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RESEARCH ARTICLE

THE APPLICATION OF STRICT LIABILITY (ABSOLUTE RESPONSIBILITY) IN PUBLIC TRANSPORTATION ACCIDENTS ONLY SHIP OF THE SHIP IN INDONESIA.

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Abstract

According to the authors the provision on the basis of liability in the case of unlawful acts committed by business actors to consumers in Act No. 8 of 1999 on Consumer Protection and Act No. 17 of 2008 About Shipping, has not yet explicitly imposed any principle, neither Disability nor Indifference. The authors argue that it is necessary to consider the possibility of applying the Strict Compliance Principle in the event of a ship accident against potential actors in this case PT ASDP is encouraged to make efforts to prevent the occurrence of accidents to the maximum and improve the efficiency of the company. Provision for the responsibility of shipping facilities providers in Law no. 17 of 2008 on Delivery only responsible for the perceived loss needs to be reviewed, because it does not satisfy the sense of justice for the victim or his heirs, especially if there is a victim who suffered death or deformity. Should be limited Is the amount of compensation the victim suffered death or disability body. Should be limited, the amount of indemnity that may be required by victims or heirs by Americans to be enforced in shipping orders against victims should not exceed US \$ 200 million. The method used, is empirical research method. The results show that the implementation of strict liability is actually possible under the Act No. 17 of 2008 About Shipping in particular Article 157 paragraph (1) reads: "The Shipping Service Provider is responsible for serving users who suffer from injury, injury, or death from ASDP operations.

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Introduction:-

Mass transportation accidents, especially in the Sea in Indonesia, are quite alarming because they occur at a high enough frequency. Data from the Department of Transportation almost every year there is always a marine accident. In the first half of 2014 there have been 75 accidents, up 70 (seventy) percent compared to the first half of 2013 "only" by 40 times. Forms of accidents that occur, among others, shipwreck caused by weather, loaded with loads and others. (BPS Sultra (2014)

Accidents for shipwreck accidents that occur in fact are poorly accompanied by proper accountability in this case PT ASDP (Lake and Sailing River Transportation) under the authority of the Ministry of Transportation. Whereas in the context of consumer protection, it should get greater attention from the Government because it involves the obligation as a service provider. The Government of Indonesia's attention to consumer protection in general is only

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seen after the reforms. Act No. 8 of 1999 on Consumer Protection was born more than 54 years after the Indonesian nation became independent. Of the many issues concerning consumer protection, there are some things that escape from the attention of policymakers, namely the responsibility that must be borne by negligence or carelessness. Based on the theory of unlawful acts, there are three elements that must be proved to be a demands for compensation can be granted include:

1. Any losses suffered by the Plaintiff;
2. Such losses are caused by the Defendant's acts or negligence;
3. The Defendant's acts or omissions are a "breach of a duty" which is the Defendant's obligation to the Plaintiff. (Robert Cooter and Thomas Ulen, 2000)

This demands for compensation can certainly be granted if the liability elements such as the causation of harm are damages arising from the action and faults or faults can be proven. However, an error or "fault" is not an absolute element to be proved in liability. The relationship between liability and fault is like a pendulum swinging following changes in the legal principles prevailing at that time. Along with greater protection needs to the consumer, then under certain conditions the fault element is removed from the requirements of the emergence of a liability (liability) So the doctrine of strict liability (absolute responsibility) arises. This strict liability doctrine emerges as a reaction to dissatisfaction over the weaknesses of the previous doctrine of responsibility.

Act no. 17 of 2008 on sea transport does not specifically regulate the accident so more likely to be transferred to article 1365 Civil Code. With that article, consumers, especially passengers, in a case of accidents, delays and others, to be able to obtain compensation shall prove the omission or error of PT ASDP INDONESIA . Of course the error proof system is difficult for the consumer. Article 25 paragraph (1) of Act no. 17 of 2008 concerning Shipping which supersedes Law no. In the case of the obligation to carry passengers, the carrier is responsible for keeping the passengers safe at their destination safely.

Act no. 17 Year 2008 is still somewhat better than with Act no. 21 of 1992 in particular concerning the responsibility of the carrier who has separated the responsibility of the carrier to persons, goods, delays or even third parties while still unifying the arrangements regarding public transport and private transport. On the other hand, material accountability for the victimized consumers should receive a greater portion of attention, given the accountability that is directly available to the victimized consumer.

