportation Law are followed, but if the rights and

⁸⁰ Sendy Anantyo, 2012, "*Pengangkutan Melalui Laut*", *Op. cit*, p.2.

⁸¹ Article 320 in Law of Commercial Code (*Kitab Undang-Undang Hukum Dagang*).

obligations of the parties are not determined in the Law, then the customs for transportation shall be followed. Habits in transportation carried out by the parties regarding rights and liabilities in which the carrier is obliged to carry out the transportation of goods and or passengers from the loading place to the destination safely, but this is not done because the passengers do not get their rights to get protection for the operation of goods and or passengers from the loading place to the destination by all means.⁸²

Previously, the principles of liability known in transport law was described; they are:

- a. The principle of fault liability,
- b. The principle of presumption of liability
- c. The principle of absolute / strict liability (*no-fault liability*)

If these principles are related to the description above, then in this case based on to the principle of presumption (principle of presumption of liability) that the transporter is assumed to be always responsible in accordance with the provisions of Article 41 paragraph (2) Law No. 17 of 2008 on Shipping. In this principle the carrier is assumed to be always responsible for any losses arising from the transportation carried out. However, if the transporter can prove that the losses incurred are not his fault, the carrier can be freed from the responsibility of paying part or all of the compensation.

⁸² Herman Susetyo, 2010, “Tanggung Jawab Nakhoda Pada Kecelakaan Kapal Dalam Pengangkutan Penumpang dan Barang Melalui Laut di Indonesia”, *Jurnal Hukum* , MMH, Vol 2, No. 1, p.14.

The responsibility of the passenger for the loss of the passenger is realized through compensation, as stated in article 472 of the Commercial Code as stated that:

“The compensation that must be paid by the transporter because of the surrender of goods in whole or in part, must be calculated according to the price of the same type and condition at the point of delivery at the time it was supposed to be delivered, with what was cut -saving in the matter of duties, fees and transportation wages, because the items were not handed over.”

The rights of passenger the carrier must provide compensation, Because the carrier is responsible for the safety and security of passengers and / or goods that are issued,⁸³ or to compensate for losses due to injuries that befall passengers in connection with transportation, unless there is evidence that the injury is a result. from an event that cannot be prohibited or prevented, or results from an error or error of the passengers themselves. If the injury is the cause of death, the carrier is obliged to compensate the suffering husband, wife, children and parents of the passenger.⁸⁴

In completing the documents, the shipowner must understand his responsibilities as the shipowner. The responsibility of the shipowner and vessel operator as stipulated in Article 181 of Law Number 17 of 2008 concerning Shipping is as follows:⁸⁵

⁸³ Article 40 Paragraph 1 in Law No. 17 of 2008 on Shipping.

⁸⁴ Article 522 in Law of Commercial Code Book II. Rights and Responsibilities Arise from Shipping (Hak Dan Kewajiban Yang timbul Dari Pengiriman).

⁸⁵ Article 181 Law Nomor 17 of 2008 on Shipping.

- 1) The owner and / or ship operator is responsible for each shipping telecommunications network and obstacles on the sea, river and lake caused by the operation of the ship.
- 2) The responsibility of the owner and / or operator of the vessel as referred to in paragraph (1) is in the form of an obligation to immediately repair or replace it so that the facility can function as before.
- 3) Repair and replacement as referred to in paragraph (2) shall be carried out within a period of 60 (sixty) calendar days since the disaster occurred.

Repairs and replacements can be immediately carried out within 60 (sixty) calendar days, so that such shipping navigation aids, shipping telecommunications and shipping channel facilities can function as before. If within the period of 60 (sixty) calendar days from the time the damage occurs is not carried out repairs or replacements by the shipowner, then the minister will make repairs and replacements in full, which will be borne by the owner and operator of the vessel in accordance with the Standard The Decree of the Minister of Sea Transportation concerning Ship Obligation Regulations to Have Certificates No.Th.1 / 17/1 Jakarta, September 26, 1964.⁸⁶

The responsibility of the owner and / or operator of the vessel in Article 181 of Law Number 17 of 2008 concerning this Shipping does not vanish the responsibility of the ship captain or the ship's leader for his mistakes which have caused damage and obstacles which cause losses to the means of

⁸⁶ Surat Keputusan Menteri Perhubungan Laut tentang Peraturan Kewajiban Kapal untuk Memiliki Sertifikat No.Th.1/17/1.

assistance navigation, shipping telecommunications, and shipping channel facilities.⁸⁷

