Vancouver 1967

May 2-4

May 19

BRITISH COLUMBIA ADMIRALTY DISTRICT

BETWEEN:

R.M. & R. LOG LTD. .....PLAINTIFF;

AND

TEXADA TOWING CO. LTD., M. MINNETTE & M. JOHNSON } DEFENDANTS.

Shipping—Negligence—Loss of boat in tow by charterer—Liability of charterer in contract and tort—Whether master owes duty of care to owner of boat.

Defendant company chartered plaintiff's 15.2 feet boomboat at $275 a month, to be returned in the same condition. While defendant company's tug was towing the boomboat in B.C. coastal waters by a tow line which ran between vertical leads to the boomboat's bow about 1 foot abaft the tug the boomboat began to sheer from side to side in calm water. The master noting that the tug's stern was under water ordered the helmsman to keep a steady course and he put the tug's engines at full ahead but the tug's stern continued to sink and the tug rolled over and sank with the tow. The master and helmsman were employees of defendant company, the master being responsible for navigation of the vessel and securing the tow line. Action was brought against defendant company, the master and the helmsman.

Held, defendant company was liable for loss of the boomboat both in contract and in tort. It was liable in contract, as the charter being that of a bare boat operated as a demise to defendant company, which was under a duty express as well as implied to return the boat in the condition in which it received it (*Outtrim v. Regem* [1948] 2 W.W.R. 38, referred to). It was liable in tort as a bailee (*Coggs v. Bernard* (1703) 2 Ld. Raym. 909) for the negligence of the master and helmsman. The doctrine of *res ipsa loquitur* applied (*The Jupiter* (No. 3) [1927] P. 122, 250; *Associated Portland Cement Mfrs v. Ashton* [1915] 2 K.B. 1, *Rex v. Canadian Tug Boat Co.* [1933] Ex. C.R. 104, referred to); but moreover there was actual evidence of faulty seamanship by both captain and helmsman.

The action must be dismissed against the helmsman but without costs. The only evidence of negligence against the helmsman consisted of admissions by the other defendants, and these were not evidence against him.

The action must also be dismissed against the master but without costs. He owed no duty of care to plaintiff but only to his employer.

(*Le Lievre v. Gould* [1893] 1 Q.B. 491; *Lister v. Romford Ice & Cold Storage Co.* [1957] A.C. 555; *Bagot v. Stevens Scanlan & Co.* [1964] 3 All E.R. 577; *Quinn v. Leathem* [1901] A.C. 495; *M'Alister (or Donoghue) v. Stevenson* [1932] A.C. 562; *Grant v. Australian Knitting Mills, Ltd.* [1936] A.C. 85; *Farr v. Butters Bros. & Co.* [1932] 2 K.B. 606; *Overseas Tankship (U.K.) Ltd. v. Miller Steamship Co. (The Wagon Mound, No. 2* [1966] 2 All E.R. 709; *Hedley Byrne & Co. v. Heller & Partners Ltd.* [1964] A.C. 465; *Winterbottom v. Wright* (1842) 10 M. & W. 109 (152 E.R. 402); *Guay v.*

Sun Publishing Co. [1953] 2 S.C.R. 216; *Dickson et al v. Reuter's Telegram Co.* (1877) 3 C.P.D. 1; *Sewell v. B.C. Towing & Transportation Co.* (1883) 9 S.C.R. 527; *Hayn v. Culliford* (1879) 4 C.P.D. 182; *Wilson v. Darling Island Stevedoring Co.* [1956] 1 Lloyd's Rep. 346 (Australia); *Scruttons v. Midland Silicones Ltd.* [1962] A.C. 446 (H.L.); *Yuille v. B. & B. Fisheries (Leigh), Ltd.* and Bates [1958] 2 Lloyd's Rep. 596; *The Anonity* [1961] 2 Lloyd's Rep. 117, distinguished.)

ACTION for damages.

