C.A. No. 109424

NOVA SCOTIA COURT OF APPEAL

Freeman, Roscoe and Flinn, JJ.A.

Cite as: Snair v. Conrad, 1995 NSCA 204

BETWEEN:

JAMES SNAIR Appellant - and - **SHELLEY ANNE CONRAD, LINDA JEAN BEZANSON and MURRAY ROBERT BEZANSON**, as Next Friends and Guardian *ad litem* of the person and estate of Shelley Anne Conrad, pursuant to the provisions of the **Incompetent Persons' Act**, R.S.N.S., 1989, c. 218, and **DONALD SNOW** Respondents - and - **HALIFAX INSURANCE NATIONALE-NEDERLANDEN NORTH AMERICA CORPORATION**, a body corporate Intervenor	David Bright, Q.C. for the Appellant John M. Rogers and Richard F. Southcott for the Respondent Shelley Anne Conrad Malcolm MacLeod and David Blaikie for the Respondent Donald Snow Ross Haynes for the Intervenor Appeal Heard: October 6, 1995 Judgment Delivered: December 7, 1995

THE COURT: Appeal dismissed with costs per reasons for judgment of Freeman, J.A., Roscoe and Flinn, JJ.A. concurring.

FREEMAN, J.A.:

This appeal is from a Supreme Court of Nova Scotia decision holding the appellant, James Snair, solely at fault with unlimited liability for a boating accident at Echo Bay, Lunenburg County, in which his passenger, Shelley Conrad, suffered permanent brain damage.

The Facts

Echo Bay is an arm of the sea three thousand feet long and six or seven hundred feet wide, running northwesterly from Princess Inlet, near Lunenburg, on Nova Scotia's South Shore. It lies between Herman's Island, on the east, and Sunnybrook, on the mainland to the west. The Lunenburg Yacht Club is on the outer tip of Herman's Island where the Bay meets the Inlet. The appellant's parents' home is on the shore in Sunnybrook, near the causeway at the head of the Bay, with its own dock and a number of boat moorings. James Snair grew up on the water.

Numerous sailboats and small craft are moored in Echo Bay and it is used as an anchorage for visiting boats, such as those drawn to the area by events like Chester Race Week, which was starting at the time of the accident. Donald Snow, a Halifax civil servant, had regularly attended the event with his family since he built his own 32-foot fibreglass yacht, the Wind Shadow II, about 1970.

Mr. Snow, his wife Jean, and son David were aboard the Wind Shadow II when it anchored for the night in Echo Bay, between 4:30 and 6:00 p.m. on Friday, August 12, 1988, several hundred feet offshore in front of the Snair property. They took their rowboat to the shore of Herman's Island to clean it, ate aboard the boat, visited the yacht club, where they made some phone calls, and returned to the yacht, where they went to bed at about 10:00 p.m. Like the other owners of sailboats moored or anchored there — Mr. Snow said he counted about fifteen — he did not put up an anchor light:

a single white light hung from the rigging to warn of the vessel's presence at night. Two other sailboats anchored in Echo Bay after the Snows'. They displayed no anchor lights.

Mr. Snow was subsequently prosecuted and fined $1.00 for failing to show a light while at anchor, contrary to the Collision Regulations under the **Canada Shipping Act**, R.S.C. 1993, c. S-9.

The appellant, James Snair, arrived at his parents' home from Halifax, where he worked, between 5:00 and 5:30 p.m. on that Friday, August 12, 1988. Shelley Conrad, 28, with whom he had remained on friendly terms after they ended a year-long romantic relationship ten days earlier, arrived at her place shortly afterwards, and James Snair joined her. Ms. Conrad had inherited her property on Echo Bay from her parents and was living in a trailer on it while her house was under construction. Her dock was about 200 feet out the Bay from the Snair dock.

They had supper with the Snair family on the lawn overlooking the Bay, with an unobstructed view of the area where the Snow yacht was anchored. They went in Mr. Snair's fifteen-foot Boston Whaler to the yacht club between 6:30 and 7:00 p.m. and returned about 11 p.m., necessarily passing near the Snow yacht both times, once in daylight, once in darkness. James Snair invited friends from the yacht club back to his parents' house to discuss plans for Chester Race Week. Mr. Snair and Ms. Conrad boarded the Boston Whaler again about 12:25 a.m., on Saturday, August 13, 1988. He planned to take a short cruise before returning Ms. Conrad to her home but it is not clear from the evidence if she knew of this plan.

Mr. Snair had operated Boston Whalers and other craft since childhood. He had bought the boat in question in 1988 when it was 10 to 14 years old; it was equipped with a 70-horsepower Evinrude outboard motor. Boston Whalers "plow" the water at low speeds and "plane" or skim the surface at speeds above 15 miles per hour.

Between plowing and planing, the bow is raised and motion is wobbly; forward visibility is limited, but the craft levels and visibility is restored when it begins to plane. It was Mr. Snair's longstanding practice to start at full power to reach the planing mode as quickly as possible.

He described his method of navigating that night as follows:

> I don't remember if I saw that boat [another anchored sailboat] on the way in. That's the only one that would have been, that would have been closest to my path. Again, because I knew it was there, I wouldn't really be looking for it. I'm going in that bay on a black night with a map in my head of the bay of how it looked at 7 o'clock when I left, okay. So I'm literally travelling blind and I rely on everything being in the same place and most mariners do that in the dark.

Seconds after leaving the dock, the Boston Whaler collided with the unlighted Snow sailboat. Mr. Snair had been turned to Ms. Conrad, talking to her. When he glimpsed the sailboat out of the corner of his eye, he took vigorous and appropriate evasive action, swinging hard to his right, but he was a fraction of a second too late to avoid the accident. Ms. Conrad suffered severe head injuries.

Ms. Conrad's guardians, the Bezansons, her sister and brother-in-law, brought action on her behalf against Mr. Snair, Mr. Snow, and the yacht club, which was accused of serving Mr. Snair too much to drink. The defendants brought cross actions against one another. Shortly before trial, Mr. Snow and the yacht club entered into "Mary Carter" agreements with Ms. Conrad, limiting total liability in return for an agreed amount and providing for partial recovery to them in the event Mr. Snair was found solely liable. The trial proceeded on the issue of liability only.

Mr. Snair was found solely to blame for the accident because he had been travelling at an excessive speed without keeping a proper lookout. Justice Merlin Nunn of the Supreme Court of Nova Scotia found, as well, that he was not entitled to limit his liability under the provisions of ss. 575 and 577 of the **Canada Shipping Act.**

Findings of Fact

Justice Nunn made a number of crucial findings of fact:

1. The Snow sailboat anchored no later than 6:00 p.m.;
2. It was properly anchored at the head of the bay and was not anchored in the main channel which other boats used, travelling in and out of the Bay; its position "did not change other than the normal drift at anchor as winds and currents change";
3. Mr. Snair's speed was 20-25 miles per hour;
4. His speed was greatly in excess of what it should have been under prevailing conditions "and that was the real cause of the accident";
5. He was clearly negligent in travelling at that speed;
6. Mr. Snair "must have seen" the Snow yacht when having supper on the lawn and going to and from the yacht club;
7. He was not keeping a proper lookout, by turning to talk to the plaintiff, at that speed in the dark, in a known anchorage area; he was not exercising that degree of care which would be reasonable in those circumstances;
8. The reckless behaviour of Snair was the real and only cause of the accident;
9. Mr. Snair was aware that it was the custom in "many of the smaller shoreline anchorages along Nova Scotia's coast, not to display lights at night, and that is the case at Echo Bay";
10. "I am unable to find that Snair has proved any negligence on Snow's part which could have been a contributing cause of the accident, despite his being in breach of the regulations.";
11. "Snair's testimony at trial was most unsatisfactory . . . directed to putting the situation to his best advantage and I find he was not credible on the key point of his speed, the location of the accident, the accident itself, and where they were

going at the time.";

12. "I found Snow to be a straightforward, credible witness and I accept his testimony as given."

The Issues

The two most substantial issues on appeal are whether Mr. Snow should be found to have caused or contributed to the accident because his boat did not display an anchor light, and whether Mr. Snair should be entitled to limit his liability as owner of the Boston Whaler because he was operating it as master pursuant to s. 577 of the **Canada Shipping Act**. The appellant particularizes the issues as follows:

(a) That the learned trial judge erred in finding that the Snow vessel was not anchored in a position in or nearby a channel utilized by other vessels to enter and exit Echo Bay;

(b) That the learned trial judge erred in finding the Appellant Snair had not contended that the Snow boat had moved from its original position prior to the collision;

(c) That the learned trial judge erred in finding that Snow's failure to display a light contrary to the **Canada Shipping Act** Regulations was not a cause or contributing cause of the accident;

(d) That the learned trial judge erred in finding that the Respondent, Shelley Ann Conrad, was not contributorily negligent;

(e) That the learned trial judge erred in finding that the Appellant was not entitled to limit his liability, pursuant to the **Canada Shipping Act**, as a master;

(f) That the learned trial judge erred in finding that the consumption of alcoholic beverages by the appellant Snair was a contributing factor to the accident.

LIABILITY

The Canada Shipping Act — Tortious Liability

Canadian maritime law, including jurisdiction over tortious liability arising

out of collisions in navigable waters, is under exclusive federal jurisdiction, under s. 91(10) of the **Constitution Act, 1867**. See **Whitbread v. Walley**, [1991] 1 S.C.R. 1273; (1991), 77 D.L.R. (4th) 25, which is also authority that the **Canada Shipping Act** applies to pleasure craft as well as commercial vessels.