Article 157 paragraph (1) of Act no. 17 Year 2008 has stipulated the responsibility of the carrier to the passenger, the owner of the goods and the third party that the Sailing Service Provider is responsible to the service user who suffered the loss, injury or death caused by the operation of the ships, related to the compensation, It is clear which system of responsibility is used in case of an event that causes a loss to the user of the service. The problem of this responsibility system will affect the level of difficulty that will be faced by passengers as service users in an effort to fulfill their right to compensation for ship accident.

Method of Research and Materials:-

Research and Materials Method: -

This research is a legal research (Olson, Kent C. 2009), with empirical data on sea transport in the form of very ship which was carried out by PT ASDP which had an accident in the Sea causing injured and dead victims. Sea ship passengers need to obtain legal protection in the form of safety and comfort for that organizer (PT.ASDP) can be accounted for the occurrence of shipwreck accidents. As legal research, in the procedure, the authors collected research data from the port of Very Kolaka-Bajoe in regency of Kolaka by interviewing the respondents. Respondents included in this research are as follows:

- a. Families of selected random sampling victims.
- b. Officials Empowerment Random selected sample.
- c. Shipwright Very random sample selected.

This research material in data collection, also using act No. 17 of 2008 on Shipping as a written document. Actually, the document is a material to analyze the Responsibility of Shipping Infrastructure Organizer in Indonesia.

Result and Discussion:-

The Role of Strict Liability in the Decrease of Accident Rate:-

Responsibility System and Incentives Generated:-

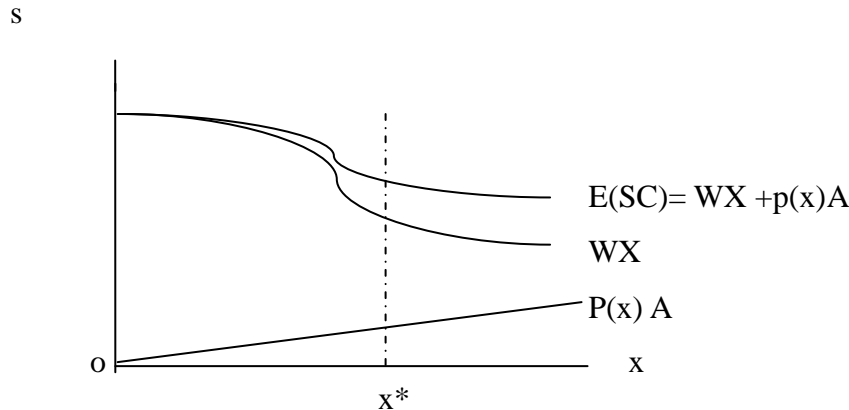
One of the problems of ships transportation is quite alarming is the lack of attention to the safety of passengers. This is evidenced by the high number of ferry accidents that have claimed casualties. On the other side of the ship, especially the Ferry is a mode of transportation that many people choose because it is cheap and fast. Even the type of ferry transportation can accommodate passengers in large numbers and become a mainstay for most people in Indonesia which is an archipelago country. Events karamnya Ferry Boat Madura Bajoe Kolaka Bridge early October 2010 which killed 36 people and 38 seriously injured was quite a distressing event because the victims were mostly from poor families so that from the casualties the victims and relatives of the victims hung the compensation from the organizers of the Sailing which the amount of compensation did not reflect the sense of justice. In addition, the occurrence of such accidents due to the lack of facilities and infrastructure of passenger safety so that at the time of the accident most of the passengers did not get adequate safety tools that contribute to the number of passengers who become victims.

The application of the strict liability principle as a system of liability to accidents may be applied to a condition in which the injurer shall provide compensation to the victim for the loss suffered without having to provide the burden of proof to the victim against the injury of the injurer. From the application of responsibilities based on the principle of strict liability will give effect to a system of responsibility that is incentive to reduce risk both in the form of burden and administrative costs incurred if the accident happened so that System responsibility also play a role in controlling dangerous activity.

Under the terms of strict liability, the injurer must always pay compensation to the victim in relation to the accident which he caused. Whereas under the terms of the negligence rule, the injurer must pay the damages he incurred only if he is found guilty, ie when his precautionary level is lower than the precautionary standard set by the court, better known as due care. Negligence rule is a dominant system of responsibility, while strict liability is only applied to certain dangerous activities. The relationship of the responsibility system based on the principle of liability in reducing accidents will begin by examining how the system of responsibility can create incentives Can further reduce accidents. Responsibility in tort may encourage the injurer to internalize the costs that were previously borne by the victim. In discussing the responsibilities and incentives that are generated to mitigate risks, first assume that the parties are neutral to risk. The parties involved here are the injurer and the victim, who have no contractual relationship. Injurer can be interpreted as a Master or a business actor that causes losses, while the victims are local residents who live on the island that is traversed by affected Ships.

