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Sept. 8

THE NEW BRUNSWICK ADMIRALTY DISTRICT

BETWEEN:

ARTHUR LAPIERRE, mariner and fisherman, as owner of the motor fishing vessel *DONALD HELENE* — PLAINTIFF;

AND

The motor fishing vessel *GLOUCESTER NO. 26*, her owners and all other persons interested therein ... — DEFENDANTS.

Shipping—Collision between two fishing vessels—Negligence—Failure to keep proper lookout—Apportionment of liability—Owner-master sued as owner—Limitation of liability—Interest on damages—Regulations for preventing collisions at sea, 1954, Rules 1, 9, 10, 24 and 29—Canada Shipping Act, R.S.C. 1952, c. 29, ss. 2(52), 657-659 and Amendment, S. of C. 1961, c. 32—International Convention Relating to the Limitation of the Liability of Owners of Sea-going Ships, 1957, Art. VI.

This is an action for damages arising out of a collision between two fishing draggers in the Gulf of St. Lawrence at about 2:30 a.m. on September 7, 1961. The vessel *Donald Helene*, which was drifting with its engine stopped when it was rammed by the vessel *Gloucester No. 26*, later sank while it was being towed to port.

It was found on the evidence that at the time of the collision the weather was fine and clear, the visibility was about twenty miles, the tide was about half-ebb, there was a northerly wind of about force 1, but there was no sea or swell. It was also found on the evidence that the *Donald Helene* was stopped in the water but under command at the time of the collision, that she was showing fore and aft navigation lights and that there were other draggers two or three miles away, of which some were stationary and others were moving.

Held: That the risk of there being another dragger or any vessel ahead of the *Gloucester No. 26* in its track was not reasonably improbable since any dragger might have pulled away from the fishing fleet to let its crew have a rest or to work as the crew of the *Gloucester No. 26* was doing.

2. That whether the *Donald Helene* was moving or not, or showing navigation lights or not, the owner-master of the *Gloucester No. 26* was at fault in not keeping the lookout required by the ordinary practice of seamen.

3. That since the *Gloucester No. 26* was well lighted, having in addition to her navigation lights, two spotlights where her crew were working, and since she could not have been more than a mile astern of the *Donald Helene* and approaching her directly when the mate of the *Donald Helene* made his last turn around his vessel, the mate was at fault in not seeing her at all.

4. That, there being no evidence to the contrary, it may be taken that the plaintiff is responsible for the conduct of the mate of the *Donald Helene* placed on duty as watchman.

5. That Rule 24 of the Regulations for Preventing Collisions at Sea, 1954, does not apply to vessels one of which has ceased to go ahead.
6. That the fault in each vessel was practically concurrent in time and identical in character and, accordingly, the parties were equally to blame for the collision.
7. That the defendant, Captain Noel, was the owner of the *Gloucester No 26* and at the material time was navigating his vessel as its master and that he was sued and appeared in his capacity as owner and not as master.
8. That although the action is *in rem*, the judgment is a personal judgment against Captain Noel without reference to the *res* as such, subject, however, to any privilege of limiting his liability which the *Canada Shipping Act* may accord him.
9. That where an owner-master negligently navigates his ship as master and is sued in the capacity of owner, s. 657 of the *Canada Shipping Act* alone applies and he does not have the legislative privilege of limiting his liability. If such owner-master were sued in his capacity of master, s. 659 of the *Canada Shipping Act* would apply and he would have that privilege.
10. That the plaintiff is entitled to interest from the date of the collision to the date of payment on the moiety of damages recoverable under this judgment.

ACTION for damages arising out of a collision between two fishing vessels.

The action was tried by the Honourable Mr. Justice Anglin, District Judge in Admiralty for the New Brunswick Admiralty District at Bathurst.

Leopold L. Langlois, Q.C. for plaintiff.

J. Paul Barry, Q.C. for defendants.

The facts and questions of law raised are stated in the reasons for judgment.

