

SUPREME COURT OF NOVA SCOTIA

Citation: *D'Entremont v Scotia Harvest Seafoods*, 2016 NSSC 320

Date: 2016-12-12

Docket: *Yarmouth*, No. 423522

Registry: Yarmouth

Between:

THOMAS DAVID D'ENTREMONT

PLAINTIFF

v.

SCOTIA HARVEST SEAFOODS INC.

DEFENDANT

Judge: The Honourable Justice Pierre L. Muise, J

Heard: June 3 and 6, 2016, in Yarmouth, Nova Scotia

**Final Written
Submissions:** July 22, 2016

Counsel: Andrew S. Nickerson, Q.C., for the Plaintiff
S. Clifford Hood, Q.C., for the Defendant

INTRODUCTION

[1] Scotia Harvest Seafoods Inc. owned the fishing vessel “Lery Charles”. On or about May 8, 2013, while engaged in “fish dragging”, during the night, the otter trawl it was towing struck pre-set lobster fishing gear belonging to Thomas d’Entremont.

[2] Mr. d’Entremont claims that Scotia Harvest was negligent in doing so and is responsible for the losses he incurred as a result. The negligent conduct alleged includes straying from the established tow track in circumstances which created an unreasonable risk of encountering pre-set lobster gear, including poor visibility and strong tides.

[3] Mr. d’Entremont’s gear was not marked with highflyers detectable by radar. Scotia Harvest takes the position that, because of that, it was not negligent, or at least, Mr. d’Entremont was contributorily negligent.

[4] There is also a dispute over which losses Mr. d’Entremont has proven, and whether he failed to take reasonable measures to mitigate his losses.

ISSUES

[5] Therefore, I must determine the following issues:

1. Has Thomas d'Entremont established his claim in negligence against Scotia Harvest?
2. Was Thomas d'Entremont contributorily negligent in failing to mark his lobster fishing gear with highflyers? If so, how should liability be apportioned?
3. What losses has Thomas d'Entremont established?
4. Did Thomas d'Entremont take reasonable steps to mitigate his losses? If not, how should that impact a damage award?

LAW AND ANALYSIS

ISSUE 1: HAS THOMAS D'ENTREMONT ESTABLISHED HIS CLAIM IN NEGLIGENCE AGAINST SCOTIA HARVEST?

[6] In *Mustapha v. Culligan of Canada Ltd.*, 2008 SCC 27, at paragraph 3, the Court succinctly outlined that:

“A successful action in negligence requires that the plaintiff demonstrate (1) that the defendant owed him a duty of care; (2) that the defendant's behaviour breached the standard of care; (3) that the plaintiff sustained damage; and (4) that the damage was caused, in fact and in law, by the defendant's breach.”

Duty of Care

[7] Whether a duty of care exists is governed by the *Anns* test. To satisfy the first stage of the test, Thomas d'Entremont must show that the harm he suffered was reasonably foreseeable and that the relationship between himself and Scotia Harvest was sufficiently close to create a duty to take reasonable steps to avoid harm. Even if the first stage of the test is overcome, the Court may still find that no

duty of care exists if there are policy considerations justifying denying liability.

[See *Edwards v. Law Society of Upper Canada*, 2001 SCC 80, at paragraphs 9 and 10.]

[8] Thomas d'Entremont's lobster traps and the Lery Charles were both fishing in the same general area, at the same time. Each year, in that area, as well as in many other areas, fish dragging and lobster fishing has been commonly conducted by vessels and gear in both fisheries.

[9] Lobster traps are set so that they remain stationary on the bottom.

Particularly in areas such as the German Bank area in question, the lobster traps are set in strings of many traps. Thomas d'Entremont had strings or trawls of 15 traps and of 20 traps. Once set, the lobster traps are left unattended for up to 72 hours, or even longer in certain circumstances, such as dangerous seas. Fish draggers, as the colloquial name implies, drag their trawls along the bottom of the ocean. This combination creates an environment where the only way fish draggers can avoid damaging pre-set lobster gear is to refrain from passing where it is set.

[10] In those circumstances, it is reasonably foreseeable that a lobster fisher will suffer harm if a fish dragger tows over his or her lobster gear.

[11] Also, in my view, the fact that both fisheries are pursued in the same area, at the same time, establishes sufficient proximity between the lobster fishers and fish draggers to establish a duty of care.

[12] In my view, there are no policy considerations justifying eliminating a duty of care on the part of the fish draggers. Without such duty of care, it would be very difficult for the two fisheries to coexist. Further, it is a violation of Section 37(1) of the *Atlantic Fishery Regulations, 1985*, SOR/86-21, and an offence under Section 78(a) of the *Fisheries Act*, R.S.C. 1985, c. F-14, if the master of a vessel fishing with mobile gear fails to maintain a distance of at least one half nautical mile between itself, including any mobile gear it is towing, and previously set lobster fishing gear. The definition of “mobile gear” in Section 2 includes otter trawls, such as the one used in the case at hand. This suggests that public policy supports imposition of the duty of care.

[13] Therefore, I find that Scotia Harvest did owe a duty of care to Thomas d’Entremont.

Standard of Care

[14] Scotia Harvest’s conduct will have breached the required standard of care if it created an unreasonable risk of harm. It had an obligation to “exercise the

standard of care that would be expected of an ordinary, reasonable and prudent person in the same circumstances”. [See *Johansson v. General Motors of Canada Ltd.*, 2012 NSCA 120, at paragraph 100.]

[15] In addition, as quoted at paragraph 106 of *Johansson*:

“The measure of what is reasonable depends on the facts of each case, including the likelihood of a known or foreseeable harm, the gravity of that harm, and the burden or cost which would be incurred to prevent the injury. *In addition, one may look to external indicators of reasonable conduct, such as custom, industry practice, and statutory or regulatory standards.* [emphasis added]”

[16] When the mobile fishing gear towed by the Lery Charles struck Thomas d’Entremont’s lobster fishing gear, Robert Eagles was at the helm. The captain of the vessel, Gilles d’Entremont had given Mr. Eagles instructions and gone to sleep in his bunk.

[17] They both testified. Mr. Eagles testified on behalf of Thomas d’Entremont. Gilles d’Entremont testified on behalf of Scotia Harvest. They were both credible witnesses. Any shortfalls in their evidence resulted, in my view, from legitimately incomplete recollection. Both did their best to relate what they did recall. In my view, their evidence established that which follows.