LaForest, J., writing for the court, at p. 1288 S.C.R., cited the judgment of McIntyre, J., writing for the majority, in **ITO — International Terminal Operators Ltd. v. Miida Electronics Inc.,** [1986] 1 S.C.R. 752 at p. 779:

> It is my view, as set out above, that Canadian maritime law is a body of federal law encompassing the common law principles of tort, contract and bailment. I am also of the opinion that Canadian maritime law is uniform throughout Canada, a view also expressed by Le Dain J. in the Court of Appeal who applied the common law principles of bailment to resolve Miida's claim against ITO. Canadian maritime law is that body of law defined in s. 2 of the **Federal Court Act.** That law was the maritime law of England as it has been incorporated into Canadian law and it is not the law of any province of Canada.

Section 2 of the **Federal Court Act**, R.S.C. 1970, c. 10 (2nd Supp.) defines Canadian maritime law as follows:

> "Canadian Maritime Law" means the law that was administered by the Exchequer Court of Canada on its Admiralty side by virtue of the *Admiralty Act*, chapter A-1 of the Revised Statutes of Canada, 1970, or any other statute, or that would have been so administered if that Court had had, on its Admiralty side, unlimited jurisdiction in relation to maritime and admiralty matters, as that law has been altered by this Act or any other Act of Parliament.

LaForest, J. continued at pp. 1295-6:

> I think it obvious that this need for legal uniformity is particularly pressing in the area of tortious liability for collisions and other accidents that occur in the course of navigation. As is apparent from even a cursory glance at any standard text in shipping or maritime law, the existence and extent of such liability falls to be determined according to a standard of "good seamanship" which is in turn assessed by reference to navigational "rules of the road" that have long been codified as "collision regulations"; see [R.M.] Fernandes, **Boating Law of Canada** (1989), at pp. 61-105; [N.J.J.] Gaskell, C. Debattista and [R.J.] Swatton, **Chorley & Giles' Shipping Law** (1987), at p. 365 and at pp. 369-374; and, for example, the decisions of this Court in **The "Lionel" v. The "Manchester Merchant"**, [1970] S.C.R. 538, and in **Stein Estate v. The Ship "Kathy K"**, [1976] 2 S.C.R. 802. It seems to me to be self-evident that the level of government that is empowered to enact and amend these navigational "rules of the

> road" must also have jurisdiction in respect of the tortious liability to which those rules are so closely related. So far as I am aware, Parliament's power to enact collision regulations has never been challenged; nor, as far as I can tell, has it ever been contended that these regulations do not apply to vessels on inland waterways. They are in fact routinely applied to determine the tortious liability of such vessels; see the cases cited in Fernandes, op. cit., at pp. 61-105. It follows that the tortious liability of the owners and operators of these vessels should be regarded as a matter of maritime law that comes within the ambit of Parliament's jurisdiction in respect of navigation and shipping.

With respect to the applicability of the **Canada Shipping Act** to pleasure craft, LaForest, J. stated at p. 1297:

> I think it is clear that Parliament must, as a matter of practical necessity, have jurisdiction in respect of the tortious liability of pleasure craft as well as that of commercial vessels. . . . This is the case not only because commercial vessels regularly ply the inland waterways but also because the phrase "pleasure craft" encompasses everything from the small motor boat to large ocean-going yachts. What I have said above as to the connection between tortious liability for negligent navigation and the navigational rules of the road comprised in the collision regulations would be just as applicable to the meeting of a pleasure craft and a commercial ship as it would be to the meeting of two commercial ships. In my view it follows that the tortious liability of pleasure craft for negligent navigation must be regarded as within the purview of Canadian maritime law and federal legislative jurisdiction. This conclusion is supported by modern texts on boating and maritime law, which make no distinction between pleasure craft and commercial ships in discussing either liability for collisions or its limitation.

Provincial contributory negligence statutes appear to be an exception to exclusivity of federal jurisdiction in the maritime law field. In **Stein v. The "Kathy K.",** Ritchie, J. specifically applied the **Contributory Negligence Act** of British Columbia, and this was not remarked upon in **Whitbread.**

The **Canada Shipping Act** provides in s. 565:

> **565**. (1) Where, by the fault of two or more vessels, damage or loss is caused to one or more of those vessels, to their cargoes or freight or to any property on board, the liability to make good the damage or loss shall be in proportion to the degree in which each vessel was at fault.

Section 571 provides:

> **571**. Any enactment that confers Admiralty jurisdiction on any court in respect of damage has effect as though references to the damage included references to damages for loss of life or personal injury, and

> accordingly proceedings in respect of those damages may be brought *in rem* or *in personam***.**

The latter section was in effect as s. 644 at the time of the decision in **Stein v. The "Kathy K."** but it has not been interpreted to extend the apportionment provisions in s. 565(1) to cases involving personal injury or loss of life. In that case, Ritchie, J. wrote, at p. 823:

> This is not a case of damage to a vessel or its "cargoes or freight or any property on board" so that s. 638 (now s. 565) can have no application and there is no express provision in the *Canada Shipping Act* for division of fault in the case of loss of life caused by the fault of two vessels in collision.
>
> The old common law defence of contributory negligence has never been recognized in collision cases in admiralty law, and the rule as to equal division adopted in the Admiralty Court appears to have applied only to damage to a vessel or its cargo. Furthermore, the collision occurred at the mouth of False Creek in English Bay, British Columbia, at a point within the inland waters of that Province and I can see no reason why a claim under s. 22(d) of the *Federal Court Act* should not be governed in that Court by the substantive law of the Province concerning division of fault. I am accordingly of opinion that the provisions of the *Contributory Negligence Act* of British Columbia, R.S.B.C. 960, c. 74, s. 2 apply to this collision and that the liability to make good the damage sustained by reason of the death of Charles Stein should be in proportion to the degree in which each vessel was at fault.

In **Shulman v. McCallum** (1993), 79 B.C.L.R. (2d) 393, Hutcheon, J.A., of the British Columbia Court of Appeal, considered both **Whitbread** and **Stein v. The "Kathy K."** in concluding that British Columbia's **Family Compensation Act** did not form part of Canadian maritime law. He wrote at p. 397:

> I cannot agree that the pronouncement in **Whitbread** of the *exclusive* jurisdiction of Parliament in Canadian maritime law is *obiter*. That pronouncement was firmly based on the prior decisions in **ITO** and **Chartwell** and I must accept that it was intended to be binding on this Court.
>
> I note that the decided cases demonstrate an exception not discussed in **ITO** or **Chartwell.** If the Canadian maritime law does not provide the necessary principle or rule, the courts in those cases have applied the law in force in the locality of the proceedings.
>
> Thus, in **Stein v. "Kathy K"** . . . where after commenting that the *Canada Shipping Act* did not provide for apportioning liability in an action

> for loss of life, Mr. Justice Ritchie said at p. 823 . . . [citing the passage quoted above].
>
> In **Whitbread**, Mr. Justice LaForest refers to the **Stein** case at p. 1296 as an example of a decision which applied the federal "rules of the road" but he takes no exception to the resort to local law.
>
> Other cases in which the court applied the local law to apportion liability include:
>
> **Gartland Steamship Co**., v. R., [1960] S.C.R. 315;
> **Walithy Charters Ltd. v. Doig** (1979), 15 B.C.L.R. 45 (S.C.);
> **Curtis v. Jacques** (1978), 20 O.R. (2d) 552 (H.C.).
>
> In each of these cases the courts applied the local law of contributory negligence to supply a rule or principle absent in the **Canada Shipping Act.**

While it is necessary, in passing, to visit provincial statutes relating to contributory negligence and apportionment between joint tortfeasors to see if their provisions would extend to Mr. Snow or Ms. Conrad, it is not necessary to consider jurisdiction for these matters unless the judgment at trial is to be reversed. If Mr. Snair and Mr. Snow are both at fault, they would be joint tortfeasors. In **Stein v. The "Kathy K."**, Ritchie, J. considered **S.S. Devonshire (Owners) v. Barge Leslie (Owners)**, [1912] A.C. 634. In distinguishing that case because it related to joint tortfeasors, he concluded that under the then s. 639(1) (now s. 566) of the **Canada Shipping Act**, liability would be joint and several.

Were it necessary to do so in this appeal, I would apply the apportionment provisions of the **Contributory Negligence Act**, R.S.N.S. 1989, c. 95 and, because personal injuries are involved, the **Tortfeasors Act**, R.S.N.S. 1989, c. 471 on the authority of **Stein v. The "Kathy K.".** If the findings of the trial judge are upheld, that only Mr. Snair was negligent, the matter is academic.

The Collision Regulations

The **Collision Regulations** under the **Canada Shipping Act** are relevant

to what constitutes negligence in the present circumstances; they are a guide to principles of good seamanship. They include the following:

PART A — GENERAL

RULE 2

Responsibility

(a) Nothing in these rules shall exonerate any vessel, or the owner, master or crew thereof, from the consequences of any neglect to comply with these Rules 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.

(b) In construing and complying with these rules due regard shall be had to all dangers of navigation and collision and to any special circumstances, including the limitations of the vessels involved, which may make a departure from these Rules necessary to avoid immediate danger.

PART B — STEERING AND SAILING RULES

SECTION 1 — CONDUCT OF VESSELS IN ANY CONDITION OF VISIBILITY

RULE 4

Application

Rules in this Section apply in any condition of visibility.

RULE 5

Look-out

Every vessel shall at all times maintain a proper look-out by sight and hearing as well as by all available means appropriate in the prevailing circumstances and conditions so as to make a full appraisal of the situation and of the risk of collision.