ANGLIN D.J.A. now (September 8, 1964) delivered the following judgment:

This action for damages arises out of a collision between two 60 foot, wooden hull, motor, fishing draggers in the Gulf of St. Lawrence a few miles east of Miscou Island, the northeast tip of Gloucester County, Province of New Brunswick, at night about 2:30 a.m. of September 7, 1961. Both crews had been fishing with other draggers. When night fell the plaintiff's *Donald Helene* drew off a mile or two from the fishing ground; its Diesel engine was stopped and the crew went to bed with the mate on watch. The defendant *Gloucester No. 26* later was proceeding in the track of the

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drifting *Donald Helene,* its crew working on deck with spot lights, and its owner acting as master navigating. Its bow rammed the centre of the square stern of the other vessel. The latter was being towed to a port when it sank and was lost.

The plaintiff Arthur Lapierre of the Magdelen Islands, Province of Quebec, was the owner of and master on board the *Donald Helene* of 46 gross tons. He alleges that, on various grounds, the collision "was occasioned by the negligence and improper navigation and management of the Master, Owner and those on board the *Gloucester No. 26*", and claims damages for the loss of his vessel.

The plaintiff's writ was issued against "The Motor Fishing Vessel *Gloucester No. 26,* her owners and all other persons interested therein", and the vessel was arrested in a port in the New Brunswick Admiralty District. The latter vessel has a gross tonnage of 43.17. Her owner is Onesime Noel of Lameque, Shippegan Island, County of Restigouche, Province of New Brunswick, and he was master on board at the time in question. In their statement of defence "the defendants deny all allegations of negligence and allege that the accident was caused entirely by the negligence of the *Donald Helene* in lying idle in the water in a fishing ground with its engine stopped as a result of which its lights were not properly illuminated and in particular having no person on watch". "The defendants claim, without admitting liability, a declaration limiting the liability of the owners of the *Gloucester No. 26* in the event that such owners were held liable."

I find that, as alleged by the plaintiff, "the weather was then fine and clear, the visibility was about 20 miles, the tide was about half ebb; there was a northerly wind (approximately force 1) but there was no sea or swell". The defendants deny that the *Gloucester No. 26* "was moving at full speed but admit that it was moving". The defendants also admit "that certain spot lights were illuminated on the *Gloucester No. 26*", that "at the time of impact the *Donald Helene* was heading approximately 270° (M) and the *Gloucester No. 26* was coming on an almost parallel course", and that "efforts to tow the *Donald Helene* into port failed and she sank to the bottom at about 0620 A.D.S.T.".

First, it is contended for the plaintiff that the *Gloucester No. 26* was in breach of Rule 24 of the *Regulations for Preventing Collisions at Sea,* 1954, which provides:

> Notwithstanding anything contained in these Rules, every vessel overtaking any other shall keep out of the way of the overtaken vessel.

It is true that the *Donald Helene,* although stopped in the water, was "under way". Rule 1(c)(v). But a vessel must be going faster than the other, and having sufficient speed to be coming up with her, in order to be considered to be overtaking. *The Franconia*[1]. Rule 24 does not apply to vessels one of which has ceased to go ahead. Halsbury's *Laws of England,* 3rd Ed., vol. 35, Shipping and Navigation, para. 988.

Next, it is contended for the plaintiff that the *Gloucester No. 26* breached Rule 29 "in failing to keep a proper lookout and to take any precaution which may be required by the ordinary practice of seamen". The following passage from Marsden's *British Shipping Laws—Collisions at Sea,* (1961), is cited by Counsel in his brief:

> Para. 892 . . . If a ship is proved to have been negligent in not keeping a proper lookout she will be held answerable for all the reasonable consequences of her negligence; thus, for example, it may be negligence not to see and avoid another ship on a clear night even if that other ship has no lights. *The British Confidence,* (1951) 2 Lloyd's Rep. 615, (ship at anchor, no lights owing to electricity breakdown; other in fault for not seeing her loom in time) . . .

The same paragraph also contains the following:

> The lookout must be vigilant and sufficient according to the exigencies of the case . . . in crowded waters the lookout cannot report every light he sees, but must report every material light as soon as it becomes material. *The Shakkeborg* (1911) reported in note to *The Umsinga,* (1911) P. at p. 245 . . .
>
> In ordinary cases one or more hands should be specially stationed on the lookout by day as well as at night. They should not be engaged upon any other duty . . .

