BETWEEN:

MARJORIE HEXTER STEIN, FOR HERSELF AND AS THE WIDOW OF CHARLES SIMMON STEIN, DECEASED, AND AS A CO-EXECUTOR OF THE ESTATE OF THE SAID DECEASED, AND MAURICE SCHWARZ AND WILLIAM I. STEIN, COEXECUTORS OF THE SAID ESTATE

Plaintiffs

and

THE SHIPS "KATHY K" (ALSO KNOWN AS "STORM POINT"), AND "S.N. NO. 1", EGMONT TOWING & SORTING LTD., SHIELDS NAVIGATION LTD., LEONARD DAVID HELSING AND JAMES IVERSON

Defendants

REASONS FOR JUDGMENT

HEALD, J

[1] This is an action under Part XVII of the *Canada Shipping Act* (R.S.C. 1970, c. S-9) brought on behalf of the widow and children of Charles Simmon Stein, deceased, who was killed as a result of a collision between a sailboat and the unmanned barge *S.N. No. 1* in tow of the tug *Storm Point* on June 27, 1970, in the waters of English Bay, Vancouver.

[2] The defendant Helsing was acting as master of the tug and he had with him a deckhand, James Iverson, who has died since the collision as a result of injuries received in an automobile accident in November of 1970.

[3] The action as against Iverson has been discontinued.

[4] The sailboat was a 5-0-5 sailboat (16 ½ feet in length) and at all material times, Ross Stein, the son of the deceased was skipper and the deceased was crew.

[5] At all material times, both the tug and barge were owned by the defendant Egmont Towing and Sorting Ltd. and operated by the defendant Shields Navigation Ltd.

[6] Counsel for all parties agreed at the trial that the trial evidence be restricted to the issues as to (1)liability for the collision and (2)as to whether the defendants are entitled to limit liability under the *Canada Shipping Act.* Counsel also agreed that it should be left for a subsequent hearing to (1) assess the damages to which the plaintiffs are entitled and, if a decree limiting liability is granted, (2) to decide the equivalent value in Canadian funds of a “gold franc” as defined in the *Canada Shipping Act*.

[7] The collision occurred at approximately 3.35 (15.35) hours on a Saturday afternoon in conditions of clear visibility and light variable winds. The sun was shining and the atmosphere was clear. Defendant’s preliminary act stipulated visibility of about 10 miles.

[8] The tidal condition is described as ebbing with little tidal force, being about one hour after high water. Captain Helsing described the condition as follows: “There was lots of water in English Bay at that time”.

[9] The deceased and his son, Ross Stein, had come to Vancouver from their home in Beverly Hills, California, on June 26, 1970, for the purpose of competing in an International 5-0-5 class sailboat racing competition which was to begin on June 28, 1970. Said competition was hosted by the Kitsilano Yacht Club of Vancouver and was to take place in English Bay.

[10] On June 27, in the afternoon, the two Steins had put their 5-0-5 in the water and participated in an informal practice race organized by the Yacht Club. After said practice race, the Steins continued sailing for additional practice in English Bay and it was in the course of this sailing that the collision in question occurred.

[11] The tug *Storm Point* had, since June 23, been some one hundred miles or so up the coast from Vancouver engaged in a cable laying operation. On June 27, it returned to Vancouver, entering False Creek with the barge *S.N. No. 1* loaded and berthing at Johnston Terminals which is located on the south side of False Creek between the Granville Street Bridge and the Cambie Street Bridge (just immediately west of the Cambie Street Bridge).

[12] The berthing took place at 13.30 hours. The cargo was then discharged from the barge. During all of the period up coast, the master of the tug had been Captain Greenfield. During the period of unloading at Johnston Terminals, Captain Greenfield contacted the President of the defendant, Shields Navigation Ltd., Mr. Peter Shields and obtained his approval to stay ashore

and to leave the tug and barge in the control of the defendant Helsing and the now deceased deckhand Iverson who were to take the tug and unloaded barge in tow back out through English Bay around Stanley Park and through the First Narrows to Bel-Aire shipyard in North Vancouver. With Helsing aboard as Captain and Iverson aboard as the only crew, the tug with the unloaded barge in tow left Johnston Terminals outbound at 15.15 hours.