J. R. Cunningham for plaintiff.

J. I. Bird, Q.C. for defendants Texada Towing Co. Ltd. and M. Johnson.

D. Brander Smith for defendant M. Minnette.

SHEPPARD D.J.:—The plaintiff, as owner, claims for the loss of the *Coast Prince* on a voyage from Vancouver to Blind Bay, B.C., founding in contract against Texada Towing Co. Ltd., the charterer, and in tort against Texada, the master Minnette and helmsman Johnson for alleged negligence causing the sinking. The facts follow.

The *Coast Prince* was a small ship (Ex. 5) of registered tonnage .81, of 15.2 feet length overall, and of breadth 8.6 feet (Ex. 3) with a steel hull, two hatches (Ex. 8), one with a cover not fastened, the other without cover, and a freeboard of $2\frac{1}{2}$ feet forward and 2 feet aft. She was known locally as a dozer or boomboat; that is one used in pushing floating logs into position, particularly in booming, sorting or loading.

On 31st October, 1966, the plaintiff, as owner, chartered the *Coast Prince* to the defendant Texada at $275.00 per month to be returned in the same condition as delivered, at the expiration of one month, but "probably until around Christmastime". Having been overhauled and being "perfectly sound" of hull, according to McMaster of the Texada Co., the *Coast Prince* was delivered to Texada on 31st October, 1966, at the Texada wharf at the foot of Dunlevy Street in the City of Vancouver.

On the 5th November, 1966, in the early hours, on instructions of Texada, the *Coast Prince,* then in the tow of the tug *Mainland Prince,* in the control of Texada and with a master and crew provided by Texada, set out on a voyage

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from Vancouver to Blind Bay, B.C. The *Mainland Prince* (Ex. 2) was a heavily powered tug with two diesel engines, each of 240 h.p., having a length of 39 feet overall, a beam of 12 feet to 13 feet and a draught of 7 feet. She carried as master Minnette, and a crew consisting of a mate and one Johnson, a deckhand, who acted as helmsman, all employees of Texada.

About 0700 hours Johnson turned out, made breakfast and took the wheel, and about 0900 hours the tug and tow pulled in behind Cape Cockburn. There Johnson pumped out the *Coast Prince* which had in the bilge about 2 feet of seawater that had come over the rail: he found her hull dry. The master, Minnette, and also Johnson, after inspection, found no water in the bilge of the *Mainland Prince*.

About 0920 the vessels left Cape Cockburn for Blind Bay, with the *Coast Prince* in tow. The towline ran from the winch aft of the wheelhouse on the *Mainland Prince* (Ex. 2) between two vertical leads and over a horizontal roller at her stern but was so short as to leave only about one foot between the stern of the tug and the bow of the tow.

At about 1000 hours off Strawberry Island, a distance of 1.2 miles from Cape Cockburn, both vessels suddenly sank in deep water at a point marked 44 fathoms on the chart (Ex. 4), but probably in deeper water. There was no sea, only a slight chop; with little wind and good weather, nevertheless the two vessels went down so suddenly that the master and Johnson, acting as helmsman, had not time to call the mate asleep in the forecastle, with the result that he was lost.

On the 7th November, 1966, at the office of Texada in Vancouver, Minnette was asked by Trevor Edwards about the sinking. Minnette said he did not know how it happened, that they were going along "fine" and all of a sudden she sank with no explanation, that he, Minnette, said to Johnson, then at the wheel, "Keep to a steady course or you will sink the dozer boat. There she goes now." That the *Coast Prince* then sank, that he, Minnette, then went out of the wheelhouse aft and saw the stern of the tug under water, ran back to the wheelhouse and told Johnson

to waken the mate, and he, Minnette, put the engines at full ahead to raise the stern but she sank.