Onesime Noel, the defendant owner and master of the *Gloucester No. 26,* says:

> I am a fisherman, age 30, and began fishing at 17. Just before the accident I was at the starboard window in the wheelhouse and I was looking all around. My crew members were working on the front. One was working on the net, the other one was throwing planks into the hold. I had my light in the mast, I had a light at the bottom, I had a light in front of the wheelhouse which was turned on the port side, it was throwing light with a shade. I had my side lights. I had my stern light.

[1] (1876) 2 P.D. 8 (C.A.).

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Q. Did you see the *Donald Helene* before you struck them?

A. No.

Q Did you see any light?

A. No, after I struck I saw a small yellow light on the dory rack on the rear . . .

Cross-examination:

Q. How long had you been a Master of the fishing boat when the collision occurred?

A. Three years

Q. Have you ever attended a marine school, a navigation school?

A. No . . .

Q. Isn't it a fact that you stated to Captain Lapierre that you were watching your echo sounder (in the wheel house) at the time of the collision?

A. No. I told Captain Lapierre I was looking at the sounder and I was looking at the flag . . . I was looking at the front and I was looking through my door for the spot on my right. It is a buoy with a flag on it and gasolene lantern on it . . .

Q. I am speaking of these spot lights you were using to provide some lighting for your men working on deck.

A. I had a light on the front mast, I had a light on my cabin on the front and they were the only two lights that could give them some light . . .

Q. Isn't it a fact that you admitted before several witnesses that you were blinded by this forward light on your mast?

A. No, if I had been blinded I would not have seen the light which was on the spot . . . The visibility was good . . . A good light you could have seen it about 10 miles . . .

Q You said in your statement of defence you were going through a field of many trawlers

A. I was not going directly through the field, I was going alongside of the large field of draggers about half a mile from the group . . . I was going about 5 or 6 knots an hour . . . I didn't say (to other witnesses) I was going at 7 knots . . .

Q. Did you have somebody on the lookout that night?

A. Yes, I had two men on the front but I had not told them to watch, to be on the lookout, because it was fine . . . I had no lookout man; I had not given any orders to anyone to be on the lookout . . .

Q Now these other ships that were in the vicinity of your vessel, at what distance did you first see them?

A. I was about a mile from them . . . I could see all their lights.

Q. How do you explain you did not see the *Donald Helene* at all before the accident?

A. Myself there was only one light that I could have seen behind if it had been throwing sufficient light, because I was going directly on the stern of his boat and I couldn't see his light that was in his mast on the front . . . I couldn't have seen his red and green side lights . . .

Q. When you said that the stern light was yellow, was not of normal strength, what do you exactly mean?

A. Well, it was not throwing the light that it was supposed to throw.

Q. Where was that light located?

A. Underneath his dory, on the dory rack.

Q. Did you see the real stern light of the *Donald Helene* on her aftermast before the collision?

A. No, I didn't see the light on the aftermast.

Q. Did you see it after the collision?

A. No, there was no light on the aftermast . . . If there had been one it would be the only boat because there is no such boat with the light on the mast . . . If there was one I couldn't see it; it was not throwing light . . . It was not lit on the mast. There was one lit on the dory rack on the rear . . .

There is a conflict of testimony with respect to there being a navigation light showing aft on the main or "aftermast" of the *Donald Helene*. The plaintiff Captain Lapierre had already testified about his lights and other matters as follows (in narrative form slightly paraphrased):

The fishing decreased and I had stopped to give my men some rest . . . There were other draggers in the vicinity when we stopped. It was about 2 or 3 miles from the nearest . . . The mate was on watch and I and the remainder of the crew were sleeping or lying down . . .

There was a light on the back mast which was visible for at least 5 miles, because it was a 50 watt bulb. It was 2 feet above the dory. I had another light on the front mast which is supposed to be visible all around. They were the regular lights. The visibility was a good 20 miles.

Cross-examination:

I was asleep (at the time of the collision). What I did the first thing was to see if my lights were on. They would be running from the battery. The light at the stern would be the light I had on the stern mast. It would be the only light visible to a vessel approaching from the rear. It was white, a bulb 50; it was a new one installed in the evening.

After Captain Noel had testified as above with respect to his seeing only a light on the dory rack and none on the mainmast, Captain Lapierre was recalled and said:

There (on the dory rack) I put a light after the accident. I took an extension cord and I went to the rear to look at the damage and the repairs, and probably this small light stayed there.