[13] The *Storm Point* was a single deck, single screw coastal tugboat of wooden construction and was 49 feet in length. The barge *S.N. No. 1* was at all relevant times, about 80 feet long and had a width of 40 feet. The tug was approximately 15 feet wide, powered by a 300-350 h.p. engine.

[14] The evidence establishes that when the tug and tow departed Johnston Terminals, the barge was close-hauled on the stern of the tug, that is to say, the bow of the barge was within 5or 6 feet of the stern of the tug. This was normal practice when navigating in False Creek. The tug left Johnston Terminals and proceeded at a slow speed of approximately 3 to 4 knots.

[15] On reaching a point slightly west of Burrard Bridge, Iverson, the deckhand, on the instructions of Captain Helsing, let out the tow-line to a distance of approximately 150 feet. This task was completed by the deckhand at a point just west of Kitsilano Spit at which time the deckhand rejoined Captain Helsing in the wheelhouse.

[16] The evidence is that it is necessary to speed up when letting out the tow-line which Helsing did on this occasion. Helsing also gave evidence that before the tow-line was let out, his speed was about 4 knots. He also testified that from the time he passed under the “trestle bridge”

(indicated on Exhibit 53 as the “Kitsilano Railway Bridge”) continuing on under the Burrard Bridge and on out to the “Spit” (also marked on Exhibit 53) there was a large number of small craft in False Creek. This traffic was going in every direction. Helsing also gave evidence (question 289 — examination for discovery) that shortly after passing under Burrard Bridge he observed a concentration of sailboats on his starboard bow approximately 5 ¾ to 7 cables away.

[17] Helsing testified further that at the Spit, the traffic cleared considerably and that there was not much traffic on his course and that it was very clear to port thereof (question 331 of Helsing’s discovery).

[18] He testified that the sailboats were about 45 degrees off his starboard bow from time of sighting until the collision. He says that one of the sailboats appeared to veer off and to proceed in his general direction when it was about 4/10 mile away. When this sailboat was about 1,000 feet away off his starboard bow, he made an alteration to port of 15 degrees. This alteration was not signalled in any way.

[19] At about this time, Helsing became concerned at the possibility of a collision whereupon he left the wheelhouse and went to the flying bridge where, he says, he had a better view of the situation. At the same time, Iverson, on Helsing’s instructions also left the wheelhouse and went back to the winch to let some slack into the tow-line. Helsing’s purpose in this was to make it possible for the sailboat to pass astern of the tug and between the tug and barge and make less of an obstruction in the event of a collision. Helsing also reduced speed gradually from the throttle control on the flying bridge, gradually, to prevent his tow from sheering or going out of control.

[20] When the two Steins first sighted the tug, they were in the process of starting to take the spinnaker down. Ross Stein immediately altered course to port to pass clear down the starboard side of the tug, and having made that turn, they were confronted with the barge directly in front of them. Ross Stein, by sculling with the rudder, tried to alter further to port and bring the sailboat clear of the barge, but the barge still came on at a speed hitting the sailboat hard. The sailboat was hit by the front of the barge at a point to starboard of the centre of the front of the barge.

[21] The collision occurred at approximately 15.35 hours. The evidence establishes that the point of collision was in an area about half-way between the Kitsilano Swimming Pool and the Second Beach Swimming Pool as same are shown on Exhibit 53. Another way of describing the approximate point of collision is to say that it is in the position where the words “White sector, red sector, green sector” occur together on Exhibit 53. Prior to the collision, the sailboat was proceeding toward that area from the waters off Second Beach and the tug and tow were proceeding from the mouth of False Creek toward that area.

[22] I proceed now to enumerate the acts of negligence which, in my view, were causal factors in this collision.

Faults of the Storm Point

[23] 1. Captain Helsing was negligent in letting out his tow-line too soon and was also negligent in letting out too much tow-line under the circumstances at that time (heavy sailboat congestion) and these two negligent acts contributed in large measure to the collision.