The carrier must also fulfill passenger safety and security and the right to be responsible when the passenger becomes a victim because of the sinking of the ship.⁸⁸ The shipping law also states that in article 40 it is also explained that as a carrier it has responsibility for passenger safety and provides compensation for registered passenger goods.⁸⁹ The carrier is responsible for the consequences caused by the operation of the ship, including the destruction, loss, or damage of goods transported, so that the passengers have the right to replace the goods and the carrier must register to insure their responsibilities as referred to and basic public passenger protection in accordance with statutory provisions.⁹⁰

The responsibilities of the carrier in accordance with the provisions of Article 40 of Law Number 17 of 2008 concerning the shipping are:⁹¹

- 1) Transportation companies in the waters are responsible for the safety and security of passengers and / or goods transported;
- 2) The transport company in the waters is responsible for the cargo of the vessel in accordance with the type and amount stated in the cargo document and / or agreed agreement or transportation contract.

⁸⁷ Article 181 Law Nomor 17 of 2008 on Shipping. *Op.cit.*

⁸⁸ Barmawi, Jenny, 2002, *Penelitian tentang tanggung jawab terbatas pada penyediaan perlindungan bagi penyedia jasa dan pengguna jasa dalam pengangkutan laut di Indonesia*, seri kedua, Jakarta; media pusaka, p.54.

⁸⁹ Article 40 in Law Nomor 17 of 2008 on Shipping.

⁹⁰ Article 41 Paragraph 3 in Law No. 17 of 2008 on Shipping.

⁹¹ Article 40 in Law Nomor 17 of 2008 on Shipping, *Op.cit.*

In addition, transport companies in the waters are obliged to insure their responsibilities and carry out basic public passenger protection insurance in accordance with statutory provisions based on Article 41 paragraph (3) of Law No.17 of 2008 on Shipping.⁹² From the existence of the responsibility of the carrier to the passenger, the legal relationship between the two parties arises. The legal relationship is the relationship of obligations and rights reciprocally arising from the existence of legal events in the form of actions, events, or circumstances.⁹³

Based on Law Number 17 of 2008 concerning Shipping, Article 169 has explained about:⁹⁴

- 1) The owner or operator of a ship operating a vessel for certain types and sizes must meet the safety management requirements and prevent pollution from the ship.
- 2) Ships that have fulfilled the safety management requirements and pollution prevention from ships as referred to in paragraph (1) are given certificates.
- 3) The safety management certificate and pollution prevention from ships as referred to in paragraph (2) in the form of a Document of Compliance Management (DCM) for the

⁹² Article 41 paragraph (3) of Law No.17 of 2008 on Shipping The Company shall insure the transport in the waters of responsibility referred to in paragraph (1) and carry out basic public passenger protection insurance in accordance with the provisions of the legislation.

⁹³ Muh Kadarisman, 2016, "Policy Formulation of Sea Transportation System", *Jurnal Manajemen Transportasi & Logistik*, ISSN 2355-4721, Vol. 03 No. 2, p.165.

⁹⁴ Article 169 Law Nomor 17 of 2008 on Shipping.

company and a Safety Management Certificate (SMC) for ships.

- 4) The certificate as referred to in paragraph (3) is issued after an external audit has been carried out by a government official who has the competency or an institution given authority by the Government.
- 5) Safety Management and Pollution Prevention Certificates are issued by officials appointed by the Minister.
- 6) Further provisions regarding procedures for auditing and publishing safety management certificates and prevention of pollution from ships are regulated by Ministerial Regulation.

From the provisions of the articles above, if the shipowner can complete the ship's documents, the payment of compensation for the occurrence of the ship accident can be resolved as soon as possible, so that PT. Jasa Raharja service insurance can replace a number of financial values contained in the policy. Basic protection PT. Jasa Raharja provides to the community through social insurance programs, namely Public Transport Passenger Accident Insurance implemented under Law No. 33 of 1964 on Passenger Accident Insurance Funds.

KM Lestari Maju which is serving across Bira Port, Bulukumba Regency, to Pamatata Port, Selayar Regency, South Sulawesi sank in front of Pa'badilang, Selayar Regency. KM Lestari Maju sank because of a leak in

the hull of the ship. KM Lestari Maju transported hundreds of passengers, minibuses, cars and motorbikes.⁹⁵

Thus, passengers who are victims of ship accidents do not need to worry about compensation because passengers who have been injured, disabled, even those who live in the world will get compensation from PT. Jasa Raharja based on Article 7 Law no.33 of 1964 on Passenger Accident Insurance Funds⁹⁶, Government Regulation No.17 of 1965 on Provisions on the Implementation of Passenger Accident Compulsory Insurance Funds, and Law No. 17 of 2008 on shipping.