[18] On the night in question, they were fishing 4X, west of German Bank. Gilles d’Entremont had regularly fished there in the spring seasons preceding this incident. He had been operating the Lery Charles for about nine years.

[19] On the trip in question, they had been fishing in that area approximately three days before encountering the lobster gear.

[20] Mr. Eagles is aware of the statutory requirement to remain a certain distance away from previously set lobster gear. In addition, even without that requirement they, “of course” tried to stay away from it in any event.

[21] Although, Gilles d’Entremont was not, prior to this incident, specifically aware of the regulatory requirement to remain one half nautical mile away from previously set fishing gear, he was aware of the need to make efforts to avoid gear conflict.

[22] On the night in question, both were aware that there was previously set lobster gear in the area where they were fishing. The Captain, Gilles d’Entremont had told Mr. Eagles. However, Mr. Eagles did not know exactly where the lobster gear was.

[23] The Lery Charles was “extensively” different from Mr. Eagles’ own lobster fishing vessel. It was a lot bigger and had more modern navigation, which was operated like a computer with a mouse and computer screens.

[24] However, he was certified to operate the vessel and he had been at the helm before. He had been fishing on the Lery Charles since February, and had also

previously fished on it. He was satisfied that the Captain had properly trained him to operate the vessel. He knew how to use the electronic equipment.

[25] Fishery Officer Daniel Fleck testified that Gilles d'Entremont told him that he had put an inexperienced man at the wheel. It is understandable that Gilles d'Entremont would say that. Mr. Eagles had only been on the Lery Charles since February and for at least some of the previous season. Therefore, more likely than not, he was not the most experienced member of the crew. In addition, Gilles d'Entremont could reasonably have been frustrated with Mr. Eagles for failing to follow his directions, and causing them to encounter lobster gear. However, that characterization of Mr. Eagles is not determinative. Mr. Eagles had operated the vessel numerous times before. He had run his own lobster vessel for a long time, albeit a smaller vessel. Therefore, I am of the view that he was sufficiently experienced that Gilles d'Entremont was not negligent in relying upon him to helm the Lery Charles that night. It was reasonable for him to expect that Mr. Eagles would adequately carry out the instructions he had been given.

[26] All of the crew routinely took turns steering the vessel. They split up the nighttime shifts.

[27] The Captain did most of the steering during the daytime. He chose to do that because that is when he had the best chance of seeing previously set lobster gear.

When he was comfortable that things were clear, he would go to sleep for a few hours.

[28] Gilles d'Entremont agreed that part of the steps taken to avoid contact with previously set lobster gear was to start a new tow in the morning, when it is daylight and they were able to see buoys marking lobster gear visually. Then, in the nighttime, they would continue towing where there were no visible signs of lobster gear during the daylight. He agreed that that was the "responsible thing to do".

[29] He agreed that it was fair to suggest that they had a plan to avoid previously set lobster gear that worked until Mr. Eagles found himself inside Thomas d'Entremont's lobster gear, due to the tides or some other reason.

[30] In addition to keeping a visible watch for lobster gear, he also talked to other fish draggers. For instance, on the trip in question, he talked to the Chelsea Lee. They told each other things were clear where each of them was.

[31] They did not have access to any documents telling them where the lobster gear was set. Telling Mr. Eagles to stay on the same tow track was, at least in part, to avoid encountering lobster gear.

[32] However, the fish draggers used VHF channel 4. When they were on their way out to fish, and when it was nice, they often received messages from lobster fishers telling them which areas they should avoid. They did not receive any such information from Thomas d'Entremont.

[33] Thomas d'Entremont testified that, during the spring of 2013, he received a telephone call from one fish dragger regarding the location of his lobster fishing gear. He provided the bearings to that person. He also provided his bearings to another individual who contacted him on the VHF. That is an additional measure taken by some fish draggers.

[34] It was a foggy night.

[35] It was dark when Mr. Eagles started his watch. The Captain instructed him to stay as close as possible to the same oval tow track they had been following. Although they had been following the track generally in a clockwise fashion. It also could be, and was, followed in a counter-clockwise fashion. The captain told Mr. Eagles to go to the bottom of their tow track, make the turn, and come back up the shallow side of the tow track, while still staying on the tow track they had been following. That would necessitate a change from navigating the oval track in a clockwise fashion, to navigating it in a counter-clockwise fashion.

[36] Mr. Eagles was using the autopilot. He was steering by manually adjusting the autopilot. Therefore, he most likely did not have the “Nav” on. He was not hand steering.

[37] He had been on duty three or four hours when there was a deviation. He lost control of the vessel steering. She was not responding as well. He was having trouble with the strong tides. The tides are stronger than where he is used to fishing, off of Hubbards.

[38] Gilles d’Entremont did not specifically remember the tides being strong. However, he agreed that it made sense that Mr. Eagles was unable to turn the vessel back on track because the tide was pushing hard against it. This was a reasonable concession by Gilles d’Entremont. It is reasonable that he would not recall the strong tide in the same manner as Mr. Eagles because he was sleeping as Mr. Eagles was making the left-hand turn at the bottom, or southern end, of the tow track. Comparing the “Olex” Plotter printout with Gilles d’Entremont’s evidence, I find that he only awoke after the vessel had traveled roughly six or more nautical miles following the commencement of the turn, and about four nautical miles after the completion of the turn.

[39] Mr. Eagles had previously had difficulty operating the vessel a few times in the past. There were times when he had to keep 10° to 30° port or starboard. He

had previously experienced going a long time with nothing happening, then the tide hitting the bow and the vessel wanting to swing around on herself.

[40] On the night in question, the vessel went off course and away from the tow track they had been following. Gilles d'Entremont agreed that Mr. Eagles did not navigate the vessel where he was asked to do so.

[41] When Gilles d'Entremont awoke, it was still dark and foggy. He was of the view that it was impossible to see lobster gear during such dark and foggy conditions. He realized that they were in the wrong position. Therefore, he turned sharply, in a northwesterly direction, toward the original tow track. At that point, he was not aware that they had struck lobster gear.

[42] He later woke the rest of the crew to help retrieve the trawl. When they pulled it up, they found buoys, rope, and lobster traps inside the trawl, as well as a buoy and lines on the "door" of the trawl.