(The dory rack is a frame between the stern and the rear of the wheelhouse carrying a dory about 7 feet above the deck. The dory serves as a lifeboat.)

I resolve this conflict by relying on two exhibits in evidence. One is an "Outboard Profile" of the *Gloucester No. 26* certified thereon by the Chairman of the Fisherman's Loan Board of New Brunswick that she was built "off these plans". The other is a like profile of the *Donald Helene*

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certified thereon by the Assistant-Manager and the Shipwright of Gaspe Shipbuilding Inc. that it is the plan of that vessel "built in our yard in 1956". The former blueprint shows no navigation light on the mainmast, and the latter does. It is probable that due to the confusion and excitement of the collision Captain Noel is mistaken in his recollection, and I find that the *Donald Helene* showed a proper navigation light aft as required by Rules 1, 9 and 10.

Counsel for the defendants submits in his brief that "the actions of both parties should be considered in the light of Rule 29 and liability determined by its application". And he cites the following passage from Marsden, *op. cit.*, (1953) 10th Ed. at p. 573:

> A vessel lying dead (stopped, per 11th Ed.) in the water has not the privileges of a ship at anchor. She is under way, and in case of risk of collision must comply with the regulations so far as she is able to do so. She must not rely upon the other ship keeping out of her way.

In the 1961 11th Ed. of Marsden, *op. cit.*, para. 899, the following has been added to this passage:

> If she is not under command she must show the appropriate lights or shapes under Rule 4, indicating that she cannot herself get out of the way. She may, moreover, attract attention by the means provided for in Rule 12.

Marsden's para. 722 contains the following:

> In *S.S. Mendip Range v. Radcliffe,* (1921) 1 A.C. 556, Viscount Findlay said that a vessel might use the "not under command" signal if she could only get out of the way of another after great or unusual delay.

There is no evidence that the *Donald Helene* was not under command at a material time, and I so find.

The following are extracts from the evidence of the mate on watch on the *Donald Helene*:

> I am 35 years of age, a fisherman since the age of 15. I checked the lights when I came on watch at 2 o'clock, there was a light on the stern mast and a light on the front mast. I checked them afterwards.
>
> I was standing in the wheel house when the collision took place.
>
> I went around the ship every 10 or 15 minutes. My last tour was about 15 minutes before the accident. I didn't notice that a boat was coming from behind; when I did notice it it was about 10 or 15 feet . . .
>
> Q. Did you hear the noise of the motor?
>
> A. No.
>
> Q. Did you see any of her lights?
>
> A. No, only when he got 10 or 15 feet from me . . .

Cross-examination:

Q. Have you any explanation as to why you didn't see the *Gloucester No. 26* prior to the time you did see it?

A. No, I didn't see it. A boat that does 7 or 8 knots an hour does not take long.

Q. The visibility was 20 miles, wasn't it?

A. Yes.

Q. So that would mean you could see it for 3 hours?

A. Yes, but it does not take 3 hours for a boat to travel 2 miles . . . There were other boats 2 and 3 miles away. Some were stationary and others were moving . . .

Q. But you didn't see the *Gloucester No. 26* until it was 10 or 15 feet from you?

A. No.

Q. Doesn't that mean you had not looked?

A. Well, I had noticed it was about 5 or 6 minutes before I had looked.

Q. Had you seen it then?

A. No, I had seen boats but I had not seen his boat.

Q. How close was the closest boat 5 or 6 minutes before the accident?

A. Some mile and a half—two miles.

Q. Do you believe the *Gloucester No. 26* came a mile and a half or two miles in that 5 or 6 minutes?

A. No, it couldn't travel quite that fast.

Q. Were you asleep at the time of the accident?

A. No, my window was open and I was looking out the window.

Q. What were you looking for?

A. I was looking forward and to the side.

Q. Had you looked to the rear at all?

A. At that time I had not really looked backward.

Q. You say you didn't hear the engine until the boat was 15 feet from you?

A. Yes.

Q. And the window of the wheelhouse was open?

A. Yes.

Q. How can you explain you didn't hear the engine before that?

A. Some make more noise than others . . .

Q. So had you seen them as watchman you could have signalled with the sound or signalled with the spot light?

A. Yes. If I had seen them in time I would have.

I find that the mate on watch on the *Donald Helene* and the owner-master navigating the *Gloucester No. 26* were both at fault in being in breach of Rule 29 which provides:

Nothing in these Rules shall exonerate any vessel, or the owner, master or crew thereof, from the consequences of . . . any neglect to keep a proper look-out, or of the neglect of any precaution which may be required by the ordinary practice of seamen, or by the special circumstances of the case.