For calculating 35 victims who died, the compensation was given only to 18 inheritance victims. Among the 18 inheritance victims, 13 of them were domiciled in Selayar and 5 others outside Selayar, namely 4 people in Watampone, South Sulawesi and one person in Surabaya, East Java. While compensation for 17 other people has not been given because officers still ensure the validity of the inheritance.⁹⁷

Based on the analysis of the author in accordance with the above explanation that the responsibility of the shipowner on KM Lestari Maju accident in the form of default accountability, the accountability for default is

⁹⁵ Pebriansyah Ariefana, diterbitkan Selasa, 3 Juli 2018, “Angkut Ratusan Orang KM Maju Tenggelam di Bulukumba” available in: <https://www.suara.com/news/2018/07/03/134849/angkut-ratusan-orang-km-lestari-maju-tenggelam-di-bulukumba>, accessed on: Today, 19th of July 2018, 19:23.

⁹⁶ Article 7 “The amount of the contribution fee and the amount of compensation in article 3 paragraph (1) poin a and other implementing provisions of this Law are governed by Government Regulations”. Law no. 33 of 1964 on Passenger Accident Insurance Funds.

⁹⁷ Endan Puput, published Thursday, 5 July 2018, “Menhub Santunan Korban KM Lesatari Maju Segera di Bayarkan” Accessed on : Friday, 18 January 2019, 08:14pm.

given due to negligence of the shipowner or ship operator in checking the crew before sailing so that there was a leak on the ship's hull which caused the ship to sink. Therefore, compensation for default is a form of compensation imposed on the carrier that does not fulfill the contents of the agreement that has been made between the carrier and the passenger.

Another term that also has the same meaning that can be seen in the formulation of Article 41 of the ninth part concerning the Obligations and Responsibilities of the Carrier of Law No. 17 of 2008 states that: the responsibilities referred to in Article 40 can be caused as a result of the vessel's deposit, in the form of:⁹⁸

- 1) death;
- 2) destroyed, lost or damaged goods transported;
- 3) delay and or goods transported;
- 4) third party losses, and so on.

The form of responsibility of the carrier is in accordance with the provisions of Article 40 of Law Number 17 of 2008 concerning Shipping which states:

- 1) Transport companies in waters are responsible for the safety and security of passengers and / or goods transported;
- 2) The transport company in the waters is responsible for the cargo of the vessel in accordance with the type and amount

⁹⁸ Article 41 in Law No. 17 of 2008 on Shipping.

stated in the cargo document and / or agreed agreement or transportation contract.

In addition, transport companies in the waters are obliged to insure their responsibilities and carry out basic public passenger protection insurance in accordance with statutory provision; everyone who does not insure its responsibility as referred to in Article 41 paragraph (3) shall be punished based on Article 292 of Law Number 17 of 2008 on Shipping;

“Everyone who does not insure its responsibility as referred to in Article 41 paragraph (3) shall be punished with imprisonment of six (6) months and a maximum fine of Rp 100,000,000.00 (one hundred million rupiah)”

From the responsibility of the carrier to the passengers, legal relations arise between the two parties. The legal relationship is the relationship of obligations and rights reciprocally arising from the existence of legal events in the form of actions, events, or circumstances. The relationship of obligations and rights occurs both because of the agreement and because of the legal provisions.⁹⁹

The most substantial obligations for passenger is that every passenger must buy a ticket according to the price. Without a ticket, passengers would not be allowed to board the ship, do not get compensation or compensation related to the accident, but the clauses on ticket of passengers stating "The ship / shipping company is not responsible for damage, loss and loss of

⁹⁹ Abdul Kadir Muhammad, *Hukum Asuransi Indonesia*, Citra Aditya Bakti, Bandung, p.75.

goods belonging to passengers during the trip" this can be detrimental to passengers who want to take responsibility and compensation. This is actually guaranteed in Article 40 paragraph (1) of Law No. 17 of 2008 on Shipping.¹⁰⁰

In reality, the case shows that the carrier did not fulfill the responsibility for the compensation to the passengers because it was based on the clause of the ticket. The transport company released the responsibility for passengers which impacted on the loss of passengers caused by a ship accident, in that they were not compensated by the carrier. So, the passengers suffered losses due to an accident and the government also did not follow-up to the problem regarding the clause of a ticket.