RULE 6

Safe Speed — International

Every vessel shall at all times proceed at a safe speed so that she can take proper and effective action to avoid collision and be stopped within a distance appropriate to the prevailing circumstances and conditions.

In determining a safe speed the following factors shall be among

those taken into account:

(a) By all vessels:

(i) the state of visibility,

(ii) the traffic density including concentrations of fishing vessels or any other vessels,

(iii) the manoeuvrability of the vessel with special reference to stopping distance and turning ability in the prevailing conditions,

(iv) at night the presence of background light such as from shore lights or from backscatter of her own lights,

(v) the state of wind, sea and current, and the proximity of navigational hazards,

(vi) the draught in relation to the available depth of water.

. . .

SAFE SPEED — Canadian Modifications

(c) In the Canadian waters of a roadstead, harbour, river, lake or inland waterway, every vessel passing another vessel or work that includes a dredge, tow, grounded vessel or wreck shall proceed with caution at a speed that will not adversely affect the vessel or work being passed, and shall comply with any relevant instruction or direction contained in any Notice to Mariners or Notice to Shipping.

(d) For the purpose of paragraph (c), where it cannot be determined with certainty that a passing vessel will not adversely affect another vessel or work described in that paragraph, the passing vessel shall proceed with caution at the minimum speed at which she can be kept on her course.

(e) In the Canadian waters of a roadstead, harbour, river, lake or inland waterway, every vessel shall navigate with caution . . . .

RULE 7

Risk of Collision

(a) Every vessel shall use all available means appropriate to the prevailing circumstances and conditions to determine if risk of collision exists. If there is any doubt such risk shall be

deemed to exist.

. . .

RULE 8

Action to avoid Collision

(a) Any action taken to avoid collision shall, if the circumstances of the case admit, be positive, made in ample time and with due regard to the observance of good seamanship.

. . .

(e) If necessary to avoid collision or allow more time to assess the situation, a vessel shall slacken her speed or take all way off by stopping or reversing her means of propulsion.

All of the foregoing collision rules have relevance to the manner in which Mr. Snair was operating his Boston Whaler. Only Rule 30 applies to the Snow yacht lying at anchor: a vessel of less than 50 meters at anchor "shall exhibit" one white light "where it can best be seen" instead of fore and aft white lights required of larger vessels.

The First Two Issues — Location of the Snow Yacht

The first two grounds specified by the appellant relate to the question whether negligence on the part of Mr. Snow in anchoring his vessel caused or contributed to the accident. A considerable amount of evidence was devoted to establishing the position of the Snow boat in the anchorage. The appellant argues that Justice Nunn could not have found as he did if he had not ignored the evidence of the witness Barry Eisnor to the effect that the Snow boat was near the centre of the channel. Even standing alone, however, Mr. Eisnor's evidence is not so clear and specific that it would necessarily have determined the point. Justice Nunn committed

no palpable or overriding error in weighing all of the evidence together and arriving at his first two findings of fact as listed above, which are those relevant to the first two issues.

With respect to the second ground, the trial judge stated:

> Snair is not contending that the Snow boat moved from its original position as the reason he was not aware of it for he says he never saw the boat before and I am unable to accept that it moved out into the channel some time before the collision.

The appellant cannot successfully contend both that he did not see the Snow boat prior to the accident, and that the accident was caused because the Snow boat was not where it had been previously. I would dismiss the appeal on the first two issues.

The Third Issue — The Absence of the Anchor Light

Justice Nunn held, with respect to the Snow yacht:

> . . . [T]he only question of negligence arises from the failure to display an anchor light. Snair's counsel contends that the fact of the breach of the **Canada Shipping Act** Regulations places the burden on Snow to show that his non-compliance was not the cause of the collision and cites **The Fenham** (1870) 3 A.C. 215 as authority in support, as well as **Hartley v. Giokas** [sic] **and Avery** 64 Alta. L.R. (2d) 240.
>
> However **The Fenham** is no longer the law as the **Act** upon which that case was based has been amended several times since, and the present law is best expressed by Lord Wright in **The Heranger** (1939) A.C. 94, at p. 104:
>
> > Whatever the Admiralty law on this matter was before the **Maritime Conventions Act**, 1911, it is now, I think, clear that the onus is on the party setting up a case of negligence to prove both the breach of the duty and the damage. This, the ordinary rule in common law cases is equally the rule in Admiralty. The party alleging negligence or contributory negligence must establish both the relevant elements.
>
> In view of this I agree with plaintiff's counsel that **Hartley v. Giokas and Avery** is wrongly decided possibly because the changes in the **Act** and the later authorities were not brought to the Court's attention.
>
> Clearly any statutory presumptions of fault have been abolished

> and the law at present is clear, a person must prove fault to succeed and mere proof of a breach of the regulations is not enough.

The Fenham and **Hartley v. Giorkas and Avery** were not relied on by the appellant in this appeal.

The trial judge continued:

> In this case the reckless behaviour of Snair was the real and only cause of the accident. I am unable to find that Snair has proved any negligence on Snow's part which could have been a contributing cause of the accident, despite his being in breach of the regulations. The time of the accident was so short, the speed of Snair's boat so fast and the visibility so poor, both from the darkness and the bow of the Whaler itself, as well as the actual situation in Echo Bay of boats at moorings and at anchor that it would be unreasonable to find that the absence of the anchor light was causative of the accident or even partly causative.
>
> I should add that it is apparently the custom in many of the smaller shoreline anchorages along Nova Scotia's coast not to display lights at night and that is the case at Echo Bay. While that custom may very well be contrary to the shipping regulations, it does exist and is a factor to be taken into account when assessing civil liability. Snair would certainly have been aware of that custom and his "travelling blind with a map in his head of the bay as it was at 7:00 p.m." at high speed and not keeping a proper look-out was not the behaviour of a responsible mariner but rather was extremely negligent and was the real and only cause of the accident.

There was ample evidence before the trial judge to support a finding of fact that it was a custom of the port in Echo Bay for vessels moored and anchored there not to display an anchor light. The expert report of Captain Andrew J. Rae was accepted by consent of all parties without requiring his testimony. It states in part:

> <u>Custom of the Port</u>
>
> The custom of the port is a usage which by common consent and uniform practice has become the law of the place or of the subject matter to which it relates.
>
> The display of anchor lights from anchored pleasure vessels in the yacht harbours and around the yacht club mooring areas in Nova Scotia is a very rare sight.

While such a custom could not legalize the absence of an anchor light, it is relevant to determining the negligence both of persons who fail to display them and

those operating boats in the anchorage with knowledge of the custom.

Mr. Snow's counsel argues that the evidence of another experienced sailor, that he would have displayed an anchor light in Echo Bay, was inadmissible because he did not testify as an expert. The trial judge did not hold it to be inadmissible but it is clear that in determining its weight, he was not persuaded by it.

With respect to the breach of regulations, counsel for Mr. Snow cites **R. v. Saskatchewan Wheat Pool,** [1983] 1 S.C.R. 205 (S.C.C.) in which the Supreme Court of Canada rejected the view that an unexcused breach of a statute constitutes negligence *per se* or *prima facie* negligence. Writing for the court, Dickson, J. (as he then was) said at pp. 225-226:

> Inconsequential violations should not subject the violator to any civil liability at all but should be left to the criminal courts for enforcement of a fine . . . .
>
> Breach of statute, where it has an effect upon civil liability, should be considered in the context of the general law of negligence. Negligence and its common law duty of care have become pervasive enough to serve the purpose invoked for the existence of the action for statutory breach.
>
> It must not be forgotten that the other elements of tortious responsibility equally apply to situations involving statutory breach, i.e., principles of causation and damages. To be relevant at all, the statutory breach must have caused the damage of which the plaintiff complains.

Commenting on this case, in his text **Canadian Tort Law**, 4th ed. (Butterworths: Toronto, 1988) Justice Linden states, at p. 188:

> This means, of course, that the judge or jury may take into account the fact of a statutory breach in their deliberations, but they are not controlled by this evidence.

The respondent, Snow, also relies on **Clark v. Kona Winds Yacht Charters Limited et al.** (1990), 34 F.T.R. 211 (F.C.T.D.) in which the plaintiff suffered back injuries when the ship Kona Winds struck an unlighted barge, the Seaspan, in Vancouver harbour. The Seaspan was found in violation of ss. 30(g) and 30(h) of the Collision Regulations because it failed to display an all-round white light. The court

found the Kona Winds solely responsible. The court stated, at p. 213:

> The collision of a moving vessel with a stationary barge, by itself, raises a presumption of negligence and fault on the part of the master of the moving vessel. In the particular facts of this case, however, there is evidence which establishes such a finding on more than merely that presumption. The weather at the time was calm. The visibility was excellent. The water was flat. A number of witnesses gave evidence that just before the collision Captain Kerr [of the Kona Wind] was not at the wheel of the vessel . . . .
>
> The conclusion which arises from the evidence and which I draw is that shortly before the collision Captain Kerr turned away from the wheel to attend a tape recorder . . . .

At p. 214 it was stated:

> In addition, the evidence establishes that proper and prudent seamanship dictated that there should have been two people in the wheelhouse of the "Kona Winds", keeping watch, on the night in question.