[43] There is some discrepancy between the evidence of Gilles d'Entremont and that of Mr. Eagles in relation to the time span between when Gilles d'Entremont awoke and when he woke up the crew to "haul back". Mr. Eagles indicated that he believed it was shortly after Gilles d'Entremont awoke. However, I accept Gilles d'Entremont's evidence on the point. He generally was more precise and certain in

his evidence. He had a better recollection of the events. As captain, he was responsible for the vessel. Therefore, he was more likely to pay closer attention. The Olex Plotter printout, at Tab 9 of Exhibit 1, appears to be consistent with his description. It shows the sharp left turn and ensuing trajectory heading northwest where Gilles d'Entremont indicates that he awoke, noted they were off track, and steered back towards where he had directed Mr. Eagles to travel. Then, at the location where he indicated that they pulled up the trawl, there appears to be a marked change in the trajectory, and then the speed, of the vessel. According to the evidence, the lighter colors denoted the slower speeds. Around the "haul-back" point noted by Gilles d'Entremont, there appeared to be an approximately 180° change in direction. In my view, the activity shown at that point on the Olex Plotter is more consistent with being the "haul-back" point than any earlier point on the path they followed after the Captain awoke.

[44] During the cross-examination of Gilles d'Entremont, it was suggested that he had previously stated that he had awoken because he heard an unusual sound and the vessel appeared to be towing slower. He did not recall making that statement. I accept that he genuinely did not recall making it. In my view, it did not detract from his credibility. Fishery Officer Daniel Fleck testified that he did make

a similar statement. However, Officer Fleck's evidence did not make it clear that that was the reason he awoke.

[45] They managed to salvage four lobster traps. Some of the balloons were destroyed. Some were still good. He saw the name Savannah & Jax marked on one of the buoys. That is the name of the boat belonging to Thomas d'Entremont.

[46] He tried to communicate regarding what he had found on VHF Channel 50 a few times during the trip, without success.

[47] When they arrived at port in Lower West Pubnico, on May 12, he found out who the gear belonged to. He called the owner immediately and told him that his gear was aboard the Lery Charles at the Dennis Point Wharf. He also gave Thomas d'Entremont's wife the coordinates to the location where they found the gear.

[48] On a subsequent trip with the Lery Charles, Gilles d'Entremont received a call from another vessel indicating that there were a bunch of balloons quite close together, near the area where he had hauled up lobster gear on his previous trip. Therefore, he stopped fishing and steamed to that location. He provided the coordinates of that location to Daniel Fleck, the fishery officer who had been communicating with him and with Thomas d'Entremont regarding the gear contact incident.

[49] There was also evidence regarding use of radar reflective highflyers to mark lobster fishing gear. Gilles d'Entremont stated he has not used many highflyers for lobster fishing. However he did use some when he was fishing in a scallop-fishing area. There are a few areas where they are used, such as where there are obvious threats for gear conflict, for example, the Tusket Basin.

[50] Scotia Harvest conceded that highflyers are not generally used with lobster gear.

[51] He testified that when the tide is really "ripping" it will pull their balloons completely under water, for as much as two hours, during which they are not detectable. Therefore, the tide could also pull down highflyers so that they are not standing straight up to be picked up by radar.

[52] Gilles d'Entremont testified that the Lery Charles was not equipped with "crab lights" because it was not in the budget when the vessel was built. Crab lights have very bright 1000 to 1500 W bulbs in rectangular or square encasements measuring 1 to 2 feet. He agreed that they could help avoid lobster gear.

[53] However, I accept his evidence that, since the night in question was foggy, it was impossible to see balloons at any appreciable distance. Therefore, more likely

than not, the presence of crab lights would not have made any difference in the case at hand.

[54] In my view, in the circumstances of this case, the practice which had been followed by Gilles d'Entremont to avoid gear conflict met the "standard of care that would be expected of an ordinary, reasonable and prudent person in the circumstances". He established a safe tow track during daylight, when conditions were favourable to seeing balloons marking lobster gear. Communication with other fish draggers and, at times, with lobster fishers also helped him establish a safe tow track. He gave instructions to Mr. Eagles to continue following the same track. He provided adequate training to Mr. Eagles, who was qualified to helm the vessel.

[55] Such precautions are reasonably required for a number of reasons. Dragging over an area with previously set lobster gear is almost certain to cause damage to that gear. If, as in the case at hand, the dragging occurs approximately perpendicular to the lobster trap strings, and continues unnoticed for a few miles, it can easily damage or destroy a large amount of gear. Until that gear can be repaired or replaced, and reset, the lobster fisher loses the income from the lobsters he or she would otherwise have captured. During times when catches and/or prices are high, that may be a very significant loss.

[56] In my view, the burden or cost of taking such measures is minimal, compared to the risk of harm. I disagree with the arguments advanced by the lawyer for Scotia Harvest that such measures would require fish draggers to stop fishing in dark, foggy or high seas, making it economically unrealistic. Such measures, in my respectful view, permit the fish draggers to continue fishing in such conditions, as long as they remain where they have established, during favourable conditions, that it is safe to pass.

[57] I did not receive evidence of the custom or industry practice followed by fish draggers generally. However, there is no indication that the practice followed by Gilles d'Entremont, as captain of the Lery Charles, is inconsistent with the general practice. It would be up to Thomas d'Entremont to establish otherwise, if he were relying on deviation from such a practice to establish breach of the standard of care.

[58] Further, whether or not the general custom or industry practice were followed is simply one factor to consider. It is not determinative. The standard of care may still be breached even if they are followed.

[59] Section 37 of the *Atlantic Fisheries Regulations* requires masters of vessels that are fish dragging to keep the vessel and the gear towed by it at least one half nautical mile away from previously set lobster gear. That provision does not

specify what measures they are required to take to ensure such distance is maintained. However, the section creates a strict liability offence. Therefore, the fish draggers will not have breached their obligations if they have exercised due diligence, or have a reasonable and an honest belief in a set of facts which, if true, would render their conduct innocent.

[60] In *R. v. Raymond*, 2006 NBPC 27, the accused did not see any lobster gear, but saw lobster fishing boats about four miles away. The Court concluded that he failed to exercise due diligence by failing to communicate with those lobster boats.

[61] There was evidence, in the case at hand, of at least one fish dragger having contacted a lobster fisher regarding the location of his gear. However, given that Thomas d'Entremont only received the one call, it did not appear to be a common practice. Certainly, it would take some time to contact all lobster fishers who could potentially be setting gear in the area where fish draggers are operating.