The clause of ticket which states the release of the responsibility of the transport company for passenger goods is also not in accordance with Article 18 paragraph (1) of Law No. 8 of 1999 on Consumer Protection. The company does not fulfill the obligations, namely according to Article 40 Law No. 17 of 2008 on Shipping and Article 18 of Law No. 8 of 1999 on Consumer Protection. Reviewing the clause on the ticket in terms of theory and applicable law is declared null and void because it contradicts the applicable Law.

B. The Legal Efforts For Passenger in Losses of Sea Transportation

¹⁰⁰ Arrasyid Nurazmi, 2018, *Tanggung Jawab Pengangkut Dalam Pengangkutan Barang Penumpang Melalui Kapal Ferry Di PT Pelnas Baruna Jaya Kepulauan Riau*, Universitas Islam Indonesia, Yogyakarta, p.59.

1. The Legal Efforts For Passenger in Loss of Life

Basically, there are two parties in sea transportation activities, namely transporters, in this case, shipping companies, which in this case is KM Lestari Maju Shipowners and consumers who use sea transportation services or passengers. The parties are bound by an agreement, namely the transportation agreement. Because an agreement is a manifestation of legal relations that is civil in nature, it contains the rights and obligations that must be carried out and fulfilled, commonly known as "achievements."

Achievement in the law agreement is the implementation of the contents of the agreement that has been agreed according to the agreed upon procedures. Concerning the law in Indonesia, there are several performance models, among others are give something, do something, or do nothing. In the law handling, the obligation of the transporter, among others are to carry passengers and / or goods safely, intact and safely arrive at their destination, to provide good service, to compensate passengers in the event of a loss that befalls passengers, and to dispatch passengers according to the schedule set.

On the other hand, the passengers' obligations are to pay the shipping cost which has been determined, to keep the goods under their supervision, to report the types of goods carried especially goods which are categorized as dangerous, and to obey the provisions stipulated by the carrier regarding transportation. The rights and liabilities of the parties are usually stated in a transportation agreement document.

Theoretically, the transportation agreement is an agreement in which one party agrees to safely bring people or goods from one place to another while the other party agrees to pay the cost.¹⁰¹ Provisions regarding transportation also apply in transportation or sea transportation activities, in this case the carrier or shipping company to transport passengers safely and safely arrive at their destination in a timely manner, and as compensation for carrying out these obligations, shipping companies get paid as the cost of carrying out transportation from passengers.

In the practice of sea transportation activities, the transporters often do not fulfill their obligations properly or correctly or can be said to have not done their “obligations and responsibilities.” This is a situation where the debtor (the person owed) does not carry out the proper performance against the creditor as agreed. Some cases or facts that can be categorized as a form of default by the carrier are not providing sailing safety and security to passengers in anticipation, delays in the scheduled departure, loss or damage of passenger luggage, negligence of ship crew damage, unsatisfactory service, information unclear about the service products offered and etc.

These problems always cause losses for passengers which of course give birth to legal problems, especially with regard to the responsibility of the shipping company or carrier to the passengers and owners of goods both as parties to the transportation agreement and as consumers. Other problems

¹⁰¹ R. Subekti, 2005, *Aneka Perjanjian*, (Bandung: PT Citra Aditya), p.69.

for consumers are delays in carrying out sea transportation that sometimes exceeds passengers' tolerance limits, and the overload of goods capacity, and there seems to be no legal effort that can be taken against the problem.

According to the provisions of the legislation in the event of an event or situation that causes losses to passengers, the transporter is responsible for compensating for losses suffered by passengers, but in the implementation the consumer or passenger experiences difficulty in fighting for his rights as a consumer. In connection with this matter, it is necessary to have efforts to empower consumers who use sea transportation services by various competent parties.

In principle, sea transport activities are legal relationships that are civil in nature, but considering sea transportation has become a broader community need, government intervention in air transportation activities is needed, namely determining policies or regulations relating to air transportation activities so that interest is needed. consumers of users of protected air transportation services. Although the transportation agreement is essentially subject to the articles of the general section of the Burgerlijk Wetboek (Civil Code) treaty law, by law various specific regulations have been established which aim at the public interest limiting freedom in terms of making trans-

portation agreements, namely putting various special obligations to the carrier which may not be excluded from the agreement.¹⁰²

According to Hartono,¹⁰³ the state has an obligation to regulate so that the interests that face it must be able to be met in ideal harmony and harmonization. For this reason, the state has the authority to regulate and intervene in predicting the possibility of violations that occur by providing a series of regulations and at the same time provide threats in the form of sanctions if there are violations by anyone in the economic sector. The set of regulations can include arrangements that have the goal of maintaining the balance of all parties whose interests are confronted, giving sanctions if indeed there has been a dispute by enforcing the applicable law, and preparing the dispute resolution institution and its procedural law.