And at p. 218:

> I cannot conclude, in the present case, that had the barge been lighted, the accident would not have occurred. There was evidence that lighting on the barge would not necessarily have been an advantage if it blended with the background lighting. There was considerable background lighting behind the barge . . . . Most importantly, however, the way the accident happened makes it clear that even if the barge had been lit, this would not likely have made any difference . . . .
>
> In addition, the existence of the unlit barges in that area was well-known to everyone familiar with Vancouver Harbour. Captain Kerr had seen the barges from across the Harbour that evening when they were over a mile away . . . . I cannot conclude that there was negligence on the part of Seaspan which contributed to the accident.

In **Montreal Harbour Comms. v. The Ship Albert M. Marshall** (1908), 12 Ex. C.R. 178, a steamer was held solely to blame for a collision with a dredge which was anchored in an improper location without proper lights in breach of the collision regulations. The steamer could have avoided the collision by the exercise of reasonable skill and care. The court cited **Marsden on Collisions** at pp. 184-5:

> The general rule that a vessel under way is *prima facie* in fault for a collision with a ship at anchor, applies, although the latter is brought up in an improper place, or has no riding-light, provided the former could with ordinary care have avoided her.

That case was cited by the Supreme Court of British Columbia in **Miller Dredging Ltd. v. The Ship Dorothy MacKenzie et al.,** [1993] B.C.J. No. 153 (QL).

The intervenor has cited **Admiralty Commissioners v. Steamship Volute,** [1922] 1 A.C. 129 (H.L.) and **Dowell v. General Steam Navigation Co**. (1855), 5 E.&B. 195, both cases dealing with collisions between two vessels under way, both of which were negligent. They are not of great assistance with respect to determining the culpability of a vessel at anchor which is protected by the presumption that fault lies with the vessel that is under power.

There is no presumption of negligence arising from the breach of the regulation with respect to the anchor light. Therefore, on the authorities cited above, it was not necessarily an act of negligence for Mr. Snow to make his conscious decision not to display an anchor light, though it was a breach of Rule 30 not to do so. The proper disposition by the trial judge of **The Fenham** and **Hartley v. Giorkas and Avery** has been noted above. Therefore, it was open to the trial judge to find as a matter of fact that the appellant failed to prove any negligence on Mr. Snow's part which could have been a contributing cause of the accident. No palpable or overriding error is apparent with respect to the trial judge's consideration of the evidence. It is apparent from the judgment, as a whole, that the trial judge was applying the correct principles of law on this point, namely, that it was for Mr. Snair to prove that what Mr. Snow did was not only negligent in the sense that it was a breach of duty he owed to Ms. Conrad but that it resulted in the accident. (See G.H.L. Fridman, Q.C., **The Law of Torts in Canada**, Volume 1 (Toronto: Carswell, 1989), at p. 322.)

It therefore did not become necessary for the trial judge to consider whether, if Mr. Snow had been negligent, his negligence was so remote it was not a substantial factor in the accident. It would not be appropriate for this court to interfere

with the finding of the trial judge that there was no negligence on the part of Mr. Snow which caused or contributed to the accident in the absence of identifiable error. (See **Stein v. The "Kathy K."** and **Toneguzzo-Norvelle et al. v. Savein and Burnaby Hospita**l (1994), 162 N.R. 161 (S.C.C.).

I would go further, however, and say that, in my opinion, the conclusion of the trial judge was not only reasonable but correct. The Snow vessel was resting in an anchorage where a number of other sailboats were moored or anchored. Following customary practice in Echo Bay, Mr. Snow had decided against displaying an anchor light, a precaution presumably considered unnecessary by the other boats as well, for the operators of the small motor boats, that were in evidence there, would have been equally familiar with the custom in that anchorage. The vessel was anchored in daylight, so other users of Echo Bay had some hours before darkness fell in which to note its presence in the anchorage as one more boat among many. Mr. Snow was entitled to assume that the operators of the motor boats would not run into him. They were under a duty not to do so. It would have been obvious to him that there was no need for them to collide with his anchored yacht, and no likelihood that they would, provided only that they handled their boats in accordance with ordinary standards of care and good seamanship as they were required to do under the Collision Regulations. He was under no duty to anticipate the extreme recklessness of Mr. Snair, nor to make allowance for it. In my view, Mr. Snow was not negligent in anchoring his boat where he did and in not displaying an anchor light. As Justice Nunn found, that did not cause the accident.

The Negligence of the Appellant

Mr. Snair not only failed to keep a proper lookout but expressed the opinion it was not necessary for him to do so. He said he was "literally travelling blind",

navigating by a map in his head of how the bay looked at seven o'clock. Therefore, he was not depending on the anchored yachts showing lights, which he knew they would not do, but on his own observation of the bay when the Snow vessel was visible by daylight — and his own recollection of it.

In choosing to operate his boat in a manner that any objective observer would consider reckless and unseamanlike, Mr. Snair was gambling on his own skills including his own powers of observation and recollection to keep him out of difficulty. He thus assumed responsibility for the results when his skills, predictably, failed him. He can blame no one but himself.

Mr. Snair testified that when he left his parents' dock with Shelley Conrad as a passenger in his Boston Whaler, about 12:35 a.m. on August 13, 1989, he operated at full throttle, as was his custom, so the boat would plane as quickly as possible. He said he had cut back on the throttle but a witness who heard his boat from the shore noted no reduction in engine speed before the crash. There was ample evidence to support Justice Nunn's finding of fact that his speed was 20 to 25 miles per hour. The night was black although there were background lights on the shore and Mr. Snair estimated visibility at about 30 feet. When he passed the third of his father's three mooring buoys, he turned his head to talk to Ms. Conrad. When he saw something white ahead, out of the corner of his eye, he cut hard to the right but was unable to avoid the collision. He came very close to avoiding it, however, and Justice Nunn considered that a split second in his reaction time could have made the difference. If he had been going more slowly, if he had not been talking to Ms. Conrad, if his reaction time had not been slowed by alcohol, he might have reacted in time.

Mr. Snair insisted he had not seen the Snow yacht from his father's lawn while he was having supper, when he went to the yacht club, nor when he returned. Justice Nunn found that his testimony was not credible in key areas and found as a fact

that he must have seen the Snow boat.

The trial judge did accept the expert evidence of Dr. Jerome Milgram. In his opinion, Mr. Snair's speed was imprudent because it did not allow him to stop within his vision distance. A proper speed in the prevailing circumstances would have been three to five miles an hour. With respect to travelling blind with a map of the area in one's head, he replied: "I don't do it and I don't know any prudent mariner that does do it."

In operating his Boston Whaler as he did in the circumstances, Mr. Snair ignored the rules of prudent seamanship set out in the Collision Regulations, and in particular Rule 2, as to responsibility, Rules 4 and 5 with respect to a proper lookout, Rule 6 as to a safe speed, and Rules 7 and 8 as to avoiding collisions. If either his lookout had been less negligent or his speed more responsible, he could have navigated through the anchorage safely and avoided the collision. I agree with the learned trial judge that Mr. Snair was solely to blame for the tragic accident.

The Fourth Issue — Was Ms. Conrad Contributorily Negligent?

The previous finding that Mr. Snair was the sole cause of the accident excludes the conduct of Ms. Conrad as a contributing cause.

Blood tests taken at the hospital after the accident indicated that Ms.Conrad had a blood alcohol level of 180.3 mg of alcohol per 100 ml of blood, well over twice the legal limit permitted drivers on the highway. On the other hand, the trial judge concluded, on the basis of expert evidence, that while Mr. Snair had been drinking during the evening, his blood alcohol level may have fallen as low as 0.00 mg per 100 ml by midnight but rose again to about 50 mg per 100 ml as the result of a beer consumed late in the evening. His blood alcohol level was well below the **Criminal Code** limit.

The intervenor argues in its factum:

> The evidence was clear that Shelley Conrad was not a first-time passenger in Mr. Snair's boat. She and Mr. Snair had travelled together in the boat many times, and on extended trips. If he had a practice of operating his boat in a certain manner, she must be seen to have been familiar with and aware of this. They were together the entire evening, before the accident, and she must also be seen to have been familiar with the level of his alcohol ingestion that evening. If, as the learned trial judge has held, owner Snair was negligent because of his awareness of the practices and intentions of mariner Snair, is not passenger Conrad also aware of those practices and intentions and thus also negligent in willingly becoming mariner Snair's passenger in the face of her awareness?

There was an evidentiary issue as to whether Ms. Conrad was even aware that Mr. Snair intended a cruise or a "flip" on the bay. The burden of proving that Ms. Conrad's negligence contributed to the accident or to the damages she suffered rested on Mr. Snair. The trial judge found:

> She was merely his passenger that evening at the time of the accident with no control of the boat or Snair's conduct in that brief window of time from starting the Whaler to hitting Snow's boat.

Under the collision regulations, the master of a vessel has responsibility to avoid collisions, and therefore to protect the vessel and its passengers. It is the master, not the passenger, who has responsibility for the safe operation of the vessel, and no case was cited to us holding the contrary. Counsel for Ms. Conrad cited **Chernoff v. Chilcott** (1988), 27 B.C.L.R. (2d) 283. A boat taken to the middle of a lake and stopped without lights so the passengers could view stars and satellites was struck by another proceeding across the lake. The owner was found negligent in his capacity as owner for making the decision to engage in that activity and he was not permitted to limit his liability. The British Columbia Court of Appeal rejected the argument that the plaintiff, one of the injured passengers, was contributorily negligent for agreeing to be a passenger knowing the intention was to go out on the lake and turn off the lights. The court held at pp. 289-290:

> . . . Mr. Kinakin was found negligent in having the boat out on the lake without lights. It was an offence for which he was prosecuted and

> convicted. The judge said that common sense should have told the passengers that being out there with the lights out could be dangerous. But common sense equally would suggest that even with the lights off there likely would be safety through keeping a lookout, meaning looking and listening . . . .
>
> I am not persuaded that proper measures for his own safety required Mr. Chernoff to take any steps. He could assume that Mr. Kinakin was acting competently and with proper concern for the safety of those aboard. I would not therefore interfere with the judge's finding that there was no contributory negligence.