[24] Captain Greenfield testified that the areas of False Creek and English Bay were very congested on summer weekends. Captain Helsing also acknowledged that it was not unusual on a Saturday afternoon in June to have considerable sailboat traffic. Captain Greenfield said “It can get rather hair-raising.” He said further that if traffic was really congested, his practice was to keep his tow close-hauled with a slow speed of approximately 3 knots. The reason for this is that you could stop the barge if it were close-hauled at a speed of 2 or 3 knots. He said “With 150 feet out, there is no way you could stop.”

[25] There are apparently three ways of towing a barge. There is the close-haul method with about 5 to 6 feet of tow-line out between the stern of the tug and the barge. This is the method Captain Greenfield says he usually adopted and this the method Captain Helsing used when he left Johnston Terminals. There is another method used sometimes of lashing the tug alongside the barge. The third method is to let some tow-line out. The evidence establishes that most tugboats with tows switch from the first method to the third method once they are away from all congested areas and in open water.

[26] However, in this case, Helsing knew there was likely to be a congestion of sailboats in English Bay, that this was the rule rather than the exception, and yet in the face of this knowledge, he ran out 150 feet of tow-line before clearing the Spit. He was asked to mark the spot on Exhibit 52 where the deckhand left the winch, indicating that the tow-line had been let out and he marked this spot as being just west of Burrard Bridge, well before the Spit. Captain Greenfield said the normal practice was to let out the 150 feet after clearing the Spit, and then only if traffic conditions warranted it.

[27] If Captain Helsing had held off letting out his tow-line until he cleared the Spit as he should have done, he probably would have refrained from doing so altogether because by that time, he had seen the sailboat congestion off his starboard bow. The evidence is that he saw the sailboats shortly after he passed under Burrard Bridge and well before he got to the Spit.

[28] I am also advised by the assessors that 150 feet of tow-line even after the Spit was an unreasonably long amount of tow-line at that point in English Bay, in circumstances like this where there was heavy sailboat traffic, that 40 or 50 or 60 feet would have been more reasonable. The more tow-line let out, the less control there is of the barge. With 150 feet of tow-line, Helsing increased the hazard to other traffic because of his lack of control.

[29] 2. Captain Helsing operated the tug and tow at an excessive rate of speed having regard to all the circumstances, from the time he let out the tow-line until the time of the collision.

[30] There is some conflict in the evidence of speed. Ross Stein estimated the *Storm Point's* speed at about 6 to 8 knots. He said that he was accustomed to seeing water traffic proceeding in Los Angeles Harbor, both at 5 knots and 8 knots because said harbor has areas where that is the speed limit. On the basis of that experience, he made the above estimate of the speed of the *Storm Point* . Helsing himself estimated the tug's speed at no more than 5 knots but this is only a rough estimate because he did not know the r.p.m.-speed ratio and he simply advanced the throttles.

[31] Looking at all of the evidence, I have the opinion that Helsing's estimate is on the low side. He testified that before the tow-line was out, his speed was 4 knots. He also agreed that he

speeded up as he was letting the tow-line out. From Johnston Terminals to the point of collision is a distance of about 1.8 miles which was traversed in twenty minutes. This represents an average speed over the entire distance of 5.4 knots. When it is considered that from Johnston Terminals out to where the tow-line was let out, the speed was from 3 to 4 knots, it is clear that from there on out, the tug had to speed up considerably to achieve an average over the full course of nearly 5 ½ knots. The evidence establishes that the tug was proceeding at approximately double the speed of the sailboat from the time of first sighting to the point of collision. The sailboat's speed was established at 3 to 3 ½ knots.

[32] Looking at all of the evidence, it is my opinion that the tug was proceeding at 7 to 7 ½ knots until he slowed down just prior to the collision. Helsing speeded up too soon, particularly in view of the congestion of sailboats ahead of him. I refer to Captain Greenfield's evidence that if the traffic was congested, his procedure was to keep his tow close-hauled and to proceed at 3 knots. In proceeding at 7 or 7 ½ knots, in congested waters, Helsing was travelling at an excessive rate of speed which contributed to the collision through his inability to stop his tow. His rate of speed affected the speed at which the barge hit the sailboat, thus contributing to the serious results of the accident as well.

[33] 3. Captain Helsing was negligent in not making an alteration to port sooner than he did and in not making a substantially greater alteration than he did and such negligence contributed in large measure to the accident.