So far there are several legal models of consumer protection as follows:¹⁰⁴

- 1) Formulate consumer protection through legislative processes (laws) and
- 2) Carry out a holistic approach, in that there are laws that regulate consumer protection issues, as well as being an "umbrella" of sectoral laws that have dimensions of consumers.

¹⁰² *Ibid.* p. 71.

¹⁰³ Sri Redjeki Hartono, 2007, *Hukum Ekonomi Indonesia*, (Malang: Bayu Media) p.132.

¹⁰⁴ Sudaryatmo, *Hukum dan Advokasi Konsumen*. 2009, p.81-82.

Many things include consumer rights and obligations, as well as the rights and obligations of the manufacturer. The presence of consumer protection laws is expected to create fair trading business activities not only for business people, but directly for the interests of consumers, both as users, users and users of goods and services offered by business actors.¹⁰⁵ The most important element in legal protection for users of marine transportation services and other types of transportation is the element of transportation safety and the responsibility of the transporter.¹⁰⁶

Based on the results of the study, it is shown that legal protection of marine passenger consumers still shows many weaknesses, both normatively and empirically. The vulnerability includes formal legal rules that have not fully protected passengers of ships; there are ship passengers who have not yet obtained their full rights such as the right to security, correct information, comfort, good service, safety and getting advocacy because they experience problems; the principle of the business actor's responsibility in the case of the sinking of the KM Lestari Maju is still based on responsibility based on errors and those who must prove the fault are the consumers, and there is no institution to protect marine passenger.

In addition, in Law Number 8 of 1999 on Consumer Protection, the rights and obligations of business actors and consumers are regulated. So far,

¹⁰⁵ Gunawan Widaja dan Ahmad Yani, 2003, *Hukum Tentang Perlindungan Konsumen*, (Jakarta: PT Gramedia Pustaka Utama), p. 9.

¹⁰⁶ E.Suherman, 2004, *Wilayah Udara dan Wilayah Dirgantara*, (Bandung: Penerbit Alumni), p.163.

the rights and obligations of the parties in sea transportation activities often do not work in a balanced manner, where consumers are in a weak and helpless position when compared to the position of the business actor who is in a stronger position even though the position of the parties should be balanced and equal because in principle they need each other and are dependent.

Law Number 8 of 1999 concerning Consumer Protection, in addition to determining the rights and obligations of business actors, the rights and obligations of consumers, also regulates legal remedies that can be carried out by consumers who suffer losses due to the actions of business actors. in the context of the prevailing Indonesian legal system efforts or means that can be carried out in the fight for people's rights, that can be pursued by applying legal sanctions for parties who violate the law, both administrative and criminal sanctions.

In addition, it can also be done by filing a civil suit with the court, or settling a case through a non-criminal route, namely the settlement of a dispute outside the court through other party intermediaries whose existence has been regulated in legislation, namely in Republic of Indonesia Law Number 8 of 1999 concerning Consumer Protection, as stipulated in article 45 which states that every consumer who is harmed can sue a business actor

through an institution tasked with resolving disputes between consumers and business actors or through courts in the environment general justice.¹⁰⁷

Consumer dispute resolution can be reached through a court or outside the court based on the voluntary choice of the parties to the dispute. Settlement of disputes outside the court as referred to in paragraph 2 does not eliminate criminal responsibility as regulated in law. If an effort to resolve consumer dispute outside the court has been chosen, the claim through the court can only be reached if the effort is declared unsuccessful by either party or by the parties, in dispute. The above provisions explicitly stipulate that consumer dispute resolution can be carried out in two ways, namely through court channels and through outside the court channels.¹⁰⁸

Article 46 stated that the claim for violation of business conduct can be carried out by a consumer who is harmed or the heir in question; a group of consumers who have the same interests; non-governmental consumer protection institutions that fulfill the requirements, namely in the form of legal entities or foundations, which in their articles of association clearly state that the purpose of establishing such organizations is for the benefit of consumer protection and have carried out activities in accordance with their articles of association; the government and / or relevant agencies if the goods and ser-

¹⁰⁷ Article 45 Law No. 8 of 1999 about Consumer Protection.