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There is no evidence to the contrary, and so it may be taken that the plaintiff is responsible for the conduct of the mate placed on duty as watchman. Marsden, *op. cit.*, para. 62.

The special circumstances of the *Donald Helene* were that she was stopped in the water, but under command; she was showing fore and aft navigation lights; there were other draggers "2 or 3 miles away of which some were stationary and others were moving"; and the visibility "was 20 miles". It appears that the mate appreciated that in those circumstances a lookout in all directions was called for, and so he went "around the ship every 10 or 15 minutes". But he "didn't notice that a boat was coming from behind" until "only when it got 10 or 15 feet from me", and then, of course, the collision on the stern was unavoidable. This other vessel was well lighted where, in addition to her navigation lights, the crew were working on deck under two spot lights. She could not have been more than about a mile astern and approaching directly when the mate made his last turn around his vessel. She was there to be seen, and was not an overtaking vessel within the contemplation of the Rules. The mate on watch was at fault in not then seeing her at all. If he had seen her, appropriate action, as he admits, could have been taken to avoid a collision.

In Halsbury, *op. cit.* p. 641, it is said with cases cited:

> For a vessel to be held at fault for not complying with one of the rules that refer to risk of collision it is not sufficient that the risk should exist. The circumstances must be such that the presence of another vessel, and of a risk of collision if nothing is done to prevent it, are apparent or ought to be apparent to those in charge. If it is probable but not certain that a vessel has done something to create a risk of collision, the risk must be assumed to exist.

As for the owner-master of the colliding vessel the special circumstances were the same, except that he was proceeding under power at "about 5 or 6 knots". He says: "Just before the accident I was at the starboard window in the wheelhouse and I was looking all around . . . I was about a mile from them (other draggers in the area). I could see all their lights". But he did not observe the navigation light showing aft on the *Donald Helene,* nor even the yellow light which he says was on the dory rack. He did not see her loom. The risk of there being another dragger or any vessel ahead

in his track was not reasonably improbable. Any dragger might have pulled way from the fishing fleet to let its crew have a rest or to work as his own crew was doing. In any event, whether the other vessel was moving or not, or showing navigation lights or not, he was at fault in the lookout required by the ordinary practice of seamen.

To my mind the fault in each vessel was practically concurrent in time and identical in character. *The S.S. Volute*[1]. Accordingly, I find that the parties were equally to blame for the collision.

In view of Captain Noel being in part responsible for the collision the next issue is whether or not he is entitled under the provisions of the *Canada Shipping Act* to limit his liability. This issue requires an interpretation of an amendment made to s. 659 of that Act in 1961, when the privilege of limiting liability, long since enjoyed under statutory provisions by shipowners, was extended to other persons interested in shipping, including masters, members of a crew and other servants of an owner and of such other persons. It appears that since that amendment and a similar one made to the *Merchant Shipping Act* of the United Kingdom in 1958 there has been no reported decision of a Court on the interpretation now required.

(It is of interest to note that a guilty ship of less than 300 tons shall for the purpose of limitation of liability under the amendments of 1961 be deemed to be 300 tons, and that it shall be at the rate per ton of the value of 1,000 gold francs. My guess is that such value in Canadian funds is at the moment about $72.00. In a bill now before Parliament provision is made for the Governor in Council to specify from time to time the amount which shall be deemed to be equivalent to 1,000 gold francs. Where liability is apportioned see *The Queen v. Levis Ferry, Ltd.*[2]

I find that the defendant Captain Noel was the owner of the *Gloucester No. 26* and at the material time in question was navigating his vessel as its master, and hold that he was sued and appeared in his capacity as owner and not in his capacity as master. Although the action is *in rem,* the judgment is a personal judgment against him without reference to the value of the *res* as such, subject, however,

[1] [1922] 1 A.C. 129.