[62] In the case at hand, there is no evidence that the captain or crew of the Lery Charles observed lobster fishing vessels in the area at the relevant time. There was evidence that, on some occasions, if the weather was good, they would receive calls from lobster fishers advising them of the location of their gear. However, it was not indicated that that occurred during the fishing trip in which the incident in question occurred. There was also evidence that, following the gear contact, Gilles

d'Entremont made an unsuccessful attempt to contact lobster fishers on VHF Channel 50.

[63] Further, even if Gilles d'Entremont did contravene Section 37, that is only some admissible evidence of negligence. I disagree with the contention of the lawyer for Thomas d'Entremont that violation of Section 37 creates a “presumption of negligence”. It does not even furnish *prima facie* evidence of negligence. [See *R. v. Saskatchewan Wheat Pool*, [1983] 1 S.C.R. 205; and, Klar, *Tort Law, Fifth Edition* (2012 Thomson Reuters – Toronto), at page 368.]

[64] I cannot find that, in the circumstances of the case at hand, failure to contact lobster fishers breached the requisite standard of care.

[65] Gilles d'Entremont acted responsibly and reasonably in establishing a safe tow track and directing Mr. Eagles to follow it.

[66] I digress to add that, following the incident, he acted in a professional and responsible fashion by: bringing in the lobster gear found in their drag; finding out who it belonged to; and, calling the owner as soon as he was able to do so. He is to be commended for that conduct.

[67] However, in my view, Mr. Eagles' conduct did not meet the requisite standard of care. Had Mr. Eagles done what Gilles d'Entremont told him to do,

they would not have run into Thomas d'Entremont's lobster gear. Instead, he allowed the vessel to depart from the safe tow track which the Captain had established. It became immediately obvious to the Captain, when he awoke, that they were significantly off-track. He immediately steered sharply towards their established safe track. That ought to have been obvious to Mr. Eagles as well. He knew, or ought to have known, that he could not expect lobster gear to be marked by highflyers as that was uncommon. He knew, or ought to have known, that in the dark and foggy conditions that existed he would likely not be able to observe balloons marking lobster gear. Yet, he proceeded to allow the vessel to travel well outside the safe zone, knowing there was lobster gear in the area and the safe zone had been established to avoid gear conflict.

[68] In my view, in those circumstances, an ordinary, reasonable and prudent person would have adjusted the steering to bring the vessel back on track, and if unable to do so at regular fishing speeds, would have slowed or stopped the vessel and effected whatever changes were needed to allow him to properly steer the vessel back on track. Looking at the Olex Plotter printout, it appears clear that, after Mr. Eagles negotiated the wide turn, he continued in a generally northeasterly direction for about four nautical miles. That was generally parallel to the direction of the eastern side of the safe tow track. However, it was about two nautical miles

outside of that safe tow track, even at its closest point. During those approximately four nautical miles, more likely than not, he ought to have been able to steer the vessel back on track. That conclusion is supported by the fact that, as soon as he awoke, the Captain was able to immediately steer northwesterly towards the tow track. For whatever reason, Mr. Eagles did not follow the Captain's instructions to come around and tow along the shallow edge of the safe tow track that had been established.

Damage Sustained

[69] There is no question that a significant amount of Thomas d'Entremont's lobster gear was damaged, destroyed, or lost as a result of being struck by the otter trawl towed behind the Lery Charles, and that it resulted in loss of catch for a period of time due to having fewer lobster pots in the water.

Causation

[70] Subject to potential questions of mitigation and betterment, which will be discussed later, there is also no question that the damage, destruction or loss of traps, as well as the associated loss of catch, was caused by the collision.

Conclusion on Negligence Claim

[71] I, therefore, find that Thomas d'Entremont has established negligence on the part of Mr. Eagles.

[72] It is well-established that employers are vicariously liable for the actions of their employees. In my view, as a crew member of the Lery Charles, Mr. Eagles was an employee of Scotia Harvest.

[73] Therefore, Thomas d'Entremont has established his claim in negligence against Scotia Harvest.

ISSUE 2: WAS THOMAS D'ENTREMONT CONTRIBUTORILY NEGLIGENT IN FAILING TO MARK HIS LOBSTER FISHING GEAR WITH HIGHFLYERS? IF SO, HOW SHOULD LIABILITY BE APPORTIONED?

[74] The test for contributory negligence has been articulated as follows:

“A person is guilty of contributory negligence if he ought reasonably to have foreseen that, if he did not act as a reasonable, prudent man, he might be hurt himself; and in his reckoning he must take into account the possibility of others being careless.”

[75] [See **Dalrymple v. MacKay**, 2016 NSSC 95, at paragraph 13, quoting *Bow Valley Husky (Bermuda) Ltd. v. Saint John Shipbuilding Ltd.*, [1997] 3 S.C.R. 1210.]

[76] Further, as stated at paragraph 47 of **Barron v. Barron**, 2003 NSSC 90:

“47 ... [A] defendant alleging contributory negligence ‘must prove to the satisfaction of the jury that the injured party did not in his own interest take reasonable care of himself and contributed, by this want of care, to his own injury.’” [Emphasis by underlining added.]

[77] As noted in *Tort Law, Fifth Edition*, at page 533, the three ways in which the plaintiff may contribute to his or her own injuries, are as follows:

“The plaintiff’s negligence may (1) contribute to the accident itself, (2) consist in the plaintiff’s self-exposure to a risk of involvement in an accident, or (3) consist in the failure to take precautions to prevent or minimize possible injuries should an accident occur.”

[78] It is helpful to illustrate each category with an example. Many contributory negligence cases arise in the context of motor vehicle related accidents. Examples from motor vehicle cases fitting within each of the three modes of contribution to injury are as follows:

1. cases where the plaintiff pedestrian was wearing dark clothing at night and attempting to cross the road at a dangerous time or location were based upon contribution to the accident itself;
2. cases where the plaintiff was a willing passenger in a vehicle operated by a driver who was unsafe due to intoxication, or some other cause, were based upon self-exposure to risk of involvement in an accident; and,
3. cases where the plaintiff failed to wear a seatbelt were based upon failing to take precautions to prevent or minimize injuries.

[79] Scotia Harvest submits that: Thomas d’Entremont, knowing that there was fish dragging activity in the area in which his lobster gear was set, ought to have

marked his lobster gear with radar detectable highflyers as a reasonable measure to protect it; and, was contributorily negligent in not doing so.