[34] Exhibit 50 shows that the position marked 1 thereon abeam of Chrystal Pool is about where Helsing says he first saw the sailboats about 5 to 7 cables away.

[35] Position 5 marks the approximate collision point. The distance from position 1 to position 5 is about 4 cables. The marked chart of this area shows that he could have altered to port 30 degrees at position 1, that he could have altered even more as he progressed further out. The fact is that he waited until he was about 1,000 feet from the Stein sailboat to alter at all and then, he only altered 15 degrees to port. His explanation for not making a greater alteration was that he wanted to be sure that he did not alter into foul ground. I do not accept this explanation as being reasonable. He should have known from his knowledge of English Bay that a much larger alteration was feasible. If he did not know this from past experience, he should have consulted his charts which would have clearly told him that he could have altered at least 30 degrees any time after position 1. The evidence also establishes that it was clear of traffic ahead and to port (question 331, discovery). Then, he was even more negligent in not altering soon enough. He could have altered at position 1. He did not alter until position 4. The distance between position 1 and position 4 is about 2 ½ cables or 1,500 feet. If he had altered any time between position 1 and position 4, he could have altered 30 degrees or more and been completely clear of the sailboat with both the tug and tow. As a matter of fact, at position 4, the assessors advise me he could have altered 90 degrees to port without endangering his own vessel. His vessel was drawing a maximum depth of 7’6”. It was also at the top of a high water of over 11 feet which would have allowed him further leeway. In my view, Helsing was guilty of improper navigation procedures which contributed in a very direct and substantial way to the collision. He knew the sailboats were there. They were at 45 degrees off his starboard bow from the sighting until the collision. The Stein boat remained on the same bearing as it came in toward him (questions 347-350, discovery) and yet he did absolutely nothing about it, even though they were on a collision

course with him, until they were about 1,000 feet away. Then, his action was clearly "too little and too late".

[36] 4. Captain Helsing was negligent in failing to comply with Rule 20(*a*) of the Regulations for Preventing Collisions at Sea (hereafter the Collision Regulations)[1]. Defendants submitted that Rule 20(*a*) does not apply in this case but that Rule 20(*b*) does because this collision occurred in a "narrow channel".

[37] The relevant portions of Rule 20 read as follows:

> (*a*) When a power-driven vessel and a sailing vessel are proceeding in such directions as to involve risk of collision, except as provided for in Rules 24 and 26, the power-driven vessel shall keep out of the way of the sailing vessel.
>
> (*b*) This Rule shall not give to a sailing vessel the right to hamper, in a narrow channel, the safe passage of a power-driven vessel which can navigate only inside such channel.

[38] It is therefore necessary to determine whether the tug *Storm Point* and her tow were navigating in a "narrow channel" at and immediately prior to this collision. The authorities are clear that a "narrow channel" is that which by the practice of seamen is treated, and necessarily treated, as a narrow channel or, the way in which seamen in fact regard it and behave in it[2].

[39] Counsel for both parties acknowledged that I was entitled to seek and follow the advice of the assessors concerning this practice. The assessors advise me that in the instant case, False Creek is considered a narrow channel but that from a point abeam of the Chrystal Pool on Exhibit 50, this body of water is no longer considered a narrow channel. That is to say, from

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1 The *Canada Gazette*, September 8, 1965, P.C. 1965-1552.

2 Marsden, 11th ed., pages 576 and 577.

about point 1 on Exhibit 50 on out, the tug was no longer in a narrow channel. Helsing estimated point 1 as being about 5 ¾ cables away from the sailboats when he first saw them. Thus it is clear that in these circumstances, the sailboats had the right of way under Rule 20, that the tug had an obligation to keep out of the way of the Stein sailboat which it failed to do. This failure and neglect on the part of the tug was clearly causative of the collision.

[40] 5. Captain Helsing and the deckhand, Iverson, failed to keep a proper lookout contrary to Rule 29 of the Collision Regulations and this breach of Regulation was to some degree causative of the collision.