[2] [1962] S.C.R. 629.

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to any privilege of limiting his liability which the *Canada Shipping Act* may accord him. The *S.S. Cristina*[1]; *The Tricape*[2]; *The Pacific Express*[3]; Marsden, *op. cit.*, para. 395.

Limitation of liability to an amount calculated by reference to the tonnage of the guilty ship depends, of course, entirely upon such statutory provisions. Before considering the provisions in question it is of interest to note that they may have been prompted by an *International Convention Relating to the Limitation of the Liability of Owners of Sea-going Ships* signed at Brussels in 1957 by several nations, including the United Kingdom and Canada. See the *Convention* in Marsden, *op. cit.*, para. 1286. It provided in part:

The High Contracting Parties,

Having recognized the desirability of determining by agreement certain uniform rules relating to the limitation of the liability of owners of sea-going ships, have decided to conclude a Convention for this purpose, and thereto have agreed as follows:

Art. 6.—(1) . . .

(2) Subject to paragraph (3) of this Article, the provisions of this Convention shall apply to the charterer, manager and operator of the ship, and to the master, members of the crew and other servants of the owner, charterer, manager or operator acting in the course of their employment, in the same way as they apply to an owner himself: . . .

(3) When actions are brought against the master or against members of the crew such persons may limit their liability even if the occurrence which gives rise to the claims resulted from the actual fault or privity of one or more of such persons. If, however, the master or member of the crew is at the same time the owner, co-owner, charterer, manager or operator of the ship the provisions of this paragraph shall only apply where the act, neglect or default in question is an act, neglect or default committed by the person in question in his capacity as master or as member of the crew of the ship.

In the United Kingdom by C. 62 of the statutes of 1958 the *Merchant Shipping Act* was amended as follows:

3.—(1) The persons whose liability in connection with a ship is excluded or limited by Part VIII of the Merchant Shipping Act, 1894, shall include any charterer and any person interested in or in possession of the ship, and, in particular, any manager or operator of the ship.

(2) In relation to a claim arising from the act or omission of any person in his capacity as master or member of the crew or (otherwise than in that capacity) in the course of his employment as a servant of the owners or of any such person as is mentioned in subsection (1) of this section,—

(*a*) the persons whose liability is excluded or limited as aforesaid shall also include the master, member of the crew or servant, and, in a

[1] [1938] A.C. 485. [2] [1956] Ex. C.R. 219.
[3] [1949] Ex. C.R. 230.

case where the master or member of the crew is the servant of a person whose liability would not be excluded or limited apart from this paragraph, the person whose servant he is; and

(*b*) the liability of the master, member of the crew or servant himself shall be excluded or limited as aforesaid notwithstanding his actual fault or privity in that capacity, . . .

In Canada by C. 32 of the statutes of 1961 the *Canada Shipping Act* was amended to read in part as follows:

657. . . .

(2) The owner of a ship, whether registered in Canada or not, is not, where any of the following events occur without actual fault or privity, namely . .

(*d*) where any loss or damage is caused to any property . . . through

(i) the act or omission of any person, whether on board that ship or not, in the navigation or management of the ship . . .

liable for damages beyond the following amounts, namely:

658. (Deals with the power of the Exchequer Court to consolidate claims.)

659. The provisions of section 657 and 658 extend and apply to

(*a*) the charterer of a ship;

(*b*) any person having an interest in or possession of a ship from and including the launching thereof; and

(*c*) the manager or operator of a ship

where any of the events mentioned in paragraphs (*a*) to (*d*) of subsection (2) of section 657 occur without their actual fault or privity, and to any person acting in the capacity of master or member of the crew of a ship and to any servant of the owner or of any person described in paragraphs (*a*) to (*c*) where any of the events mentioned in paragraphs (*a*) to (*d*) of subsection (2) of section 657 occur, whether with or without his actual fault or privity.

The submission of Counsel for the defendant Captain Noel is that, although he was sued and appeared in the action as the owner of the *Gloucester No. 26,* nevertheless he was also her master, and thus he qualified under s. 659 as "any person". Accordingly, it is contended, he is entitled to limit his liability under s. 659 notwithstanding his fault, if he was at fault.