Under a Note of Protest (Ex. A for identification) Minnette on behalf of Texada stated in effect that at about 0600 hours he relieved the mate on watch, made the usual routine inspection of the engine room and the tug while the deckhand took the wheel, and also:

> When vessel was abeam of Strawberry Island which was distant about ½ mile on the starboard side the Dozer Boat was sheering from side to side. Slowed engine down and proceeded aft to wait for Dozer Boat settling down and then saw that the stern of the tug was under water. Immediately made way back to wheelhouse and put engines full ahead in an endeavour to raise the stern.
>
> The vessel did not lift as anticipated but the stern continued to sink and the vessel rolled over with a corkscrew action on to her starboard side, and sank within two or three minutes. The deckhand took to the water and I escaped by climbing up the partition and through the wheelhouse port door, but the Mate was trapped in the forecastle and could not be released before the vessel sank.

After speeding up the engines the *Mainland Prince* heeled over to starboard, Johnson went out the starboard door of the wheelhouse into the water, the master out the port door. It is evident that the *Mainland Prince* having lost stability then fell over on her starboard beam and went down.

The plaintiff brought action for loss of the *Coast Prince* and joined as defendants Texada, Minnette the master and Johnson the deckhand.

The Texada Co. is liable in contract in that the charter being that of bare boat operates as a demise to Texada, and Texada was under a duty implied: *Outtrim v. Regem* [1948] 2 W.W.R. 38, per Sidney Smith J.A. at p. 46, and also expressed as admitted on discovery by its officer McMaster, to redeliver the *Coast Prince* in equally good condition as when received.

McMaster testified that the *Coast Prince* was examined and found to be sound. Under the charter Texada agreed to return her in that condition on expiry of one month but with the option to extend the time until Christmas of 1966 if so required by Texada. That option of extension was not exercised.

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The *Coast Prince* went down in deep water where Texada abandoned her. Hence Texada is in breach of the contract in failing to redeliver.

The Texada Co. was also liable in negligence as a bailee. Under the charter by demise it was under a duty of care: *Coggs v. Bernard* (1703) 2 Ld. Raym. 909 (92 E.R. 107). Texada is liable vicariously for the negligence of Minnette, the master, and of Johnson as helmsman; on discovery McMaster for Texada testified:

> MR. CUNNINGHAM:
>
> 157 Q. Does Texada have a practice of giving instructions to the skipper as to procedures followed in towing vessels?
>
> A. It is the duty of our dispatcher to tell the skipper what to do and where, it is also our policy, once the skipper is hired, as far as the navigation of the vessel, navigation etc., it is his responsibility.
>
> 158 Q. What about the responsibility for securing the tow line?
>
> A. That's up to the skipper.

1. The doctrine of *res ipsa loquitur* applies to presume negligence against Texada. Texada had possession and control as holding under a charter by demise: *The Jupiter* (No. 3) [1927] p. 122 at p. 131, affirmed at p. 250; *Associated Portland Cement Manufacturers (1910) Ltd. v. Ashton* [1915] 2 K.B. 1; *Carver's Carriage by Sea (British Shipping Laws)* para. 44.

   The vessel was lost suddenly in deep water in fair weather and within 1.2 miles of Cape Cockburn, where she had been safely towed from Vancouver. Under such circumstances that sinking would not have occurred without negligence. Hence Texada had control and the sinking would not ordinarily occur without negligence, therefore negligence is presumed against Texada: *Rex v. Canadian Tug Boat Co. Ltd.* [1933] Ex. C.R. 104 at pp. 114-16.

2. There is actual evidence that the loss of both vessels, particularly of the *Coast Prince* was due to negligence arising out of faulty seamanship:
   (a) in failing to prevent the towline escaping from between the leads, and

(b) in the master attempting to speed up the engines after seeing the tug *Mainland Prince* down by the stern.

(c) in the failure of the helmsman to keep a steady course.