[41] Rule 29 provides as follows:

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

[42] One of the puzzling features of this case is the lack of earlier action by Helsing. He knew that he could expect a concentration of sailboats in English Bay, he knew that such a concentration would present hazards for him, he saw a sailboat concentration soon after he passed under Burrard Bridge, when he was still more than ½ mile from them. He and Iverson discussed the presence of the sailboats, he saw the sailboats proceeding toward him on a steady 45 degree course and yet he took no action whatsoever until the Stein boat was 900 to 1,000 feet away. Surely such lack of action compels the inference that Helsing and Iverson were not keeping a proper lookout, that their minds must have been on other matters and that this unmistakable negligence on their part was causative of the collision.

[43] 6. The *Storm Point* was in breach of Collision Regulation 28(*a*) which reads as follows:

> (*a*) When vessels are in sight of one another, a power-driven vessel under way, in taking any course authorized or required by these Rules, shall indicate that course by the following signals on her whistle, namely: —
>
> One short blast to mean "I am altering my course to starboard".
>
> Two short blasts to mean "I am altering my course to port".
>
> Three short blasts to mean "My engines are going astern".

[44] The evidence is that Helsing made one alteration of 15 degrees to port when the Stein boat was 900 to 1,000 feet away and that he did not signal by whistle or otherwise said alteration. It is arguable whether this violation, *per se*, was causative of the collision but it is certainly revealing of Helsing's casual attitude to the whole situation in which he found himself. As a matter of fact, he admitted on the witness stand that he did not even know where the whistle button was so that he could not have blown the whistle if he had wanted to — without first looking around and locating it. He had been first mate on the tug for several days when it was up coast engaged in cable laying operations, and on this occasion, he was its Master on a 2 ½ hour voyage through congested waters. Surely minimal prudence on his part would have suggested that he familiarize himself with all the controls and their location before commencing the voyage.

[45] How would a reasonably prudent and reasonably competent Master have conducted himself after he first saw the sailboats? At position 1 on Exhibit 50, he would have altered 30 degrees to port, he would have reduced speed and he would have whistled 2 short blasts pursuant to Rule 28(*a*). He did none of these and his failure to do so is certainly causative.

[46] Then, later on, after he had altered course 15 degrees to port, after the Stein sailboat had altered to port and was running approximately parallel to and abeam of the tug, the tug being only 50 to 100 feet away, he should have given 5 short blasts to alert the sailboat of the presence of the tug and barge. He could also have shouted at that short distance to warn the sailboat about the barge in tow. He did none of these things and thus was guilty of a breach of Rule 12 of the Collision Regulations which reads as follows:

> Every vessel or seaplane on the water may, if necessary in order to attract attention, in addition to the lights which she is by these Rules required to carry, show a flare-up light or use a detonating or other efficient sound signal that cannot be mistaken for any signal authorized elsewhere under these Rules.

[47] The *Storm Point* was also in breach of the following additional Collision Regulations:

> A. Part D — Preliminary.
>
> 1. In obeying and construing these Rules, any action taken should be positive, in ample time, and with due regard to the observance of good seamanship.
>
> 2. Risk of collision can, when circumstances permit, be ascertained by carefully watching the compass bearing of an approaching vessel. If the bearing does not apreciably change, such risk should be deemed to exist.
>
> B. Rule 22.
>
> Every vessel which is directed by these Rules to keep out of the way of another vessel shall, so far as possible, take positive early action to comply with this obligation, and shall, if the circumstances of the case admit, avoid crossing ahead of the other.
>
> C. Rule 23.
>
> Every power-driven vessel which is directed by these Rules to keep out of the way of another vessel shall, on approaching her, if necessary, slacken her speed or stop or reverse.

[48] Helsing was also in breach of the following National Harbours Board Regulations[3].

> 35. (1) No vessel shall move in the harbour at a speed that may endanger life or property.

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[3] The *Canada Gazette*, 1955 Consol., p. 2252, P.C. 1954-1981 dated December 16, 1954.

> 37. (1) Every vessel towing another vessel shall have sufficient power to perform such service properly and shall, at all times, keep as complete control as possible of the vessel in tow.