¹⁰⁸ Yuliana Beatrich Udam, 2013, "Perlindungan Hukum Bagi Konsumen Pemakai Jasa Angkutan Laut Di Pelabuhan Jayapura", *Jurnal Penelitian Mahasiswa Fakultas Hukum "Mix Law"* Volume 1 Nomor 1, Universitas Yapis Papua, p.103.

vices consumed or utilized result in substantial material losses and victims that are not small. guideline submitted by a group of consumers, a governmental or non-governmental consumer protection agency as referred to in paragraph 1 letter b, letter c, or letter d, submitted to the public court.

Provisions regarding large material losses and victims that are not small as referred to in paragraph 1 letter d are regulated by government regulations. The provisions of article 46 above determine the parties that can submit a claim to the business actors who have harmed the interests of consumers, these parties are as follows:¹⁰⁹

- 1) A consumer who is harmed or the heir in question;
- 2) A group of consumers who have the same interests;
- 3) Institutions for the protection of non-governmental consumers who fulfill the requirements, namely in the form of legal entities or foundations, government and / or agencies.

Regarding the settlement of off-court disputes stipulated in article 47, which states that consumer dispute resolution outside the court is held to reach an agreement on the form and amount of compensation and / or regarding certain actions to guarantee that there will be no recurrence by consumers. The provisions of article 47 regulate consumer dispute resolution outside the court, in everyday life known as alternative disputes solutions,

¹⁰⁹ Article 47 Law Number 8 of 1999 about Consumer Protection.

for example negotiation, mediation, arbitration, or through institutions in the form of government that specifically resolve consumer disputes, namely the consumer dispute resolution body as regulated in article 49 of the government which establishes a consumer dispute resolution body at the level II to resolve consumer disputes outside the court. Legal remedies stipulated in the Republic of Indonesia Law Number 8 of 1999 concerning consumer protection above can also be applied or used by consumers who have been harmed by the shipping business actors in shipping practices.

Based on the case of KM Lestari Maju Ship wreck which served the crossing from Bira Port, Bulukumba Regency, to Pamatata Port, Selayar Regency, South Sulawesi, KM Lestari Maju was reported to have sunk in front of Pa'badilang, Selayar Regency, when it was about to run. KM Lestari Maju sank because of a leak in the hull of the ship. KM Lestari Maju transported hundreds of passengers, minibuses, cars and motorbikes. There were 35 victims who died, but the compensation was only given to 18 legacy victims. Among 18 legacy victims, 13 of them were domiciled in Selayar and 5 were outside of Selayar, namely 4 in Watampone, South Sulawesi and one in Surabaya, East Java. While compensation for 17 other people has not been given because officers still ensure the legacy of the inheritance.

Based on the analysis of the author, passengers who have been injured, disabled, and even those who live in the world will get compensation from PT. Jasa Raharja. Jasa Raharja is a state-owned business entity mandat-

ed to provide protection to the community; the protection is given in the form of compensation, that is, compensation for the cost of care, and permanent disability benefits for victims of accidental public transportation based on Article 7 Law no.33 of 1964 on Passenger Accident Insurance Funds,¹¹⁰ and Government Regulation No.17 of 1965 on Provisions on the Implementation of Passenger Accident Compulsory Insurance Funds.

Budi, the Minister of Transportation, has also assigned PT. Jasa Raharja to record the victims, both those who died and those who survived, along with the amount of compensation they should have. The amount of compensation for the families of the victims who died was IDR 50 million and issued a guarantee letter for the cost of care to the hospital where the injured victims were treated.¹¹¹ Right to compensation for the heirs of the dead and hospital care guarantee is given by PMK No. 15 of 2017.

2. The Legal Efforts For Passenger in Loss of Goods

Transportation in Indonesia has an important role in advancing and expediting domestic and foreign trade because transportation can facilitate the flow of goods from the production area to consumers so that consumer needs can be met. This can be seen in the current development of transporta-

¹¹⁰ Article 7 “The amount of the contribution fee and the amount of compensation in article 3 paragraph (1) poin a and other implementing provisions of this Law are governed by Government Regulations”. Law no. 33 of 1964 on Passenger Accident Insurance Funds.