[80] In my view: this alleged ground for contributory negligence is most akin to the dark clothing motor vehicle cases; and, Scotia Harvest is advancing that Thomas d'Entremont was contributorily negligent on the basis that his failure to use highflyers contributed to the accident itself.

[81] Mr. Eagles testified that he did not use highflyers to mark any of his lobster gear. However, he fishes lobster in District 33, where they are not concerned about gear conflict between lobster fishers and fish draggers.

[82] Gilles d'Entremont agreed that he mostly comes into contact with highflyers marking lobster fishing gear in the area of the 50 mile limit line, as those are the only ones likely to need highflyers.

[83] Gilles d'Entremont acknowledged that the use of highflyers would create more of a drag than normal trailer buoys. If the anchor did not hold the high flyer properly it could snarl the end of the string of lobster traps. However, he was of the view that the problem could be solved by using a heavier anchor.

[84] Gilles d'Entremont testified that, when highflyers are upright, and sea conditions are relatively calm, the radar can detect them three or four miles away.

He agreed with the suggestion that, in strong tides, the highflyers may lay down for as much as two hours per tide, or four hours per day. During those times, the radar would not detect them. However, he added that there were calm conditions in the three days they had fished prior to encountering the lobster gear. Consequently, had Thomas d'Entremont's lobster gear been marked by highflyers, they would, more likely than not, have detected them at some point during those three prior days.

[85] Harold Berry testified that he fishes lobster out of Yarmouth, where there are approximately 70 vessels. He has been a captain for 22 or 23 years. They fish 25 to 30 miles offshore. He has very rarely seen highflyers used to mark lobster gear. He has not used any himself, even though he has fished in areas where there was mobile gear fishing activity.

[86] He is familiar with their use in longlining. He commented on the ability to detect highflyers with radars. He said that it is not that good. The highflyers tend to lay down in heavy tide and in rough weather you only see them intermittently on the radar.

[87] He added that there was a tendency for them to create messes with trawls in heavy tides because they are heavy to move. They also have a tendency to move the lobster fishing gear around.

[88] Thomas d'Entremont testified that, the year following this gear conflict, he placed a highflyer at each of the four corners of the area where his lobster gear was set. However, he lost all but one of them. Such a post-event change in practice is a factor that may be considered in determining whether pre-event conduct was reasonable. However, it is noteworthy that the attempted new practice proved unworkable.

[89] Thomas d'Entremont has only seen one or two lobster fishers use highflyers. Not many do. He agreed that they would be detectable by radar most of the time, except when they were pulled down to a laying position by the tides.

[90] He has set his lobster pot trawls in the same general area west of German Bank for about 13 or 14 years, and, except for the one year in which he tried highflyers following the incident, has always marked his traps with balloons. He has done that knowing that fish draggers fish that area each spring.

[91] He was aware of the danger of draggers hitting lobster gear because he commented that "everyone knows you get a ball of gear in a drag".

[92] As previously stated, Scotia Harvest conceded that highflyers are generally not used with lobster gear.

[93] There is no legal requirement for lobster fishers to mark their gear using highflyers. Marking them with balloons is in conformity with regulatory requirements. Such conformity is not determinative. However, it is a factor to consider in determining whether Thomas d'Entremont acted reasonably in using balloons, and not highflyers.

[94] Similarly, the fact that use of highflyers is uncommon, and mainly occurs near the 50 mile line, is also a factor to consider in determining whether or not he acted reasonably.

[95] It is also noteworthy that Thomas d'Entremont has light-reflective tape on his balloons. That makes them more easily detectable with lights, particularly crab lights.

[96] In these circumstances, in my view, it is difficult to find that Thomas d'Entremont acted unreasonably by not using highflyers to provide additional warning to fish draggers. However, it is unnecessary to determine that, because, in my view, Scotia Harvest has not established that, in the circumstances of the case at hand, Thomas d'Entremont's conduct contributed to the accident.

[97] It has not been established that the presence of highflyers would have alerted Mr. Eagles to the presence of lobster gear. There was evidence of strong tides,

increasing the likelihood that the highflyers would have been laying down at the relevant time. Scotia Harvest did not advance that highflyers would have prevented the incident because they would have alerted Mr. Eagles to danger. Even Mr. Eagles himself did not provide evidence that he would have acted differently if he had noted highflyers on the radar. Rather it was advanced that the presence of highflyers would have permitted the Captain to detect them by radar in the three days preceding the incident.

[98] In my respectful view, in the circumstances of the case at hand, it has not been shown that that would have impacted the outcome. Even without detecting any such highflyers on the radar, the Captain had directed Mr. Eagles to maintain the vessel's course on the same safe tow track they had been following. Detecting highflyers on the radar would not have changed that direction.

[99] It was not detection of previously set lobster gear which caused Gilles d'Entremont to immediately steer the vessel towards the established safe tow track when he awoke. He did not discover the presence of lobster gear in their trawl until they had traveled about another five nautical miles and pulled it up.

[100] I accept his evidence on that point. It is not inconsistent with the evidence of Fishery Officer Daniel Fleck regarding what Gilles d'Entremont told him.

According to Officer Fleck, Gilles told him that he awoke to the vessel laboring

and determined that the boat was not where he told the Mate to go. He added that they found lobster traps in their otter trawl. However, he did not specify the time frame between when Gilles awoke and when they discovered the lobster traps.

[101] In my view, he immediately changed the course of the vessel because he knew it was unsafe to continue on the same course due to the danger of encountering previously set lobster gear.

[102] It is for these reasons that, in my view, Scotia Harvest has failed to establish that the absence of highflyers contributed to the accident.

[103] This conclusion is supported by that in *Pembina Resources Ltd. v. ULS International Inc.*, [1990] 1 F.C. 666. In that case, the dragging anchor from a ship belonging to the Defendant damaged a submerged natural gas pipeline. It submitted that the Plaintiff was contributorily negligent in not marking the pipeline with metal spar buoys that would be detected by radar because it knew that vessels traditionally anchored in the area. The Plaintiff had marked the location of the pipeline with ice pole buoys, which, it was conceded, lacked stability and tended to tip over and lie flat so as to not be clearly visible in heavy seas. Despite that, the court concluded that the failure to mark the pipeline using metal spar buoys did not contribute to the damage as it was not an effective cause of it. The cause of the damage was that the Defendant negligently allowed its anchor to drag.