In my view, mere reliance by a passenger on a master to avoid collisions, even if that master is known to the passenger to have a propensity for recklessness, is an insufficient basis for a finding of contributory negligence by the passenger. The trial judge found that Ms. Conrad had no control over the boat or Mr. Snair's conduct. The accident resulted from both Mr. Snair's speed and his lack of a proper lookout. Ms. Conrad might have anticipated the speed or even, on the basis of past experience, have consented to it, although she had no realistic way of controlling it. But Mr. Snair had kept sufficient lookout to avoid accidents in the past and she had no reason to believe that he would fail in his duty to keep a proper lookout at the critical moment. In my view, the trial judge committed no error in determining that Ms. Conrad was not negligent in a manner that contributed to the accident or to her own damages. I would dismiss this ground of appeal as I have all other grounds of appeal with respect to the determination by the trial judge that Mr. Snair must bear full responsibility for causing the damages suffered by Ms. Conrad.

LIMITATION OF LIABILITY

The Fifth Issue — Limited Liability

Under the **Canada Shipping Act**, a shipowner who entrusts his ship to a master and crew is entitled to limit his liability for damages caused by their negligent acts provided that he is able to show that he is without actual fault or privity for the

resulting casualty. The liability of the master and crew is always, with or without fault or privity, limited in a similar degree. Mr. Snair, as owner-master of the Boston Whaler, seeks the benefit of these provisions.

The limitation was based historically on the value of the ship which the owner could surrender in order to escape further personal liability. The rather arcane statutory measure of limited liability substituted by the **Canada Shipping Act** for the actual value of the ship is 3,100 gold francs per ton of the ship's capacity, for personal injury or death, and one thousand gold francs per ton for property damage. Tonnage is not a measure of weight but of cubic volume and the minimum tonnage of small craft, for limitation purposes, is set at 300 tons. In the present case, involving the minimum tonnage, liability would be limited to about $100,000 in current dollars. While Ms. Conrad's damages have not yet been established, they have been estimated in the range of $4,000,000.

The Canada Shipping Act — Limitation of Liability

Section 575 (1) of the **Canada Shipping Act** provides:

> **575**. (1) The owner of a ship, whether registered in Canada or not, is not, where any of the following events occur without his actual fault or privity, namely,
>
> (a) where any loss of life or personal injury is caused to any person on board that ship,
>
> (b) where any damage or loss is caused to any goods, merchandise or other things whatever on board that ship,
>
> (c) where any loss of life or personal injury is caused to any person not on board that ship through
>
> (i) the act or omission of any person, whether on board the ship or not, in the navigation or management of the ship, in the loading, carriage or discharge of its cargo or in the embarkation, carriage or disembarkation of its passengers, or
>
> (ii) any other act or omission of any person on board that ship, or

(d) where any loss or damage is caused to any property, other than property described in paragraph (b), or any rights are infringed through

(i) the act or omission of any person, whether on board that ship or not, in the navigation or management of the ship, in the loading, carriage or discharge of its cargo or in the embarkation, carriage or disembarkation of its passengers, or

(ii) any other act or omission of any person on board that ship, liable for damages beyond the following amounts:

(e) in respect of any loss of life or personal injury, either alone or together with any loss or damage to property or any infringement of any rights mentioned in paragraph (d), an aggregate amount equivalent to three thousand one hundred gold francs for each ton of that ship's tonnage, and

(f) in respect of any loss or damage to property or any infringement of any rights mentioned in paragraph (d), an aggregate amount equivalent to one thousand gold francs for each ton of that ship's tonnage.

Subsection (2) makes it clear that the limitation applies separately to each distinct occasion when loss occurs and ss. (3) excludes the owners of ships under a contract governed by the law of a country other than Canada which does not limit liability or sets a higher limit. Section 576 deals with apportionment of the limited liability among several claimants.

Section 577 provides:

577. (1) Sections 575 and 576 extend and apply to

(a) the charterer of a ship,

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

(c) the manager or operator of a ship and any agent of a ship made liable by law for damage caused by the ship

where any of the events mentioned in paragraphs 575 (1)(a) to (d) 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 575(1)(a) to (d) occur, whether with or without his actual fault or privity.

"Any person acting in the capacity of master or member of the crew" can

include the owner acting in either of those capacities. This has been generally accepted in the case law. See **The Annie Hay**, [1968] 1 Lloyd's Rep. 141. **The Alastor**, [1981] 1 Ll.L.R. 581 (C.A.).

In **The Bramley Moore** [1963] 2 Ll.L.R. 429, Lord Denning wrote, at p. 437:

> The principle underlying limitation of liability is that the wrongdoer should be liable according to the value of his ship and no more. A small tug has comparatively small value and it should have a correspondingly low measure of liability, even though it is towing a great liner and does great damage. I agree that there is not much room for justice in this rule; but limitation of liability is not a matter of justice. It is a rule of public policy which has its origin in history and its justification in convenience.

The Supreme Court of Canada stated in **British Columbia Telephone Company v. Marpole Towing Company [Chugaway II]**, [1971] S.C.R. 321 at p. 338 that:

> . . . the limitation of liability provisions . . . are expressly designed for the purpose of encouraging shipping and affording protection to ship owners against bearing the full impact of heavy and perhaps crippling pecuniary damage sustained by reason of the negligent navigation of their ships on the part of their servants or agents.

"Actual fault and privity" requires the actual involvement or knowledge of the owner as opposed to vicarious liability for the acts of agents or servants under the doctrine *respondeat superior* (See, e.g., **The Eurysthenes**, [1976] 2 Ll.L.R. 171 (C.A.)).

The meaning of "actual fault and privity" under the 1894 **Merchant Shipping Act** (U.K.), which governed Canadian shipping until the **Statute of Westminster** granted Canada extra-territorial jurisdiction in 1931, resulting in the **Canada Shipping Act**, was defined in **Asiatic Petroleum Co. v. Lennard's Carrying Co. [The Edward Dawson]**, [1914] 1 K.B. 419 (C.A.) affirmed [1915] A.C. 705 (H.L.). In a famous statement which remains the law under the similar provisions in the **Canada Shipping Act**, Lord Justice Buckley stated:

> The words "actual fault or privity" in my judgment infer something personal to the owner, something blameworthy in him, as distinguished from constructive fault or privity such as the fault or privity of his servants or agents.

Lord Justice Hamilton added:

> Actual fault negatives that liability which arises solely under the rule of "respondeat superior."

The Edward Dawson, carrying a cargo of benzine oil, stranded in gale force winds because of defective boilers and a fire resulted. The owner was unable to limit liability because it had knowledge, that is, privity through its managing director, that the boilers were defective, gave no special instructions to the master or chief engineer, and permitted the ship to go to sea in an unseaworthy condition. The shipowner could not limit its liability because it failed to meet the burden of proving it came within the statute. The managing director was not the servant of the company but "somebody for whom the company is liable because his action is the very action of the company".

The Appellant's Position

It is argued on behalf of Mr. Snair that even if he was at fault as an owner, as the trial judge found, he was entitled to limit his liability because the accident occurred while Mr. Snair was acting in his capacity as master. That is to say, when the owner and master are the same individual and the master is at fault, it is urged that the limitation on the individual's liability, in his capacity as master, extends to limit his liability in the capacity of owner as well. It would be irrelevant how blameworthy his conduct may have been in the capacity of owner. In other words, the limitation on the liability of the negligent master would shelter the faulty owner when they are the same person. The appellant argues that this proposition accords with the **Canada Shipping Act** and has support in the case law.

While it seems counter-intuitive to consider that the liability of an individual for a single casualty can be both limited and unlimited at the same time, it also seems dubious that the liability of the owner-master should always be limited. The appellant's contention should not be dismissed out of hand, however, because if correct, it would

be of considerable significance, providing owners who are also masters with an important protection not afforded to other owners. With the exception of **Chernoff v. Chilcott**, in which the owner failed to limit his liability, there have been few cases in which an owner-master has been at fault in both capacities.

Gloucester No. 26, [1965] 1 Ex. C.R. 586, was cited on behalf of Mr. Snair but it has not been followed because it was decided on a narrow technical distinction. In it, however, Anglin, D.J.A. was concerned with the conceptual problems related to the owner-master, and made these comments at p. 600:

> Two elements in construing those sections (s. 657 and s. 659, now s. 575 and 577) 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.
>
> . . . 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.

The Objective Standard

In seeking an answer to the sheltering contention, it is useful to consider the related question, raised by Anglin, D.J.A., of the privity of the owner-master. When the same individual is involved, how can an owner fail to have privity to every act of the master, including his negligence resulting in a casualty? That seems to accord with common sense, but it would make it virtually impossible for an owner operating his own boat to limit his liability when his negligence in his capacity as master has damaged

another. Yet it is clear that owners are able to limit their liability even when they are at fault, provided the fault is only in their capacity as master or crew member and not in the capacity of owner. (See **The Alastor**, [1981] 1 Ll.L.R. 581.)