Using an economic approach, the probability of accidents decreases if pre-action is improved. If the probability of an accident is denoted by p , and the precaution is denoted by x , then in a graph $p = p(x)$ is a decreasing x function. In the event of an accident, there will be a loss such as loss of income, property damage, medical expenses and others. If A represents the value of money from a loss incurred by an accident, then A multiplied by p is an expected loss that is valued in the amount of money.

The following graph shows the estimated social costs incurred by an accident indicated by the prevention cost and the estimated costs incurred by the loss. (Dina Simbolon, Review On applying Strik Liability in Train, Thesis, UI, 2011, h. 56-58)



The estimated social cost is obtained by vertically adding the w_x line and the $p(x)A$ curve at each level of the preventive action x . The result is a U-shaped curve labeled $SC = wx + p(x)A$. Since this social cost estimate curve is U-shaped, there is a value of x corresponding to the U-base. The value marked with x^* in the graph above is a level of preventive action that minimizes the social costs that are expected to arise by accident. Efficiency requires the minimization of social costs, so x^* is a socially efficient level of prevention measure, or simply, an efficient level of preventive action. (Dina Simbolon, Review On applying Strik Liability in Train, Thesis, UI, 2011, h. 56-58)

In addition to incentives, the system of responsibility is also related to the level of care or prudence level. . In unilateral accident, it can be assumed that the injurer alone can reduce the risk by choosing the degree of precaution. Assume x as the cost for prudential action (or the money value of the measures taken) and $p(x)$ is the probability of the accident causing the loss h , where p decreases in x . Assume that the social objective is to minimize the estimated total cost, $x + p(x)h$, and x^* show the optimal x . With strict liability, the injurer pays a loss of h every time an accident occurs, and they naturally bear the cost of maintenance x . Thus, they minimize $x + p(x)h$, thus, they choose x^* . Under the terms of negligence assume that the caution level x is equal to x^* , meaning that the injurer causing the damage must pay h if $x < x^*$ but No need to pay anything if $x \geq x^*$.

Then the injurer will choose x^* : he will not choose $x > x^*$, because it will burden him with greater cost and he avoids responsibility by simply selecting x^* ; He will not choose $x < x^*$, because it will hold him accountable (in which case the strict liability analysis shows that he will not choose $x < x^*$). What is the relationship between unilateral accident, prudential and activity level? Unilateral accident allows for the injurer to choose the level of activity z , which is interpreted as the number of times they engage in their activities (or if the injurer is the company, their output scale). If $b(z)$ becomes a benefit of the activity, and assume the social object is to maximize $b(z) - z(x + p(x)h)$; Here $x + p(x)h$ is assumed to be the cost of precaution and danger that is expected to occur each time the injurer is involved in its activities. If x^* and z^* are optimal values, note that, as before, x^* $x + p$ minimizes $(x)h$, and that z^* satisfies $BN(z) = x^* + p(x^*)h$, The marginal benefit of activity equals marginal social costs, consisting of the sum of the optimal prudential costs and expected accidental losses.

In strict liability, the injurer chooses both the degree of carefulness and the optimal level of activity, which is their goal of social purpose. In the terms of negligence, the injurer chooses the optimal caution x as before, but their activity is socially superfluous. Since the injurer avoids responsibility by taking a cautious attitude x^* , he chooses z to maximize $b(z) - zx^*$, so z satisfies $b(z) = x^*$. The cost of the injurer to raise the level of activity is only the x^* prudent cost, which is less than the social cost, which also includes $p(x^*)h$. The failure of the negligence provision to control the level of activity arises because negligence is defined in the case of caution only. A justification for this assumption is that the court may face deep difficulties Enter the activity level on the definition of negligence. Problems with the level of activity in this negligence provision apply to every aspect of behavior that would be difficult to include in the standards of neglect (including, for example, research and development activities).

Liability Insurance:-

According to Shavell, the ideal social solution to the problem of accidents is how to reduce the losses caused by accidents, but also how to protect the parties against the risks that exist. This is relevant because not only potential victims are likely to face the risk of loss due to accidents, but also potential investors who may be at risk of

assuming responsibility. Risks faced by potential victims can be minimized through accident insurance, while the risks faced by potential injurers can be minimized through liability insurance. Parties may insure risks that they may face either because of their own intention to avoid the burden of risk or because of the regulations that oblige it. An example of compulsory insurance or compulsory insurance is motor vehicle insurance that aims to guarantee compensation against the party who suffered losses by accident. One of the arguments about the importance of compulsory insurance is the availability of protection for the victim if the injurer is unable to compensate. In addition, economists also emphasize that without adequate guarantees, prevention efforts are not maximal, causing increased risk.