¹¹¹ Indiana malia, published Wednesday, 4 July 2018, “kapal lestari yang tenggelam angkut 139 penumpang”, Available on: <https://www.idntimes.com/news/indonesia/indianamalia/kapal-km-lestari-yang-tenggelam-angkut-139-penumpangnbspnbspn/full> , Accessed on : Friday, 15 February 2019, 11:20pm.

tion services in Indonesia which are beginning to show progress, as evidenced by the fact that there are many industrial companies that believe in using transportation services.

Transportation according to Purwosutjipto is a reciprocal agreement between the carrier and the sender, in which the carrier binds himself to carry out the transportation of goods and / or people safely from one place to the destination, while the sender binds himself to pay transportation fees.¹¹²

Sea transportation occurs because of an agreement between the two parties, namely the party providing the transportation service with the service user. The existence of this agreement causes a responsibility for the carrier which lies in the safety and security of the ship and its cargo, especially during shipping or during transportation as stated in article 468 KUHD. In transporting goods through the sea, there are several kinds of documents that must be accompanied by them, including the most important ones are the bill of lading in article 506 KUHD.

Meanwhile, those who are authorized to issue the agreement are contained in article 504 KUHD, namely the transporter; besides that the captain also has the authority to issue an agreement based on 505 KUHD. With the increasing frequency of sea transportation, especially in the transportation of goods from and out of the country, it is also regulated in

¹¹² Purwosutjipto, 1991, *Pengertian pokok Hukum Dagang Indonesia 3*, Hukum Pengangkutan, Djambatan, Jakarta, p. 2.

international conventions, in addition to KUHD and government regulations in the field of sea transportation. Therefore, the more developed sea transportation requires legal efforts to protect the interests of the parties involved in sea transportation through the development of norms or legal rules in a strict manner to reflect the balance in the lightness of responsibility and rights arising from each party.

The existence of formal sources of legal rules that aim to protect consumers in the field of sea transportation shows the existence of normative legal protection, meaning legal protection based on the presence or absence of legal norms that can be used as a basis for consumers to protect rights and its interests in consuming goods and / or services produced by business actors in order to create legal certainty for consumers, especially for the rights and interests of consumers that must be protected so that consumers will easily take refuge in these norms or legal rules as a means of their protection.

This is based on Article 1 point 1 of Law No. 8 of 1999 on Consumer Protection. Based on the results of the inventory of laws and regulations in the field of sea transportation, both public and civil law, there are formal sources of the regulation, including Law No. 8 of 1999 on Consumer Protection, Law No. 17 of 2008 on Shipping, Civil Code, KUHD, Convention, International Convention, other related laws, several government regulations, ministerial decisions and other implementing rules. Therefore, consumers

(sender or recipient of goods) have the right to claim the carrier through compensation claims as stated in article 472 KUHD.

Based on the case that allegedly caused the sinking of KM Lestari Maju, there was a leak in the ship's body. In addition to leaking, the ship is suspected of being hit by waves in the middle of the hull in the sea, but the cause has not yet been followed up by the national search and rescue agency (BASARNAS).¹¹³ After the sinking of KM Lestari Maju, many items spilled because they were carried by large currents and not only the items were swept away but the vehicles also floated out. Not a few fishermen took items that spilled into the sea because the sinking of the ship was near the beach of Pabbadilan, Bungayya Village. From the data manifest until it was obtained from the porter and official officer port of Bulukumba, the passengers who boarded the ship were around 139 people, but from the collection of data by the Search and Rescue (SAR) team who carried out the evacuation there were 201 people, so investigators thought that the ship was overloaded.

Based on Law No. 8 of 1999 on Consumers Protection, passengers in this case act as consumers having the right to be heard and the right to get compensation.¹¹⁴ Therefore, the law refers to an effort to improve sea transportation services should begin to be designed with more participation and to accommodate the interests of consumers.

¹¹³ Pebriansyah Ariefana, published on Tuesday, 3rd of July 2018, "Angkut Ratusan Orang KM. Maju Tenggelam di Bulukumba".

¹¹⁴ Article 4 and 5 "hak dan kewajiban" Law No. 8 of 1999 on Consumers Protection.

Based on the case above, it can be analyzed that claims for compensation are usually settled at the port of destination between the carrier and the recipient of the goods. In accordance with article 487 the rules stipulate that collection of the right of "lawsuits" for compensation must be carried out within 1 year after delivery of goods. If the carrier has been proven guilty of damage / loss of the goods, the carrier will replace the amount of compensation determined by the regulations stated in the agreement.