As the case law makes apparent, the answer to both questions, sheltering and privity, is found in the application of the objective standard of the ordinary reasonable shipowner (**The Lady Gwendolyn**, [1965] I Ll. L.R. 335 (C.A.)), rather than a subjective standard, to the interpretation of ss. 575 and 577 of the **Canada Shipping Act**, in the circumstances of each case. Courts have consistently interpreted s. 575 as if it contained the following emphasized words:

> **575**. (1) The owner of a ship, whether registered in Canada or not, is not, where any of the following events occur without his actual fault or privity, **in his capacity as owner** namely, . . .

The case law draws a clear distinction between faults that can be attributed to owners in their capacity of owners on the one hand and the negligence of masters and crews, in the capacity of master or crew member, on the other. There is a bundle of responsibilities or functions associated with each capacity. The objective standard is the conceptual tool necessary to keep the bundles in separate compartments. In general, the owner is responsible for the functions related to the seaworthiness of the ship and the competence of its staff, and the master and crew for the functions related to its safe navigation or operation.

"Privity" simply means knowledge, but it is knowledge judged by the standard of an ordinary reasonable shipowner. For example, if an owner appoints a competent master, which is one of the responsibilities of the owner, he is not then accountable for an isolated negligent act by the master resulting in a collision. However, if the owner becomes aware of practices of the master that reflect on his competence, and does nothing to correct the situation, the owner becomes privy to the master's incompetence and cannot limit his liability.

The Lady Gwendolyn is authority for the objective standard, that of the ordinarily reasonable shipowner, against which the conduct of the owner of a ship must be examined for actual fault or privity if he is to limit his liability for a marine casualty. The Court of Appeal stated:

> In their capacity as shipowners they must be judged by the standard of conduct of the ordinary reasonable shipowner in the management and control of a vessel or of a fleet of vessels, A primary concern of a shipowner must be safety of life at sea.

In **Paterson Steamships Ltd. v. Robin Hood Mills Ltd. [The Thordoc]** (1937), 58 Ll. L.R. 33, The Thordoc's cargo was damaged when she stranded because of an improperly adjusted compass. The compass had been adjusted and the owners thought it had been done properly. No actual fault or privity was found on the part of the owners who were entitled to limit their liability. Lord Roche stated:

> In this action personal fault or privity of the respondents being essential both courts have found that the respondent company which employed a compass adjuster of repute and proved that before the accident it knew from his account requiring payment for his work that the work had been done, was entitled to be satisfied.

It was also argued in that case that the shipowners had employed an incompetent wheelsman, but they were able to prove the master and officers were certified. The court found the stranding was caused by negligence and not incompetence and there was no evidence to show fault, or privity to incompetence, by the owners in the employment of the master and crew. The master might have been wrong in allowing the wheelsman to take the helm in the circumstances, but the owners were not at fault in hiring the master or the crew, and therefore not privy to their negligence.

The Analysis of the Trial Judge

The trial judge found that Mr. Snair had failed to show he was without fault or privity in his capacity as owner and therefore had not succeeded in limiting his liability under s. 575, even though he had also been acting in his capacity as master and enjoyed limited liability in that capacity pursuant to s. 577.

Justice Nunn took **Vaccher v. Kaufman**, [1981] 1 S.C.R. 301, a case involving master and owner limitations pursuant to the **Canada Shipping Act**, as his point of departure in reviewing the case law. He quoted Ritchie, J. at p. 307:

> It will be seen that where a ship owner is not able to establish that he was in no way at fault or privy to what occurred he is not entitled to the limitations of liability for which provision is made in s. 647 (now s. 575).
>
> The burden of proof resting upon a ship owner under s. 647 is a heavy one as was described in the judgment of this Court in **Stein Estate v. The Ship "Kathy K."**, at p. 819, where it was said that:
>
> > The burden resting on the shipowners is a heavy one and is not discharged by their showing that their acts were not "the sole or next or chief cause" of the mishap. As Viscount Haldane stated in **Standard Oil Co. of New York v. Clan Line Steamers, Ltd.**, [1924] A.C. 100, at p. 113:
> >
> > > . . . they must show that they were themselves in no way in fault or privy to what occurred.
>
> It is clear therefore that even if it can be shown, as I think it is in this case, that the owner's acts were not "the sole or next or chief cause" of the collision, he would nevertheless not be entitled to limit his liability unless he was able to show that in his capacity as owner he was 'in no way in fault or privy to what occurred.'

In that case, Vaccher, owner and master of the "Blue Waters", hired two inexperienced crew members who, with himself and the cook, made up the ship's company. He left the two young crew members in charge while on a cruise in Queen Charlotte Sound, instructed them to watch out for moored boats, and went to bed.

They negligently ran into the Centennial 71 and sank it. The Supreme Court of Canada found Vaccher was unable to limit his liability because he could not discharge his onus as owner to show he had no actual fault or privity. He should have known when he hired the young men that it would be necessary at times to leave them in charge of the navigation of the vessel. He argued that he was negligent in his capacity as master in leaving them in charge and therefore was entitled to limit his liability under s. 649 (now s. 577). The court found it unnecessary to consider that argument because he had failed to limit his liability as owner under what is now s. 575. This case is telling against the proposition urged by the appellant. If an owner-master were entitled to shelter behind the limitation of liability he enjoyed in his capacity as master, it would have been necessary for the Court to consider that argument.

Justice Nunn next considered **The Norman** (1960) 1 Ll.L.R. 1, in which a fishing boat struck an uncharted rock off Greenland and sank with loss of life. The owners had received revised navigational information indicating the presence of the rock after The Norman left on her voyage, but had failed to communicate it by radio to the ship:

> . . . The court held that the owners had failed to prove that the owners failure to communicate latest information that would assist navigation did not contribute to the loss and that, therefore the owners had failed to prove that the loss occurred without their fault or privity, and accordingly, they could not limit their liability.

(Similarly, in **Grand Champion Tankers Ltd. v. Norpipe A/S and others [The Marion]** [1984] 1 Ll.L.R. 1, owners were held personally liable and denied the right to limit liability when their manager failed to provide up-to-date charts to The Marion, as a result of which her anchor fouled an undersea pipeline resulting in a $25,000,000 damage claim.)

In **The Lady Gwendolyn**, a collision was caused by The Lady Gwendolyn's excessive speed in fog. The owner, a brewing company, used the vessel to shuttle

cargoes back and forth across the Irish Sea. The owner was responsible for perusal of the ship's logs and should have been aware that the master kept to schedule by operating too fast in fog. Justice Nunn quoted Sellers, L.J. at p. 339:

> A primary concern of a shipowner must be safety of life at sea. That involves a seaworthy ship, properly manned, but it also requires safe navigation. (emphasis added by trial judge.) Excessive speed in fog is a grave breach of duty, and shipowners should use all their influence to prevent it.
>
> . . . [T]he appellants have failed to satisfy me as they failed to satisfy Mr. Justice Hewson that they were free from actual fault which contributed or may have contributed (emphasis added by trial judge) to cause the collision.

Here the court was not considering, as such, the speed in fog at the time of the collision, a specific act of negligence over which the owners had no control, but the captain's propensity to go too fast in fog, which related to his competence, and to which the owners were privy.

In **The England** (1973), 1 Ll.L.R. 373, owners who failed to provide the master of a vessel, which collided with another in the River Thames, with relevant navigational by-laws, failed to limit liability. The trial judge quoted Megaw, L.J. at p. 380:

> . . . [I]t is not for the (Plaintiff) to prove that the fault did cause the casualty. It is for the (Defendant) to prove that the fault was not a cause of the casualty - and I stress the words "a cause"; because, in my judgment, here, as in so many other cases where causation is relevant, it is not necessary that it should be established that a particular matter is the one and only sole and exclusive cause of the casualty. It is sufficient if it is established that it is a substantial cause.

Justice Nunn stated:

> It is not enough for Snair to establish that his acts probably did not contribute or that they might not have contributed. (Emphasis in original.) In **Dollina Enterprises v. Wilson**, (1977) 2 F.C. 73, Pratte, J. of the Federal Court of Appeal, [considering the roles of the master Crewe and the owner Fiddler], said at pp. 74 and 75:
>
> > When the collision occurred, it was dark and the visibility was poor. In spite of that, the Joan W. II was proceeding at her normal speed of eight knots. The Trial

> Judge, as I read his judgment, found, correctly in my view, that the failure of Crewe to reduce speed of his vessel was a fault which had contributed to the accident.
>
> If Crewe's fault had merely been an isolated act of negligence, it could certainly be argued that the collision had occurred without Fiddler's actual fault. But Crewe's failure to reduce the speed of his ship cannot, in my view be so considered. He testified that, at the time of the collision, he was navigating at his usual speed in his normal way. Moreover, the evidence shows that Fiddler may have had the occasion, during his two voyages with Crewe, to observe the negligent habit of his employee . . . .
>
> Had it been proven that Fiddler had been aware of Crewe's bad habit and had not done anything about it, it would have been established, in my view, that Fiddler had committed a fault preventing the appellant from limiting its liability. The evidence shows neither that he committed that fault nor that he did not commit it; it merely indicates that he might have committed it. This is, in my view, sufficient to say that the appellant has failed to discharge the *onus* of proving that the collision had occurred wholly without Fiddler's fault. (Emphasis added by trial judge.)