The two vessels, the *Mainland Prince* with the *Coast Prince* in tow left Cape Cockburn with the towline leading aft from the winch on the tug *Mainland Prince* through two vertical leads at the stern (Ex. 7) with the tow approximately 1 foot astern. On such length of line the tow must follow directly in the track of the towing tug but subsequent events indicate that the towline had jumped out from between the leads. Immediately before the sinking the master told the helmsman to keep the tug on a steady course else he would sink her tow, and in the Protest Note (Ex. A) the master states that the tow was "sheering from side to side". Those manoeuvres, the danger of sinking from failing to hold a steady course, and the sheering from side to side would have been impossible if the line had continued through the leads so as to have held the *Coast Prince* about 1 foot from the stern of the *Mainland Prince*. On the other hand, if the towline jumped out of the leads, then the line would run from the winch aft of the wheelhouse on the tug (Ex. 2) to the bow of the *Coast Prince* and in such circumstances if a steady course were not steered, the *Coast Prince* could veer from side to side, and if allowed to get to one side would be in danger of being pulled over and sinking.

The order to steer a direct course and the veering of the tow indicate that the towline had escaped from between the leads. The freeboard of the *Mainland Prince* aft was approximately 10 inches to 11 inches and her bulwark below the leads was not high, probably 18 inches (Ex. 2), hence the vertical leads would commence at 28 or 29 inches from the water and extend upward for another 12 inches. The *Coast Prince* had a freeboard at the bow of 30 inches, therefore her bow would hold the towline above the bottom of the leads. In the normal case, a longer towline would fall

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astern of the towing tug into the water and through the water then up to the tow; in such circumstances there would be less danger of the line jumping from between the leads. However that was not this case. The towline led directly to the bow of the *Coast Prince* which bow was sufficiently high to lift the towline out of the leads if there were sufficient commotion. Also the *Coast Prince* was light, having been pumped out at Cape Cockburn and being a comparatively light vessel (Ex. 5), while the towing tug was heavily powered. However it may have occurred, the towline was out of the leads as seen by the subsequent events as described by the master. In this case the U-bolts should have been placed over the line to prevent this escape, but although on the tug, they were left unaffixed. That was the fault of the master (McMaster's Discovery Q. 158). The failure to keep a steady course was the fault of the helmsman Johnson.

At the trial there was reserved the question of admitting the Note of Protest (Ex. A). On the 3rd of May, 1967, counsel for the defendants, Texada and Minnette, elected not to call evidence. As a result Minnette was not called, either by Texada or on his own behalf. On the 4th of May, 1967, counsel for Texada and Minnette asked that the Note of Protest be put in evidence on the ground that in Question 321 counsel for the plaintiff had put in evidence portions of the Note of Protest, therefore the document having been referred to should be admitted in evidence. The proper time for this objection to have been taken was at the time Question 321 was tendered at the trial but the objection was not then taken and not until later and after it had been decided not to call Minnette, hence the objection might be taken to have been waived. However, as the Note of Protest did afford some evidence as to the manner in which the sinking had occurred and its admission in evidence did not destroy the fact that it was a self-serving statement and apparently tendered to avoid the necessity of Minnette having to submit to cross-examination, and within the adverse inferences permitted in *Barnes v. Union*

Steamships Limited [1954] 13 W.W.R. 72 at p. 75, therefore the Protest Note is admitted.

There was also an error in seamanship in the master's speeding up the engines when he had found the stern of the *Mainland Prince* pulled under water, evidently by the sunken *Coast Prince*. That putting the engines full ahead merely raised the bow and thereby decreased the buoyancy of the *Mainland Prince,* hence she fell over on her starboard beam and sank. It would have been better to have reduced speed or to have stopped. Texada is liable in negligence.

As against Johnson, the plaintiff's action is in negligence, but the evidence in proof of such negligence is not admissible against Johnson. The negligence is largely proven as follows:

1. From the examination for discovery of Minnette, but the answers of Minnette are not evidence against Johnson.

2. From the admissions on 7th November, 1966, by Minnette to Trevor Edwards at the Texada office. That evidence, while admissible against Texada, who produced Minnette for Edwards' information, nevertheless is not authorized by Johnson nor admissible against him.