In the *Canada Shipping Act* by s. 2(52) "'master' includes every person having command or charge of a ship, but does not include a pilot".

With respect to the above amendment made in the United Kingdom in 1958 it is said in Marsden, *op. cit.*:

Para. 60. The statutory limitation of liability does not apply to protect an owner, or a part owner, by whose actual fault or with whose privity the collision occurred unless, it seems, under the provisions of the *Merchant Shipping (Liability of Shipowners and Others) Act, 1958,* s. 3,

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the act or omission in respect of which he seeks to limit has occurred when he was acting in the capacity of master or a member of the crew of his own vessel. There is, however, at present no decision as to the meaning of the section . . . Before the enactment of the *Merchant Shipping (Liability of Shipowners and Others) Act, 1958,* the provisions of which apply only to liabilities arising from an occurrence that took place after August 1, 1958, an actual wrongdoer who was not an owner was not protected. In the great majority of cases, such a wrongdoer was not worth suing unless his employers could be persuaded to indemnify him, but in one case, at least, in an action instituted after the owners of a vessel had limited their liability, the plaintiffs obtained judgment for the balance of the damage sustained from an actual wrongdoer, the master of the vessel. *Chalmer and Blackwater Navigation, Ltd. v. J. Mumford,* (1940) 66 Ll.L. Rep. 10.

Para 195. It has been said that to constitute actual fault the owner's action need not have been the sole or next or chief cause of the occurrence, but it must be a contributory cause. *The Bristol City,* (1921) P 444, (C.A.).

With respect to Marsden's comment on the above amendment made in the United Kingdom in 1958 it is to be noted that the phraseology thereof differs from that in the above amendment made to the *Canada Shipping Act* in 1961, and that we are here concerned only with construing the latter.

Observations on the interpretation of a statute providing for limitation of liability were made in the Ontario Court of Appeal in *The Georgian Bay Transportation Co. v. Fisher*[1]. On the main issue it was held that the ship in question was not a British ship within the meaning of the statute, and therefore the owner was not entitled to limit liability with respect to a claim for a loss of life by the ship foundering. The following are extracts from the judgments:

Per Patterson, J A : The subject of actual fault or privity was before the Court of Admiralty in 1865, and 1866, in two cases, viz.: *The Spirit of the Ocean,* 34 L J. Adm. 74; and *The Obey,* 1 A. & E. 102 L.R. In each case the master, who was on board when the collision occurred, was said to be part owner of the vessel; and in each case it was held by Dr. Lushington, that the fault of the part owner, although it might destroy his own right of limitation of his liability, would not involve his co-owners in that consequence . . .

I find the limitation clauses treated by Judges of the highest eminence as proper to be construed strictly, because they derogate from common law rights . . .

Per Burton, J.A.: It has frequently been held that the limitation of liability, created by this and similar statutes, is not one to be favoured, inasmuch as it operates severely upon the sufferers, and that it is incumbent therefore upon parties seeking freedom from liability to bring themselves strictly within the words of the enactment.

[1] (1880) 5 Ont. Ap. R. 385.

The Spirit of the Ocean[1] was followed in *Gale v. S.S. Sonny Boy*[2].

In *The Maple Prince*[3] the District Judge in Admiralty for British Columbia said, with reference to construing the *Canada Shipping Act* as of that date:

> Anomaly is inherent in the whole concept of the statutory limitations which are bound to produce irrational results. There is nothing logical in holding that a tug-owner can limit his liability by the tonnage of the one tug involved in an accident when he may have a whole fleet of ships available to make amends for his negligence. But we must take the policy of Parliament as we find it.

In this last case the policy of Parliament was clear on the terms of the statute.

The principles on which a statute is ordinarily to be construed were reviewed by the Judicial Committee in *City of Vancouver v. Bishop of Vancouver Island*[4]. In that case a municipal tax act exempted "every building set apart and in use for the public worship of God". It was held that the exemption applied to the land and the church upon it. The Committee said that one principle was:

> The grammatical and ordinary sense of the words is to be adhered to. unless that would lead to some absurdity, or some repugnance or inconsistency with the rest of the instrument, in which case the grammatical and ordinary sense of the words may be modified, so as to avoid that absurdity and inconsistency, but no further . . .