Having concluded that the onus on Mr. Snair as owner was a heavy one, the trial judge reviewed the facts:

> I am satisfied that the intention Snair had, while still at the Snair residence and therefore an intention of the owner, was to leave the Snair residence with the plaintiff and go for a cruise or "flip" with her in the bay and then take her home to her house which was less than 200' away . . .
>
> Having already found that the Snow boat was at anchorage at 4:00 p.m. and certainly by 5:00 p.m. just at the head of the bay and would have been in clear view of anyone at the Snair residence, I am satisfied not only that Snair, as owner, ought to have seen it, but also that he must have seen it. As a prudent owner he would have advised his alter ego, as master, of the presence of the strange boat in the bay and its location (see **The Norman**, **supra**). Indeed, he had a duty to do so. There were at least 3 occasions when he must have seen the Snow vessel prior to the decision to go out for a cruise after midnight.
>
> He was also aware, as owner, in advance that mariner Snair was going to drive the Whaler as he had always done, at high speed. In his testimony Snair said that his intention was to leave the wharf as he always did, under full power to plane as soon as possible. Glenn Gray said, of Snair's boat driving, "when he goes he goes, when he goes he nails it".
>
> Clearly owner Snair was aware of the practice and intention of

> mariner Snair and, considering the darkness of the night, let alone the presence of the Snow boat, owner Snair would have to know that mariner Snair was going to travel at a speed far excessive for the circumstances (see **The Norman**, **supra**), and, even though it was himself he should have taken steps to assure that mariner Snair travelled at a safe speed. [Intended reference by Justice Nunn was presumably to **Dollina Enterprises** or **The Lady Gwendolyn**]
>
> Also, Snair had been drinking that night and, as indicated earlier, reaction times and particularly those relating to perception and cognitive choices and response are affected at low levels of blood alcohol concentration and even, after drinking, when the concentration reaches 0.00. While Snair could not be expected to know the niceties of blood alcohol concentrations or their effects with any precision he knew, as owner, that mariner Snair was going to take the plaintiff out on the bay in his Whaler though he had been drinking and that could create a risk.
>
> [I]t cannot be said that Snair has proved that his activities as owner were without fault or privity or disproved that any one or all of them had anything to do with the accident or may not or possibly did not contribute to the accident. In my view all were contributing factors leading to the accident and owner Snair is therefore not entitled to a limitation of liability under Section 575 of the **Canada Shipping Act**.

In my view, Justice Nunn correctly interpreted the law and applied it to the facts. The key finding is that the three instances he cited of Mr. Snair's fault, in his capacity as owner, "were contributing factors leading to the accident". His conclusion would ordinarily have disposed of the matter, but it does not fully address the appellant's argument on appeal that he is entitled to shelter as owner behind the limitation on his liability as master.

Does the Master's Limitation Shelter the Owner?

Justice Nunn was careful to distinguish Mr. Snair's negligent or faulty acts as owner from his negligence or faulty acts as master, dealing with what he referred to as a "tortured fiction" in the manner it had been dealt with in other cases. In **Chernoff v. Chilcott**, *supra*, for example**,** the British Columbia Court of Appeal was careful to consider the decision made by the owner before the boat left shore, that is, in his

capacity as owner, to stop it unlighted in the lake to view the sky, where it was struck by another boat.

MacDonald, J.A. stated at p. 293:

> Mr. Kinakin (the owner) was found negligent for failure with respect to lookout. Clearly, at all times when a lookout should have been kept, he was carrying out the functions of master. But, in my view, the situation is quite different with respect to his negligence in failing to have the boat's lights on.
>
> . . . The decision to turn the lights off when the boat got on to the lake was as effectively made ashore, as would be a decision to go out on to the lake at night, in a boat which was not equipped with lights. Mr. Kinakin, as owner, pre-empted a contrary decision on the part of Mr. Kinakin as master. In short, my opinion is that Mr. Kinakin, as owner, has failed to discharge the burden of establishing that he was in no way at fault or privy to what occurred. Accordingly he has not qualified for the limitation of liability provided for in s. 647.

There is a clear finding of negligence against the master. This did not enable the owner, who had not discharged his onus as to fault and privity, to limit his liability.

Justice MacDonald arrived at this conclusion in **Chernoff** after quoting at length and with approval from the judgment of Fulton, J., in **Walithy Charters Ltd. v. Doig** (1979), 15 B.C.L.R. 45 (S.C.). Justice Fulton held against an owner who sought to limit his liability by pleading that throughout the period in question he was acting as master of the vessel. The owner had been operating his charter boat in his capacity as master when gasoline fumes were detected; he brought it back to her berth but remained aboard with his passengers for an hour and a half. A spark ignited the fumes while the boat was being unloaded. It was held that the decision to unload the fishing gear and equipment and provisions of the passengers was made in his capacity as owner and he was not entitled to limit his liability. He was not negligent in his capacity as master.

Under s. 575 of the **Canada Shipping Act**, only an owner can limit his liability. Section 577 extends that limitation to charterers or others with an interest in the ship analogous to that of owner. What is extended, however, is defined in s. 575 which must be seen as the governing provision. Where s. 577 causes difficulty is in the last paragraph, which begins by extending that limitation to masters or crew members but ends by excluding the key provision of "actual fault or privity" inherent to the s. 575 limitation on liability. It is on that portion of s. 575 that the appellant and the intervenor base their argument that the limitation on Mr. Snair's liability in his capacity as master has the effect of limiting his liability as owner.

The effect of s. 575 is merely to restrict the effect of the doctrine of *respondeat superior* which creates liability without actual fault. Section 577, on the other hand, as it relates to masters and crew members, is an arbitrary statutory modification of the more basic principle that a wrongdoer must make his victim whole.

The liability of owners who are also masters would always be limited if they could shelter behind the limitation of the master. Section 575 with its requirements as to "actual fault or privity", would not apply to them. This appears to be contrary to the intention of the statute, as it is to the conclusions of the cited cases. It could lead to such anomalies as the owner-master of a vessel which caused damages because the owner failed to equip it properly, or engage a competent crew, seeking to limit his liability by proving that he operated the boat negligently in his capacity as master. That, of course, is exactly what was attempted in **Vaccher.**

The appellant relies on **Chamberland v. Flemming** (1984), 29 C.C.L.T. 213 (Alta Q.B.). The trial judge found that Flemming, the owner of a jet boat, was sharing the operation of it with a friend, when it swamped a canoe, drowning one of the canoeists. The friend was experienced in the operation of boats, but this was his first time to drive a jet boat. Both operators were found negligent but entitled to limit their

liability as master or crew member. The trial judge did not appear to consider Fleming's fault or privity in his capacity as owner and made no finding as to whether Fleming was at fault as owner in allowing his friend to drive under his supervision. This case therefore cannot assist the appellant's argument.

The appellant also cites **The Alastor** in which the Court of Appeal in England held that an owner who did his own repairs on his yacht could limit his liability when the control system failed while the vessel was being moved at quayside, causing damage to another vessel, because of an improperly installed cotter pin. The owner was acknowledged to be an experienced and competent engineer. In his capacity as owner, therefore, he was not at fault in appointing himself to do the maintenance in the capacity of engineer. As a crew member, he was entitled to limit his liability under s. 503 of the **Merchant Shipping Act,** the equivalent of s. 577 of the **Canada Shipping Act**. Even when the maintenance was done negligently, the owner was still entitled to limit his liability because, in his capacity as owner, he was not privy to his own negligence in his capacity as engineer. The negligence was an isolated act, not attributable to the competence of the engineer.

The Alastor clearly illustrates how the courts have applied the objective standard to avoid the conclusion that an owner is necessarily privy to his own acts in another capacity. It illustrates as well the importance of the objective standard in separating the sphere of responsibility of the owner, in his capacity of owner, from that of a master or crew member, acting in that capacity, who also happens to be the owner. If a subjective standard had been applied, the owner, the same person as the engineer, could not have escaped privity for the engineer's negligent installation of the cotter pin.

Sir David Cairns, writing for the court, addressed the following questions:

(1) Can the owner limit liability if he was at fault in a relevant respect?

(2) If he can, what is meant by the phrase "in the capacity of master or member of the crew?"

(3) On the facts here was the Judge right to treat the defendant as acting in the capacity of master or member of the crew in relation to the maintenance of the vessel?

He wrote at p. 584:

> Taking the first of those points, it was held by Mr. Justice Brandon in **The Annie Hay,** [1968] 1 Lloyd's Rep. 141; [1968] P. 341 that an owner could limit liability notwithstanding his own actual fault if the fault arose when he was acting in the capacity of master or crew member. That decision has stood for 13 years without, so far as we know, ever being questioned. In my judgment it was clearly right. Mr. Thomas contends that "any person" in s. 3(2) of the 1958 Act must be construed to mean "any person other than the owner". I can see no reason why the plain straightforward expression "any person" should be deemed to have been intended by Parliament to be read with any such limitation. The purpose of the 1958 Act is to amend the 1894 Act and there is nothing surprising in an owner being given a right in the later Act which was expressly withheld from him in the earlier one. The 1958 Act repealed s. 508 of the 1894 Act which provided as follows:
>
> > Nothing in this Part of this Act shall be construed to lessen or take away any liability to which any master or seaman, being also owner or part owner of the ship to which he belongs, is subject in his capacity of master or seaman, or to extend to any British ship which is not recognised as a British Ship within the meaning of this Act.
>
> If it had been intended that owners should not be able to benefit from s. 3(2) of the 1958 Act that intention would have been made clear by leaving s. 508 of the old Act in force. Its repeal is strong support for the view that there was no such intention.