3. The Note of Protest, while on behalf of Texada, is not authorized by Johnson nor evidence against him. Johnson testified that he was 17, having five weeks' experience, but said that he did not hear Minnette tell him to keep a steady course else he would sink her, and from the circumstances I am unable to find that he must have heard that direction, having regard to the excitement of the moment. On Johnson's evidence he kept a steady course as directed. There is therefore no evidence to the contrary and it is impossible to find him guilty of negligence.

As to Minnette, the liability of Texada is a vicarious liability for the negligence of Minnette. As stated by

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McMaster, an officer examined for Texada, "navigation, etc." was the master's responsibility and the securing of the towline was a matter for the master. Texada's liability in negligence is established by the statements of Minnette and those statements must prove Minnette equally liable, provided he is under a duty of care to the plaintiff. As stated in *Le Lievre v. Gould* [1893] 1 Q.B. 491 by Lord Esher, M.R. at p. 497:

> A man is entitled to be as negligent as he pleases towards the whole world if he owes no duty to them.

Hence, the question is whether the circumstances do create any duty of care by Minnette to the plaintiff.

Under the circumstances the plaintiff has not made out a duty of care on the part of Minnette to the plaintiff. There is some difficulty in seeing a basis of duty of care from the master to the plaintiff. No doubt as an employee the master is under a duty of care to Texada, his employer: *Carver on Carriage by Sea* (1963 Ed.) para. 42; *Lister v. Romford Ice & Cold Storage Co. Ltd.* (H.L.) [1957] A.C. 555; *Bagot v. Stevens Scanlan & Co.* [1964] 3 All E.R. 577 at p. 581. Usually the plaintiff as owner could sue Texada as charterer by demise and Texada as employer could claim against the master as employee. But that succession of duties does not necessarily impose a like duty on the master to the plaintiff or other third person who may be shipper or owner.

In collisions between two vessels the owners of the vessels in proximity, and the masters and crews engaged in their navigation are under mutual duties of care. But this master seems outside the circumstances giving rise to such duty. The master is not bailee of the ship or cargo: *Carver* (1963 Ed.) para. 44; *The Jupiter* (No. 3), *supra*, at p. 131, affirmed p. 250; *Associated Portland Cement Manufacturers (1910) Ltd. v. Ashton, supra*, and therefore does not come within the principle of *Coggs v. Bernard, supra*, to impose a duty on the master in favour of the bailor owner. The principle of *respondeat superior* would apply to charge the owner, or the charterer by demise, but not the

master, with the negligence of members of the crew: *Carver* (1963 Ed.) para. 94.

The plaintiff has cited various general statements as permitting the inference of the duty of Minnette to the plaintiff but it is to be observed that such general statements "must be read as applicable to the particular facts proved or assumed to be proved"—"a case is only authority for what it actually decides": *Quinn v. Leathem* [1901] A.C. 495 at p. 506.

The plaintiff has cited *M'Alister (or Donoghue) v. Stevenson* [1932] A.C. 562, where Lord Atkin at p. 580 refers to the neighbour as follows:

> Who, then, in law is my neighbour? The answer seems to be—persons who are so closely and directly affected by my act that I ought reasonably to have them in contemplation as being so affected when I am directing my mind to the acts or omissions which are called in question.

That statement should be taken with reference to the facts there proved or assumed and therefore should be taken to apply to the circumstances creating the duty of a manufacturer to the ultimate consumer, namely, where goods are sent out in such form as to prevent reasonable intermediate examination: *Grant v. Australian Knitting Mills, Ltd.* [1936] A.C. 85. On the other hand, where a derrick had defective gears which were capable of inspection, then the principle did not apply to permit a workman not the buyer to recover from the manufacturer: *Farr v. Butters Brothers & Co.* [1932] 2 K.B. 606.