In *Canadian Performing Right Society, Ltd. v. Famous Players Canadian Corporation, Ltd.*[5], the Judicial Committee said with respect to construing a section of the Copyright Act, 1921, of Canada:

> Great stress is laid by the appellants on the extreme inconvenience of a literal construction . . . One answer to this argument is that it ought to be addressed to the legislature and not to the tribunal of construction, whose duty it is to say what the words mean, not what they should be made to mean in order to avoid inconvenience or hardship . . . Of course, if it could be established that the provision in question is capable of two meanings, one of which would produce a reasonable and the other an unreasonable and unjust result, much might be said in favour of adopting the former. But it is here that the appellants' difficulty arises . . .

In the present problem I think that the terminology of the sections of the *Canada Shipping Act* in question show

[1] 34 L.J. Adm. 74.
[2] [1945] 2 D.L.R. 363.
[3] [1955] Ex. C.R. 225.
[4] [1921] 2 A.C. 384.
[5] [1929] A.C. 456.

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clearly enough what the policy and intent of Parliament is, and we need not consider whether the result is reasonable or unreasonable, just or unjust, from the point of view of either a plaintiff who suffered damage or a defendant who was at fault or in privity causing it. In my opinion, for the following reasons, that intent is that where an owner-master negligently navigates his ship as master and is sued in the capacity of owner s. 657 alone applies, and therefore he does not have the legislative privilege of limiting his liability. If, however, such owner-master is sued in the capacity of master, s. 659 applies and he does have that privilege.

Two elements in construing those sections are quite clear. It has long since been well settled in interpreting a provision in shipping legislation giving an owner the benefit of limiting his liability that an owner-master, sued in his capacity as owner, has "destroyed" his privilege through his negligence as master, for as owner he was in privity with himself with respect to his fault as master. And it is also clear that the words "any person" found in ss. 657 and 659 are so comprehensive that they must include a person who is an owner-master navigating the ship.

I would think that it is not without significance that Parliament used the word "extend" in providing in s. 659 that "the provisions of sections 657 and 658 extend and apply to etc.". The grammatical and ordinary sense of the word "extend" connotes that the extension is to a person other than an owner as such whose privilege is fully provided for in s. 657. It is elementary that a person's conduct may be in one or another capacity in the eyes of the law, and he must sue or be sued in the capacity appropriate to the matter in question. Hence it may be taken that Parliament has envisaged that a shipowner might well at times be navigating his ship in the capacity of master. The extension of the benefit of limiting liability was therefore given to a person, who may be an owner, "acting in the capacity of master". To say that "any person" in s. 659 is an owner acting in the capacity of owner would result in having to take the intent of Parliament as being that the privilege he lost under s. 657 he regained under s. 659. One may hardly assume that Parliament's policy was to create that inconsistency.

I trust that it will be understood that my attempt to construe the *Canada Shipping Act* has not been influenced by what may have been agreed upon in the *Brussels Convention* of 1957, nor by the amendment in the United Kingdom in 1958 which apparently the learned author (Registrar of the Admiralty Court in London) of the latest revision of Marsden on *Collisions at Sea* would construe otherwise than I do the Canadian amendment of 1961. I have kept in mind that in a matter of limitation of liability with respect to shipping accidents it is the function of the legislature and not a Court to achieve any uniformity which the nations concerned may desire.

The plaintiff is entitled to interest from the date of the collision to the date of payment on the moiety of damages for the loss of his vessel recoverable under this judgment. *The Queen v. Levis Ferry, Ltd., supra.* The defendants in their defence "claim" a declaration limiting liability, which I will treat as a counterclaim. See the practice spoken to in *Gale v. S.S. Sonny Boy, supra*; *The M.S. Pacific Express, supra.*

There will be judgment in favour of the plaintiff Captain Arthur Lapierre of the *Donald Helene* against Captain Onesime Noel of the *Gloucester No. 26* and her bail for half the amount of damages caused by collision, with interest at 5 per centum per annum from September 7, 1961, to date of payment, and with half the plaintiff's costs. If the parties are unable to agree on the damages, the assessment thereof is referred to the Registrar. The defendants' counterclaim for a declaration limiting their liability is dismissed with costs. Expenses in common, such as reporting the evidence, will be borne equally by the parties.

Judgment accordingly.