The discussion here will be emphasized on liability insurance in simple accident and responsibility model, where there are two parties here namely potential injurer and potential victim. From this model there are several things that can be assumed as will be described below. First, the injurer can only reduce the risk of loss by taking a cautious attitude or also called precautionary behavior, such as driving with regard to traffic conditions or buying safety support equipment. Second, any losses incurred can be judged by money. Third, the injurer is a party demanded by the victim, because it has absolute responsibility for the losses incurred and have assets to pay compensation. Fourth, the victim and the victim are both avoiding risk, and liability insurance is sold at a fair tariff by the competitive insurance industry. Fifthly, there are two forms of regulation on insurance: prohibited coverage, and full coverage. Sixth, social welfare positively depends on the expected benefits of the injurer and the victim.

The cautious attitude of the injurer varies and depends on a variety of conditions. If Injurer buys partial responsibility for his / her responsibilities, the degree of precaution he or she implements is positive but tends to be below optimal. The results achieved are not ideal because the prudential level of the injurer differs from the optimal level of social precaution; The results achieved are also less than ideal because the injurer tends to assume certain risks. On the other hand, although the results achieved by liability insurance are not socially ideal, they can not be resolved by issuing a law prohibiting the existence of liability insurance. It is true that the prohibition on the sale of liability insurance will increase the cautiousness of the injurer because the injurer concerned will be fully liable. However, if liability insurance is prohibited, the injurer is positioned in a disadvantageous state by losing the liability for the risk of damages that may arise. At the same time, victims will also not benefit from the absence of such coverage. In fact the victim does not care if the injurer buys Liability insurance or not, and how their level of caution, because the victim's hypothesis is given full compensation for the loss he suffered based on the definition of strict liability. Thus, the ban on the existence of liability insurance is also not socially beneficial. On the other hand, regulations requiring full liability insurance are also not socially advantageous because injurers are disadvantaged because there is no possibility of choosing partial liability insurance. This reduces the expected benefits of the injurer and results in no change in the expected benefits of the victim. In other words, the rules prohibiting the existence of liability insurance or requiring full accountability insurance are not socially beneficial because the social losses incurred by the accident are borne entirely by the injurer, the externalities of the losses are internalized. Therefore, it is not socially advantageous for the state to intervene on contracts made by the injurer, especially the contracts associated with the insurance of liability.

Insurance liability is very important for the effectiveness of strict liability implementation. The insolvency or inability of the injurer to pay compensation is more of a serious issue with strict liability than negligence. In general, if the amount of losses incurred exceeds the wealth of the injurer, the underdeterrence issue (prevention is not maximized) also appears. However, with the provision of the strict liability injurer will regard the accident as something equivalent to the amount of his wealth and therefore he will take the necessary precautions that are worth the amount of wealth that he has. If the wealth is lower than the value of losses caused by accidents, the injurer will take less than optimal precautions. Thus, the strict liability underdeterrence problems arise when the value of losses incurred by an accident exceeds the wealth of the injurer. On the other hand, insolvency in negligence is less of an issue because under a negligence injurer system will still have incentives to take precautions as required by the legal system as long as the optimal cost of prudence is still below the amount of individual wealth. The reason is that the injurer will still be careful to avoid the obligation to pay compensation to the victim. In negligence, insolvency will only be a problem if the cost of prudence exceeds the amount of wealth of the injurer. At the policy-making level, the introduction of strict liability will only be efficient if the strict liability provisions are accompanied by adequate amounts of liquidity, such as compulsory insurance or insurance required by law.

Possibility of Strict Liability Implementation in Public Transportation Particularly Ferry:-

From the explanation of the system of responsibilities and incentives caused to accidents, both the provisions of strict liability and negligence each have advantages and disadvantages. With regard to activity levels, there is a proposition that strict liability becomes a preference if the desired level of activity is reducing the injurer, not the level of victim activity. The questions that arise from the proposition are: First When, precisely, it should choose to reduce the level of injurer activity rather than the victim.