[104] Similarly, in the case at hand, the cause of the damage was that Mr. Eagles negligently allowed the Lery Charles to travel outside of the established safe zone.

[105] Scotia Harvest argues that, if lobster fishers can continue to mark their gear using balloons, without having to use radar reflective highflyers to warn fish draggers of the presence of their gear, it creates an unfair situation. It allows lobster fishers to set a trap for fish draggers without them having any practical method of avoiding liability.

[106] I have already indicated that, in the circumstances, the method of avoiding liability put in place by Gilles d'Entremont was reasonable. In my view, it was also practical.

[107] There may be circumstances where failure to mark the presence of lobster gear with a radar reflective high flyer would effectively create a trap. For example, in the case at hand, if Thomas d'Entremont, knowing that fish draggers were fishing the oval trajectory used by the Lery Charles, moved his lobster gear into that trajectory, he may be found to be contributorily negligent if he did not take reasonable measures to alert the fish draggers to the presence of his gear, such as by using highflyers and/or by notifying the fish draggers. If he did not, then, it might be argued that he was unreasonably creating a dangerous situation or risk of harm to himself.

[108] Scotia Harvest bases its argument that lobster fishers fishing in areas where there is also mobile gear fishing activity ought to be required to use radar reflective highflyers, in part, upon the Collision Regulations requiring small vessels to display radar reflectors. It argues that, without that, such vessels cannot be seen in the dark or the fog, in certain conditions, just like previously set lobster gear using only balloons. However, in my view, the previously set lobster gear does not pose the same dangers to navigation as small vessels. The Collision Regulations regulate shipping, not fishing. In the case of the lobster gear, the risk is to it, not the mobile gear. There is no need for a radar reflector requirement to protect the mobile gear. Therefore, in my view, the shipping requirements do not inform what constitutes reasonable measures in terms of marking lobster gear.

[109] Scotia Harvest also argues that, since highflyers are used in drift-netting and long-lining, they should be used in lobstering where fish-dragging also occurs. A similar distinction can be drawn between the lobster fishery, on the one hand, and the driftnet and longline ground fisheries, on the other hand. In those other fisheries, unlike the lobster fishery, the gear does not necessarily remain stationary. In my view, that is an important distinguishing feature.

[110] Despite arriving at the conclusion that I have, in the circumstances of the case at hand, I recognize that the mobile gear sector has to contend with some

uncertainty regarding the exact location of lobster fishing gear. That uncertainty could be addressed by regulating the ocean depths at which draggers and lobster fishers can fish contemporaneously. If lobster fishers were limited to fishing at a maximum depth which was shallower than that which fish draggers were permitted to fish during the times when the season is open for both fisheries, each sector would have more certainty regarding the location of each other's fishing activities. However, it is not my function to engage in regulatory revision. I am limited to determining and applying the law to the circumstances of the case before me.

ISSUE 3: WHAT LOSSES HAS THOMAS D'ENTREMONT ESTABLISHED?

Value of Lost or Damaged Gear

[111] Thomas d'Entremont testified as to the lobster gear that was damaged or lost. There were some minor inconsistencies due to uncertain recollection arising from the passage of time. However, he did enter, at Tab 1 of Exhibit 2, hand-printed notes made by himself shortly after he first discovered the gear he had lost. He explained that information. It was credible and reliable. His evidence was also supported by that of his wife, Marica d'Entremont. She assisted him by preparing more legible notes at his direction and/or by helping him conduct calculation of

damages using actual invoices of gear purchased. From this evidence, I conclude as follows.

[112] On May 10, 2013, when he checked his pots, he found that he was missing: two complete trawls of 20 pots each; one complete trial of 15 pots; six pots at the southern end of another trawl; as well as associated rigging and gear, including seven grappling anchors, seven 180 fathom buoy lines, six coils of 9/16 rope for trawls, and 14 balloons.

[113] Another of his 20 pots trawls was not where he had left it. He found it ¼ mile from where it should have been. However, he was able to locate and re-set it.

[114] Gilles d'Entremont, on May 12, returned four pots, one anchor and one balloon. Two of the pots were useless. Thomas d'Entremont brought them to the dump. He described the condition of the returned pots as being as though they were "pulled through the bottom for six and a half miles".

[115] However, his loss of grappling anchors was reduced to two 60 pound anchors and four 100 pound anchors. His loss of balloons was reduced to 13. His loss of traps (if one does not exclude the useless pots) was reduced to 57.

[116] On May 18, Thomas succeeded in locating more of his gear at a location where he had been told there was a quantity of balloons and gear bunched up.

There, he retrieved what he said was 17 or 18 more pots. Since the ultimate claim was for 40 totally lost pots, and that number is not in dispute, I conclude that it was 17 that was located. He was also able to salvage an unspecified amount of rope. I also infer the balloons he retrieved reduced his number of lost balloons to 6, as that is the amount claimed in his Statement of Claim and his demand letter, which he confirmed were accurate.

[117] In the end, he totally lost 40 pots and received or retrieved 21 (i.e. 4 received and 17 retrieved). Those 21 traps, although he took two of them to the dump, were all counted as depreciated traps because their lifespan as a whole was lessened as a result of being dragged over the bottom for what was estimated to be 6.5 miles. Thomas d'Entremont explained that it wears off the coating and the pots rust quickly. He added that rusty pots do not fish well.

[118] He testified that he also gave two new pots as payment for use of loaned lobster gear which he fished until the end of the season. However, the demand letter prepared at the end of July, 2013 indicates that there was one such pot provided. That is closer to the event. The post-trial submissions on his behalf also request compensation for only one such pot. Therefore, I find that there was only one pot provided in payment for loaned gear.

[119] The amounts claimed for the lost gear were based upon invoices for items purchased following the event. They confirm the following prices:

1. balloons \$35.96 each;
2. 90 pound anchors \$137.75 each;
3. rope for pots trawls, \$2.10 per pound; and,
4. rope for buoy lines \$1.84 per pound.

[120] Even though the invoice provides a unit price of \$137.75 for 90 pound anchors, Thomas claimed the value of the two 60 pound anchors as being \$78 each, and the value of the four 100 pound anchors as being \$130 each. Although there is no evidence of their expected lifespan, there is nothing to indicate that they would not last a very long time, and perhaps the fisher's entire career. Therefore, those unit amounts appear reasonable.