However, if there is no information on the price of the goods at the destination, the carrier will compensate for the loss of the price. After submitting a claim to the carrier, the sender or recipient of the goods can carry out the settlement of prosecution for compensation violations committed by the carrier through 2 (two) ways in accordance with the contents in Article 45 paragraph (2) of Law No. 8 of 1999 on Consumer Protection, that are;

a. Litigation

Litigation is The actions between two opposing parties working in the interest of enforcing or defending a legal right. In most cases, the parties settle litigation by working out an agreement, but they may also go to court and have the jury or judge determine the final resolution. The process of litigation, a case (called suit or lawsuit) is brought before a court of law suitably empowered (having the jurisdiction) to hear the case, by the parties involved (the litigants) for resolution (the judgment).

b. Non-Litigation

Non-Litigation is Resolving or settling any dispute without bringing in a lawsuit or without the intervention of the Court. The concept of non-litigation evolves around, not to bear the rigour of law, rather it is better settling/resolving issues without expensive law suits and court interventions.

Based on the case of the Legal Efforts against the loss of goods by passengers of KM Lestari Maju, without a ticket, passengers would not be allowed to board the ship, did not get compensation or compensation related to the accident, but the clauses on ticket of passengers stating "The ship / shipping company is not responsible for damage, loss and loss of goods belonging to passengers during the trip." This can be detrimental to passengers who want to take responsibility and compensation. This is actually guaranteed in Article 40 paragraph (1) of Law No. 17 of 2008 on Shipping.¹¹⁵

The clause on this ticket is also not in accordance with Article 18 paragraph (1) of Law No. 8 of 1999 on Consumer Protection which states about the release of the responsibility of the transport company for passengers' goods. The company did not fulfill its obligations, namely according to Article 40 Law No. 17 of 2008 on Shipping and Article 18 of Law No. 8 of 1999 on Consumer Protection. Reviewing the clause on ticket, in terms of theory and applicable law, it is declared null and void because it contradicts the applicable Law.

¹¹⁵ Arrasyid Nurazmi, 2018, *Tanggung Jawab Pengangkut Dalam Pengangkutan Barang Penumpang Melalui Kapal Ferry Di PT Pelnas Baruna Jaya Kepulauan Riau*, Universitas Islam Indonesia, Yogyakarta, p.58.

In Article 475 of the Commercial Code it is stated that “If the carrier is not a vessel entrepreneur, the obligation to compensate according to article 468 concerning transportation by sea is limited to the amount in the case of damage suffered, based on the provisions of the previous article, that can be billed to the ship entrepreneur.” In the event of a dispute, the carrier must show the liability. Reviewing the clause on ticket, in terms of theory and applicable law, it is declared null and void because it contradicts the applicable Law. So, the passengers can claim the items / goods to carrier because the carrier is responsible for the goods of passenger.

Passengers can also do legal efforts through non-litigation. Non-litigation is settlement of consumer disputes outside the court through a process of mediation, arbitration or conciliation which aims to reach an agreement on the form and amount of compensation so as not to recur losses suffered by consumers,¹¹⁶ but the passengers did not have a lawsuit to the problems arising from the clause of ticket on the carrier.

The carrier are obliged to insure their responsibilities and carry out basic public passenger protection insurance in accordance with statutory provision. Passengers who have been injured, disabled, even those who live in the world will get compensation from PT. Jasa Raharja. The passengers did not file a lawsuit about loss of goods because the carrier release of the responsibility for passengers’ goods. So, in criminal act, transporters or car-

¹¹⁶ Article 47 Law No. 8 of 1999 on Consumer Protection

rier gets punishment, while the captain is released from criminal act. Ship accident as referred to in Article 245 is the responsibility of the skipper unless it can be proved otherwise.¹¹⁷

Based on the analysis of the author, from the case of the sinking of KM Lestari Maju in front of Pa'badilang, Selayar Regency. KM Lestari Maju sank due to a leak in the hull; the ship has a problem, where water enters the lower floor deck; and the ship was allegedly hit by waves on the ship's body while in the middle of sea, so the captain must be responsible for the safety of passengers and goods.

Based on the previous explanation, it is known that the ship was not sea-worthy or did not meet the standards of sailing (kelaiklautan), thus causing a boat accident that caused many victims. if we examine the importance of meeting the standards of sailing, the captain have to determine whether the ship was feasible or not for sailing, based on Article 302 in Law No. 17 of 2008 on Shipping. The captain shall get punishment in the criminal act because his actions caused a loss of life.

¹¹⁷ Article 249 in Law No. 17 of 2008 on Shipping