Secondly, why not establish that both the injurer and the victim are equally responsible? To these questions, Keith Hylton attempts to test the cross-externalization of the risks that occur when the offender is engaged in a dangerous activity such as driving. The choice between strict liability and negligence depends on the extent to which there is a reciprocal exchange, in the sense that risks are externalized by A to B With a rough idea is equal to the risk that is externalized by B to A. The key to determining the preference between strict liability and negligence are:

Externalizing risk:-

strict liability becomes an option only when the risk is nonreciprocal. When the risks are nonreciprocal, the negligence provisions encourage those who externalize the high risk to develop their activities and vice versa encourage those who perform low-risk externalization to contract their activities so as to enlarge the loss. Strict liability leads to the opposite result, therefore an option when the risk is externalized is asymmetric.

Externalization of benefits:-

The existence of externalization of the benefits of making the law socially desirable to adopt negligence rather than strict liability because it is possible that there is a risk reciprocity. Conversely, the lack of externalization of benefits will make the liability provisions fail to cause an optimal deterrent effect in accidents involving bilateral risk. In order to internalize the risks caused by A and B by driving can be done in full, both must be required to pay the cost of accidents that occur between them. Since the provisions on responsibilities fail to suppress both parties in an accident, their incentives to engage in activities will be excessive if they are not limited by externalization of benefits. According to Hylton, strict liability is suitable for welfare reasons only when the perpetrator of a lawless act (tortfeasor) externalizes the risk greater than the normal offender and also does not externalize the additional benefits.

In certain activities that pose serious risks if involuntary irrespective of the control of the manufacturer, carrier or user, strict liability may be applied to the parties concerned. The doctrine of strict liability on activities that are abnormally dangerous (abnormally dangerous Activity) was introduced in the United States in the late nineteenth century. Initially the provision of strict liability is intended to indemnify the landowner for damage to property he or she owns due to an activity or a condition committed on the property of the defendant, where there is an unavoidable potential for harm even with utmost care, . This provision is rooted in the case of *Rylands v. Fletcher* are then codified in Restatement (Second) of Torts. Section 520 Second Restatement gives an explanation of what is meant by "abnormally dangerous" which are:

Existence of high degree of risk of some harm to person, land or chattels of others; Likelihood that the harm that result from it will be great; Inability to eliminate the risk by the exercise of reasonable care; (d) extent to which the activity is not a matter of common usage; Inappropriateness of the activity to the place where it is carried on and; Extension to which its value to the community is outweighed by its dangerous attributes.(Hylton, 2015).

In the preceding explanation have seen how the possibility of response from both individual parties and organizations against different standards of liability provisions. For example, whether potential injurers will take the same or more precautionary measures or less if their actions are assessed by standard negligence or strict liability standards. Then by using the economic analysis approach to accidents, attempt to achieve social goals such as minimizing costs arising from accidents by increasing the level of care or the level of prudence by the parties involved in an activity that can cause an accident. The application of a liability provision, whether it is negligence or strict liability, will be efficient when tailored to the type of accident that may occur from a particular activity or action. In unilateral accident, where in this type of accident there is only one party that plays a major role in preventing the occurrence of accidents, strict liability provisions would be more appropriate, because strict liability can Encourage optimal behavior in the prevention of accidents Related to consumer protection in the field of public transport services, especially the Ferry, strict liability provisions are appropriately used to reduce the number of accidents that often claimed casualties. First, the main potential injurer in terms of the probability of an accident

with the operation of the Ferry Ship is the Ferry itself. Especially in Indonesia where Ferry Ship Line has not used the subway system, the possibility of accidents that can cause casualties will be higher because the Ferry Ship line intersect with the ship line in general other than it has not connected to other bodies associated with the weather also increasingly enhance the possibility Accidents in the sea .. With the application of strict liability provisions in the event of an accident, it is expected that the Ferry Ship operators will be more careful and take the necessary steps to minimize the occurrence of accidents. Secondly, the application of strict liability is expected to be achieved the efficiency of service offerry Ship so that the Ferry can be a public transportation modes that are safe and comfortable for the passengers or their service users.

Closing:-

In the case of liability for accidents, the law is not specifically regulated and therefore more likely to be transferred to article 1365 of the Privat Law In Indonesia. With that article, the consumer, especially passenger, must prove the omission or error of PT ASDP to be able to obtain compensation in case of accident, travel delay, and others.

The application of strict liability has actually been made possible under Law no. 17 of 2008 concerning Shipping in particular Article 157 Paragraph (1) which reads: "Sailing Service Provider is responsible to service users who suffered losses, injuries, or death caused by the operation of ASDP."

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