[121] Thomas calculated the replacement cost of the buoy and trawl lines by converting the lengths of rope required to the weights of rope that would produce those lengths, and multiplied them by the price per pound for the types of rope in question. The reasonableness of his calculation was not challenged. I accept it. The cost of the four buoy lines was \$119.60 each, for a total of \$478.40 plus HST. The cost of the two trawl lines was \$323.40 each, for a total of \$646.80 plus HST.

[122] One of the invoices for the price of traps is at Tab 1 of Exhibit 1. The first page of that invoice shows two different prices for two different types of traps. One

is \$119.00. The other is \$114.25. Thomas initially indicated that, of the traps he had lost, about half were of one type, and the other half were of the other type. The last page of that invoice shows prices for three other types of traps. The prices for those types are noted as being \$116.25, \$121.50, and \$130.50 respectively. When asked again which types were lost, Thomas acknowledged that he did not know. He stated he gathered up all the information and made an estimate that he believes was probably lower than it should be.

[123] Scotia Harvest in its provisional calculation of what it thought were reasonable amounts for damages, used the figure of \$116.63 per trap. It arrived at that figure by using the average price of the traps on the first page of the invoice, i.e. \$119.00 and \$114.25. Thomas, in his post-trial submissions, while pointing out that there was also further labour involved in completing the trap kits, which would justify \$125 per trap as a reasonable figure, indicated that he was prepared to accept \$116.63 as the replacement value of the traps. He re-calculated his loss using that figure, even though he had previously claimed \$125.00. Therefore, I will also use \$116.63 as the replacement value for the traps, being the cost of new traps of the types lost, destroyed or damaged.

[124] In my view, since there has been no claim for any of the extra labor provided by Thomas and his crew to complete the pot kits, re-rig new trawls, and untangle

the bunched-up gear located on May 18, in my view there ought to be no reduction for the unspecified amount of rope salvaged.

[125] Thomas d'Entremont also provided evidence of items needed to complete the trap kits. He testified that the items noted in invoice number 0375, at Tab 1 of Exhibit 1, totalling \$371.45, inclusive of HST, might be sufficient or insufficient, he did not know. In addition, the lost gear for which reimbursement is claimed is specified in the Statement of Claim. There is no separate claim for trap kit completion items. They have not been included in the tally contained in the Plaintiff's post-trial brief. Therefore, I will not include the \$371.45 in my calculation. However, I will consider it, as well as extra labour, when weighing the uncertainties regarding the age/remaining life of the lost and damaged traps, in the course of assessing the issue of betterment.

Betterment

[126] Thomas d'Entremont did not know the age of the traps he lost.

[127] He does not usually keep traps over four years old. He fishes 375 traps in the fall, and 400 in the spring. He replaces approximately 100 pots each year. He did not know how old the lost pots were.

[128] Under that replacement schedule, on average, each fall, he would be starting the season with 100 new traps having a useful life of four years, 100 with three years of useful life left, 100 with two years left, and 100 with one year left. Then on average, at the end of each spring season, he would have 100 traps with three years left, 100 traps with two years left, 100 with one year left, and 100 with no useful life left.

[129] When the incident occurred there was still about 12% of the 2012-2013 season left. Therefore, following the normal replacement pattern, he would have had 100 traps with 3.12 years left, 100 traps with 2.12 years left, 100 with 1.12 years left, and 100 with 0.12 years left.

[130] He knew that the 21 traps he recovered were new from the Fall of 2012. It was almost the end of the spring season when the incident happened. Therefore, they would have had 3.12 years, or 78% of their useful life left. Instead, on average, even though two were discarded, he estimated they had one year of useful life left. Therefore, on average, for the 21 recovered traps, he lost 2.12 years of useful life, which is 53%.

[131] If the remaining 379 traps followed the normal replacement pattern, they would have been composed of 79 traps with 3.12 years of useful life left, 100 with 2.12 years, 100 with 1.12 years, and 100 with 0.12 years. Therefore, the average

remaining life of those 379 traps would be about 1.54 years, such that he would have lost, if the lost traps reflected that average, 38% of the total useful life.

[132] His claim is for the price of new traps, having a full useful life. None of the traps he lost had a full useful life. Therefore, it would be unfair to compensate him for the full value of new traps. That would offend the betterment principle.

[133] However, the exact age of the lost traps is uncertain. Thomas d'Entremont's inability to determine the exact age of the lost traps is due to their disappearance, which I have found Scotia Harvest responsible for. He has not claimed the cost of items, such as hog rings, clips and rubbers, nor the labour, needed to complete the trap kits. He was inconvenienced and had to expend extra fuel and effort to look for and untangle lost gear. No amount has been claimed for that. These points militate in favour of some increase in the percentage of the new cost of traps that Thomas d'Entremont is to be reimbursed for.

[134] On the other hand, though there was no evidence regarding the expected lifespan of the rope, it only makes sense that rope would wear, and would not last for the fisher's entire career. Since I do not have evidence of the age or useful life of the rope it would be speculative to come up with a remaining lifespan and determine damages on that basis. Therefore, I will allow the claim for new rope. However, I will consider the inevitable fact that rope does not last forever in

tempering any increase in relation to the traps to account for the points I have just mentioned.

[135] For these reasons, in order to prevent an inappropriate betterment windfall by awarding the full cost of new traps, while fairly compensating Thomas d'Entremont for his losses, I will award him 55% of the new trap cost for the 21 traps recovered, and 40% of the new trap cost for the 40 lost traps.

[136] Consequently, I calculate the total value of lost, destroyed or damaged gear as follows:

1. 6 balloons at \$35.96 each – \$215.76
2. 2 @ 60 lbs. anchors at \$78 each – \$156.00
3. 4 @ 100 lbs. anchors at \$130 each – \$520.00
4. 4 buoy lines at \$119.60 each – \$478.40
5. 2 trawl lines at \$323.40 each – \$646.80
6. 1 replacement trap as repayment for loaned gear - \$116.63
7. 40 lost traps at 40% of new value of \$116.63 – \$1,866.08
8. 21 traps depreciated by 55% of new value of \$116.63 – \$1,347.08
9. HST on above items – \$802.01
10. Total gear loss - \$6,148.76

Lost Catch

[137] In addition, Thomas said he calculated his lost fishing income by taking the average catch per trap, when he was fishing his full trap limit, in the five trips

previous to the incident, and in the two or three trips during which he was once again fishing his full trap limit after the incident. His wife, Marica d'Entremont clarified that they included three trips after he was once again fishing at his full trap limit.