In dealing with the question whether an individual is acting as owner or in the capacity of master or crew member, he stated at p. 585:

> In my view the question is one of fact. I do not consider a man can never be said to be acting in the capacity of owner when he is afloat, nor that his capacity is never that of master or member of the crew when ashore. I would say that you do not test the capacity in which a man is acting by asking what his obligation is; you look rather to see in what capacity he is acting and then, if necessary, ask what his obligation is in that capacity. The word "capacity" is an ordinary English word whose meaning is clear in the context in which it is used in the Act. If any exegesis is necessary I would say simply that acting in the capacity of an owner means doing things which are usually done by an owner and correspondingly with the capacity of a master or crew member.
>
> As it was put in words used by Lord Justice Buckley in **Leonard's Carrying Co. Ltd. v. Asiatic Petroleum Company Ltd.,** [1914] 1 K.B. 419 at p. 432 and frequently quoted since:

> The words "actual fault or privity" infer something personal to the owner, something blameworthy in him as distinguished from constructive fault or privity such as fault or privity on the part of his servants or agents.
>
> If a ship is unseaworthy because there has been negligence in the doing of something which an owner usually does, then that is actual fault in the capacity of owner. If it is unseaworthy because of negligence in the doing of something such as a master or engineer usually does, then it is actual fault in the capacity of such master or engineer.

Sir David Cairns considered his view "entirely consistent" with two Canadian cases cited above, **Walithy Charters v. Doig** and **Kaufman v. Vaccher**

In **Walithy Charters**, Justice Fulton referred to the **International Convention Regulating the Limitation of the Liability of Owners and of Sea-going Ships**, signed at Brussels in 1957 by both Canada and the United Kingdom, as the source of s. 649 (now s. 575) of the **Canada Shipping Act** and the equivalent English provision:

> 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. <u>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</u>. [Emphasis added]

Article. 6(3), and particularly the portion to which I have added emphasis, makes it clear that the contention of the appellant must fail. The limitation of liability accompanying the fault of the owner-master in his capacity as master is a wholly different concept, resting on different principles and arising from different considerations, from the limitation of liability available to an owner-master in his

capacity of owner. One does not shelter the other; the **Convention** is clear. Sections 575 and 577 of the **Canada Shipping Act** must be interpreted as giving expression to an international convention to which Canada was a signatory nation. The language of the statute does not conflict with the language of the **Convention**. Moreover, in none of the cited cases has s. 575 (formerly s. 649) of the **Canada Shipping Act**, or its British counterpart, been interpreted in a manner that conflicts with Article 6 of the **Convention.**

The statute is clear: to limit liability under s. 575, an owner must discharge the heavy onus of showing himself free of actual fault or privity, in his capacity as owner, and this has not been interpreted contrary to its plain meaning in any of the cases. If he is also the master or a crew member, his liability in that capacity is limited under s. 577. Whether or not he enjoys limited liability under s. 577 is not a consideration in determining whether he has a right to limit his liability in his capacity as owner under s. 575. Unlike the **Convention**, the statute does not refer specifically to the owner-master. The principle is the same whether the owner and the master are two individuals or one individual acting in two different capacities.

It should be noted, however, that the lower courts appeared to be applying a subjective standard in **The Rhone v. The Peter A.B. Widener**, [1993] 1 S.C.R. 497. The courts below found that the owner, the Great Lakes Towing Company, was not entitled to limit its liability for an accident caused by navigational mistakes by the master because the master was a directing mind of the company — that is, the owner and the master were the same person. The appeal was allowed and Great Lakes was permitted to limit its liability because the master was not, in fact, the operating mind of the company.

Summary of the Law

In my view, the questions raised in this appeal as to sheltering and privity, which were foreshadowed by the concerns of Anglin, D.J.A. in **The Gloucester 26**, are

resolved by applying the objective standard of the ordinary reasonable shipowner proposed in **The Lady Gwendolyn**, and bearing in mind the words of Sir David Cairns, in **The Alastor**, that "acting in the capacity of an owner means doing things which are usually done by an owner and correspondingly with the capacity of a master or crew member."

As a practical matter, an owner who is also master may have a heavier evidentiary burden because he knows all about the foibles of the master which affect his competence, but that is quite different from holding him privy to any act of negligence of the master. To apply a subjective standard would deprive an owner of the protection to which he is entitled under the **Canada Shipping Act** merely because he has appointed himself rather than another to operate the vessel, even if he happens to be the most competent person available. None of the cases has gone this far.

In the cited cases, although examples are not abundant, all owner-masters found to be disentitled to limit their liability failed to prove themselves free of fault or privity in their capacity as owners (**Chernoff**, **Vaccher**, **Walithy**). In none of the cases did a faulty owner acquire the limitation because he was also a negligent master. Nor was any owner-master who was fault-free in his capacity as owner found to be disentitled to the limitation solely because he was subjectively privy to his own negligence in the capacity of master or crew member (**The Alastor**).

In order to limit liability pursuant to s. 575 of the **Canada Shipping Act**, therefore, a shipowner (or a person analogous to an owner under s. 577) must discharge the onus of proving that the events resulting in damages occurred "without his actual fault or privity" within his capacity as shipowner. The standard to be applied is an objective one, that of the ordinary reasonable shipowner. An owner-master may have actual knowledge of his own negligence in his capacity as master or crew member, but by applying the objective standard, that knowledge is to be distinguished

from fault or privity in his capacity as owner.

The owner's responsibilities divide into three principal categories:

(1) The ship must be seaworthy in the sense of being fit for the intended voyage, in good repair and properly equipped, and safe for those on board. (**The Alastor, The Eurysthenes, The Thordoc**, **The Edward Dawson**)

(2) The ship must be provided with proper navigational aids including current charts, rules and information. (**The Norman, The Eurysthenes, The England**, **The Thordoc**, **The Marion**)

(3) The ship must be properly and competently staffed. (**The Lady Gwendolyn, Vaccher, The Alastor, The Eurysthenes, Dollina Enterprises**, **The Thordoc**)

The objective standard of the ordinary reasonable shipowner makes the owner responsible for the competence, as opposed to the negligence, of the master and crew.

Liability of the master and each crew member is always limited, in the same degree as that of the owner. This limitation is separate and distinct from, and based on different policy considerations than, the limitation of the owner's liability and applies "whether with or without his actual fault or privity."

These concepts are relatively free of difficulty when the owner and the master or crew member are different individuals. The **Canada Shipping Act** does not specifically refer to the owner who is also the master. An individual who suffers damages as the result of marine casualty has the right to pursue his or her remedies against either the owner or the master or against both of them. There can be no difference in principle whether the owner and the master are two individuals or one individual in two capacities.

Applying the Law

No case has gone so far as to hold that when the owner and master are the same individual, the limitation on the master's liability shelters the owner who cannot show himself free of fault or privity. In my view, for the reasons given above, the appellant's argument runs counter to the clear meaning of ss. 575 and 577 of the **Canada Shipping Act**, as well as the case law, and cannot be sustained.

Justice Nunn found that Mr. Snair, in his capacity as owner, had not discharged the heavy onus of proving he was free of fault or privity:

* He knew Snair the master's tendency to operate the boat recklessly (**The Lady Gwendolyn**, **Dollina Enterprises**).

* He knew of the presence of the anchored Snow boat and failed to draw this to Snair the master's attention (**The Norman**).

* He permitted Snair the master to operate the boat knowing he had been drinking and should have known this could have affected his reaction time.

These were findings of fact supported by the evidence and the trial judge, as noted above, made no palpable or overriding error in reaching them. They cannot be disturbed by this court. (See **Toneguzzo-Norvelle et al. v. Savein and Burnaby Hospital** (1994), 162 N.R. 161 (S.C.C.).) Each was a breach of the duty of an ordinary reasonable shipowner. The evidence did not support the conclusion that alcohol was a major factor, but Snair the owner was unable to discharge the onus of showing he was without actual fault or privity in allowing the boat to be operated by a master whose competence might have been affected by his consumption of alcohol.

The three findings abundantly support the conclusion that Snair the owner failed to discharge the onus of proving that he was without actual fault or privity to the standard of an ordinary reasonable shipowner. On the facts of the present appeal it would add nothing if a subjective standard were the correct one to apply, permitting a finding that Snair the owner was privy to the actual negligence of his alter ego Snair the

master, in failing to keep a proper lookout and operating at a reckless speed. Mr. Snair, in his capacity as owner, is not entitled to shelter behind the limitation on his liability in his capacity as master.

I agree with the trial judge that Mr. Snair is not entitled to limit his liability, and I would dismiss this ground of appeal.

The Sixth Issue — Consumption of Alcohol

This issue has been dealt with in considering the limitation of liability and I would dismiss this ground of appeal.

Conclusion

I would dismiss the appeal with costs to be taxed against the appellant and the intervenor as one party. The issue of damages has not yet been tried so the amount involved is not known. Under the present rules, costs on an appeal are ordinarily forty per cent of the costs at trial. I would order that the respondent Shelley Anne Conrad's costs on this appeal be fixed at forty per cent of the costs she recovers at trial, plus disbursements, and that the respondent Donald Snow's costs on this appeal be fixed at forty per cent of the costs he recovers at trial, plus disbursements.

J.A.

Concurred in:

Roscoe, J.A.

Flinn, J.A.

C.A. No. 109424

NOVA SCOTIA COURT OF APPEAL

BETWEEN:

JAMES SNAIR

Appellant

- and -

SHELLEY ANNE CONRAD, LINDA JEAN BEZANSON and MURRAY ROBERT BEZANSON, as Next Friends and Guardian *ad litem* of the person and estate of Shelley Anne Conrad, pursuant to the provisions of the **Incompetent Persons' Act**, R.S.N.S., 1989, c. 218, and **DONALD SNOW**

Respondents

HALIFAX INSURANCE NATIONALE-NEDERLANDEN NORTH AMERICA CORPORATION, a body corporate

Intervenor

REASONS FOR JUDGMENT BY: FREEMAN, J.A.