The plaintiff also contended that damage to the plaintiff was reasonably foreseeable and therefore the duty is to be presumed from Minnette to the plaintiff. However, *Overseas Tankship (U.K.) Ltd. v. The Miller Steamship Co. (The Wagon Mound, No. 2)* [1966] 2 All E.R. 709 at p. 717, held that foreseeability is relevant to determining whether there is a breach of the duty or to measure the damages arising from the breach rather than to creating the duty.

It is also contended that *Hedley Byrne & Co. Ltd. v. Heller & Partners Ltd.* [1964] A.C. 465, has somehow

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altered the law, that is, in holding that if A assumes a responsibility to B to tender to him deliberate advice, there could be a liability if the advice is negligently given. That statement of liability should be taken to apply only to the facts which were there proved or assumed, which are quite distinguishable from the case at bar.

Here the charter is by contract between the plaintiff as owner and Texada as charterer, and several cases have held that the duty is restricted to those parties to the contract and the obligation or benefit does not extend to any third person even to an employee. In *Winterbottom v. Wright* (1842) 10 M. & W. 109 (152 E.R. 402) the defendant had undertaken to supply a conveyance to the employer but that did not permit the plaintiff, an employee who operated the conveyance, to recover for injuries received from a defect. While that case has been qualified in *M'Alister (or Donoghue) v. Stevenson, supra,* that qualification must be confined to the facts of that qualifying case. In *Le Lievre v. Gould, supra,* a mortgagor engaged a surveyor to give certificates of the progress of the work, and on the faith of those certificates the plaintiff mortgagee advanced monies. It was held that he could not recover in the absence of deceit. That case has been qualified in the *Hedley Byrne* case but the qualification should be taken as limited to the facts of *Hedley Byrne,* and therefore as merely setting up an exception, particularly in view of *Guay v. Sun Publishing Co. Ltd.* [1953] 2 S.C.R. 216, holding that an action did not lie for negligent use of words. In *Dickson et al v. Reuter's Telegram Co. Ltd.* (1877) 3 C.P.D. 1, the addressee of a telegram brought action against the telegraph company for the incorrect transmitting of the message, but the Court held that the duty of reasonable care was owing, not to the addressee, but to the sender who was the contracting party. While Texada has assumed a duty to the plaintiff it does not follow that Minnette, an employee, is under a like duty to the plaintiff.

In cases over water carriage of goods, various judgments have imposed on third persons a like duty to that

assumed by the carrier by contract, but such like duty has been invariably imposed on an employer and not on an employee.

In *Sewell v. B.C. Towing & Transportation Co.* (1883) 9 S.C.R. 527, here cited by the plaintiff, the facts were that the plaintiff had engaged the towing company for a tow from Royal Roads to Nanaimo and thence to sea, and the towing company engaged a second company to assist in the towing, which service the second company undertook, but through negligence the tow was damaged and the Court held both companies liable on the ground that both were under a duty to the plaintiff to use reasonable care and skill in carrying out their undertaking and that duty applied to the second company, who had made no contract with the plaintiff. That is distinguishable. In the case at bar the master, Minnette, had undertaken no service for the plaintiff; the vessel was not being taken to Blind Bay for the plaintiff but for Texada. As stated in *Outtrim v. Regem, supra,* at p. 41 "The use which was to be made of the vessel during the term rested entirely with the charterers. The then owner had no voice whatever in it." Hence the master acted solely as servant of Texada and in performance of his duties as such servant.

Carver refers to *Hayn v. Culliford* (1879) 4 C.P.D. 182 as follows, "A new chapter in the law of tort had begun. In *Hayn v. Culliford* it was held that the shipowner was liable to the shippers for damage to their goods by the negligence of stevedores employed by him even though the bill of lading was issued by the charterer." *Carver, supra,* p. 80, para. 90. The extent of that "new chapter" is seen in the two cases immediately following.