[138] During the hearing, Scotia Harvest suggested that a better approach might have been to calculate the average catch in each trap on May 10, 14 and 18, 2013, while Thomas was fishing with only about 340 traps. In its post-trial submissions, it accepted the reasonableness of the approach taken by Thomas.

[139] During the hearing, it was explained, by Thomas and Marica d'Entremont jointly, that the approach was taken because not all traps fish the same.

Consequently, it would skew the results to base the analysis upon catches made when he was not fishing a full complement of pots. I agree that that is a reasonable explanation and approach.

[140] Despite 61 traps having been lost or temporarily missing, Scotia Harvest submits that the claim for lost income is based upon 60 traps. The parties have agreed on that, despite the July 2013 claim letter noting that it is based upon 61 missing traps, and the Statement of Claim doing the same, and arriving at the same total claim of \$2272. They have also agreed that Thomas d'Entremont lost 2.6 pounds per trap, per trip, at \$4.75 per pound. If all three trips during which Thomas

d'Entremont fished with a 60 trap shortfall are included, they agree that amounts to a loss of \$2223. This is a civil matter. The parties are at liberty to reach such agreements. I will honor it.

[141] However, Scotia Harvest submits that Thomas failed to take reasonable steps to arrange to have replacement gear in the water earlier. Consequently, there should be a reduction in the number of claimable trips. They say it should be based upon two trips, making it one third less. That brings us to the next issue, relating to mitigation.

ISSUE 4: DID THOMAS D'ENTREMONT TAKE REASONABLE STEPS TO MITIGATE HIS LOSSES? IF NOT, HOW SHOULD THAT IMPACT A DAMAGE AWARD?

[142] On May 10, when he first discovered he had missing gear, Thomas looked around for it near the location where he expected to be, before moving on to the next set location. He did not extend his search further after pulling his other gear on that day because the seas were too high to retrieve the gear which he expected to be comprised of around 60 traps in a pile.

[143] He did not replace his lost gear right away because he did not have any extra. However, he did contact the Department of Fisheries and Oceans for extra tags to replace the ones he had lost in case he did find replacement gear.

[144] Thomas indicated that in May it is difficult to buy used lobster traps, even though it is easy at other times of the year, such as in June, following the end of the season. He called friends around Pubnico. He also called his stepfather on Cape Sable Island. Everyone was fishing their traps.

[145] He was able to secure replacement tags from the Department of Fisheries and Oceans relatively quickly. In addition, he was able to secure sufficient replacement traps in time to have them with him on his May 18 trip, which was his third trip out after discovering his missing traps.

[146] His next day out after the 10th was on the 14th. By then he had received coordinates, through his wife, which initially emanated from Gilles d'Entremont, regarding a location where there was a large number of balloons and lobster gear grouped together. However, on that day, he first checked the pots that he had already set before proceeding to look for that other gear because he was waiting for the weather to improve. However, the weather did not improve. There were two metre seas. That would create a lot of strain while trying to retrieve the bunched-up gear. He assessed the situation and determined that it would be unsafe for the crew to attempt the task. In addition, he did not believe his vessel would have enough power to retrieve the gear and that he would require a fish dragger to assist. Therefore, he did not do so on that day.

[147] He did not return to his fishing grounds on the 15th, even though it was a nice day, because he wanted to wait until a day that he would return to haul his gear so that he could carry out both tasks in one trip. That was because the cost of fuel made it not economically feasible for him to return just to see if he could retrieve his bunched-up gear. It took them three or four hours to “unfowl” the bunched-up gear. It is a six hour steam each way to get to his fishing grounds. That would burn quite of bit of fuel.

[148] On May 18, when he retrieved the last 17 traps and some associated gear, he had already borrowed and rigged other pots to set. So he did not use the ones that he retrieved.

[149] Gilles d’Entremont had never tried to find replacement lobster traps in mid-May; but, had no difficulty at other times of the year.

[150] In my view, Thomas d’Entremont’s decision to refrain from searching for and trying to retrieve what he expected to be, and what turned out to be, a tangled mess of gear requiring hours to untangle, during rough seas, to protect his crew from excessive danger, was reasonable. All too often we hear of tragedies at sea. Some of those likely result from excessive risk-taking. Thomas d’Entremont should not be penalized for taking reasonable steps to ensure the safety of his crew.

[151] The total lost catch claim is only \$2223. One third of that is only \$741. There was no evidence of the exact cost of operating Thomas d'Entremont's lobster vessel for the 15 or 16 hours that would have been required to find and untangle the gear. Scotia Harvest has not provided evidence of any estimate of that cost. However, it would not seem unreasonable to expect that it would approach or exceed \$714, especially counting wear and tear on the vessel. In addition, it would have created an extra 12 hours of work for the captain and crew. Therefore, in my view, it was reasonable for Thomas d'Entremont to wait until he had to steam out to check his set traps.

[152] If he had travelled to his fishing grounds on the 15th to find and retrieve the gear, been unsuccessful, and attempted to claim the cost of that attempt to mitigate, Scotia Harvest may well have been able to advance an argument that expending those resources on a special trip dedicated only to recovery efforts was an unreasonable attempt at mitigation. They may have argued that he should have waited until he was going out to check his set gear, because the costs exceeded the potential gain.

[153] His efforts to obtain replacement traps left a little to be desired. However, there was no evidence upon which I could find that he ought reasonably have been able to locate and rig replacement traps in time for his May 14 trip.

[154] For these reasons, I find that he has not failed to mitigate his losses, and there should be no associated reduction in damages.

CONCLUSION

[155] For the foregoing the reasons, I conclude that:

1. Thomas d'Entremont has established that Mr. Eagles was negligent, and Scotia Harvest is vicariously liable for that negligence;
2. Thomas d'Entremont was not contributorily negligent;
3. Thomas d'Entremont did not fail to mitigate; and,
4. Scotia Harvest shall forthwith pay damages to Thomas d'Entremont in the amount of \$8,371.76, with \$2,223.00 of that amount being for lost catch and the remainder being for lost or damaged gear, inclusive of HST.

ORDER

[156] I ask counsel for Thomas d'Entremont to prepare the order.

COSTS

[157] If the parties are unable to reach an agreement on the question of costs, I will accept submissions in writing.

PIERRE L. MUISE, J