In *Wilson v. Darling Island Stevedoring Company* [1956] 1 Lloyd's Rep. 346 (Australia) and in *Scruttons v. Midland Silicones Ltd.* [1962] A.C. 446 (H.L.) the shipper contracted with the carrier who employed stevedores to handle the cargo and they damaged the shipment by negligent handling. The plaintiffs (the shipper or subsequent holder of the bill of lading) recovered from the stevedores in tort, but the stevedores were denied the benefit of a

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clause limiting liability contained in the contract with the shipper, as the stevedores were not parties thereto nor was the limitation of liability held in trust for them. The duty of care and the liability therefrom was on the contracting stevedores, the employers, and not on the employees who were in fact negligent.

In *Yuille v. B. & B. Fisheries (Leigh), Ltd. and Bates* [1958] 2 Lloyd's Rep. 596, the plaintiff, as master, recovered against the employer company and Bates the managing director for personal injuries received by the plaintiff when his vessel, being towed by a sister ship, both owned by the defendant company, broke the tow rope, allowing the first vessel to go aground and injuring the plaintiff. The company was held negligent in supplying defective equipment and Bates the managing director as a joint tortfeasor. There is some difficulty in stating the effect of this judgment because Willmer L.J. in a subsequent judgment in *The Anonity* [1961] 2 Lloyd's Rep. 117 at p. 126 said:

> In support of this a decision of my own in *Yuille v. B. & B. Fisheries (Leigh), Ltd., and Bates (The Radiant),* [1958] 2 Lloyd's Rep. 596, was cited. That was, it is true, a case in which, on its own particular facts, I did come to the conclusion that a personal action lay against the managing director of a company on the same facts as actual fault or privity was found against the company. But I am certainly not prepared to accept that this must necessarily be so in all cases. It seems to me that the question whether an injured plaintiff could successfully bring a personal action against a member of a company, whose conduct is held to amount to actual fault or privity of the company within the Merchant Shipping Acts, must depend on whether, in the particular case, the relationship of "neighbours" in the eye of the law is established. I say nothing as to whether a personal action against the late Mr. Everard could have been sustained on the facts of the present case. I do not think that that question arises.

In any event it does not provide any basis for holding liable Minnette as master in the case at bar.

In *Carver's Carriage by Sea (British Shipping Laws* (1963 Ed.)), in dealing with the liability of the carrier's servant, the author has stated at para. 92:

> There is no direct authority as to the liability in tort for negligence of the master or crew of the vessel in respect of their failure to care for goods carried.

and in para. 93 he has stated:

> "It is to be observed," said Salmon J. in *Clayton v. Woodman* ((1961) 3 W.L.R. 987, 996), "that *Donoghue v. Stevenson* has frequently been applied, but only where the damage complained of was physical, that is, to persons *or property*." That is true as regards damage to persons: it is as yet untrue, it is submitted, as regards damage to property, but as the principle now appears to apply generally to financial loss it would be logical to apply it also to damage to property.

"The categories of negligence are never closed": *Donoghue v. Stevenson, supra,* at p. 619, therefore must continue. While they continue this Court should declare the law as it is, that is, whether the circumstances do give rise in law to a duty of care—but not as it might be extended. Hence it is sufficient to say that while the master, Minnette, was, in fact, negligent, he in law was under no duty of care to the plaintiff.

In conclusion, the plaintiff will have judgment against the defendant Texada for the value of the *Coast Prince* to be determined on reference, and interest and costs, and the action will be dismissed as against Minnette and Johnson without costs.

The negligence in fact of Minnette and Johnson has created a vicarious liability of Texada, and a loss of vessel to the plaintiff, but Johnson escapes liability because Minnette's statements are not evidence against Johnson, and Minnette escapes because there was no duty of care to the plaintiff. Under those circumstances the loss of the plaintiff or of Texada should not be increased by allowing either Minnette or Johnson their costs.

The able assistance by the learned Assessors should be gratefully acknowledged.