Faults of the Sailboat

[49] 1. The crew of the Stein 5-0-5 sailboat were negligent in that they failed to keep a proper lookout. The evidence is that Ross Stein, the skipper, and his father, his crew, were concentrating on tuning their boat to the two other sailboats that were sailing along with them. I think they were concentrating too much on their sailing and not enough on other traffic in the Bay. They had the right of way over motor-driven traffic in the Bay but this does not give them the right to completely ignore all other traffic. They should have seen the tugboat sooner than they did. What is even more baffling is why they did not see the barge until just seconds before it hit them. The barge was only 150 feet behind the tug. Surely, a reasonable lookout would have spotted the barge sooner. In my view, the sailboat breached Collision Regulation No. 29 (*supra*) which imposes on all vessels and their crews, the duty to keep a proper lookout.

[50] 2. The crew of the Stein sailboat had never sailed in the waters of English Bay before the day of the collision. They were from California. They were not familiar with the traffic reasonably to be expected in English Bay nor with the customs of seamen in these waters. It was incumbent on them to familiarize themselves with local rules and local customs. This they did not do, nor did they take the trouble to observe the traffic in English Bay. Had they done this for any reasonable length of time, they would, in all likelihood, have observed tugs with barges in tow with varying lengths of tow-line. The evidence was that in California harbors where they were accustomed to sailing, tugs did not tow barges in this fashion. Therefore, they did not expect to see a barge behind the tug and this may account to some extent, for the fact that they

did not see the barge earlier. However, this does not excuse them. They were sailing in an area that was new to them. They should have known local customs and procedures and their failure to acquaint themselves with same was negligence on their part.

[51] The legal principles to be followed in cases of this kind are stated in *Marsden's British Shipping Laws, Volume 4, Collisions at Sea* on pages 2 and 3 thereof as follows:

> The essential elements of actionable negligence were stated in 1823 by Lord Stowell in *The Dundee* , ((1823) 1 Hag. Ad. 109 at p. 120) a case of collision between two vessels, to be "a want of that attention and vigilance which is due to the security of other vessels that are navigating on the same seas, and which, if so far neglected as to become, however unintentionally, the cause of damage of any extent to such other vessels, the maritime law considers as a dereliction of bounden duty, entitling the sufferer to reparation in damages."
>
> It is the duty of seamen to take reasonable care and to use reasonable skill to prevent the ship from doing injury, (*The Voorwaarts and the Khedive* (1880) 5 App. Cas. 876 , 890, *per* Lord Blackburn) and what is reasonable must be tested by the circumstances of each case....
>
> The negligence usually relied on is a failure to exercise the skill, care and nerve which are ordinarily to be found in a competent seaman, amounting to a breach of the duty of good seamanship, or a breach of the international or local regulations for preventing collisions. "We are not to expect extraordinary skill or extraordinary diligence, but that degree of skill and that degree of diligence which is generally to be found in persons who discharge their duty. (*Per* Dr. Lushington, *The Thomas Powell and the Cuba* (1866) 14 L.T. 603 .)

[52] In the case of *The Billings Victory* (1949) 82 Ll. L. Rep. 877 at 883, Willmer J. said:

> ... It appears to me that the most important thing to give effect to in considering degrees of blame is the question which of the two vessels created the position of difficulty.

[53] The "position of difficulty" in the case at bar was, to a large extent, created by the tug and its negligent acts enumerated *supra*.

[54] The negligence of the sailboat was in not keeping a proper lookout and in not seeing the tug and barge sooner. This negligence was causative, but to a lesser degree than that of the tug.

[55] I have therefore concluded that liability should be apportioned on the basis of 75% to the tugboat *Storm Point* and 25% to the 5-0-5 sailboat skippered by Ross Stein.

Limitation of Liability

[56] The defendants filed a counter-claim in this action under which they seek to limit their liability pursuant to the provisions of s. 647 of the *Canada Shipping Act*, R.S.C. 1970, c. S-9.

[57] The relevant portions of said section are as follows:

> *647.* (2) 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,
>
> . . . . .
>
> (*c*) where any loss of life or personal injury is caused to any person not on board that ship through
>
> . . . . .
>
> (ii) any other act or omission of any person on board that ship; ...

[58] Said section 647 provides further that in such event the liability for loss of life or personal injury, either alone or together with any loss and damage to or any infringement of any rights is limited to 3,100 gold francs for each ton of the ship's tonnage to be distributed 21/31 to the claimants for loss of life or personal injuries and 10/31 to claims for damage to property or infringement of rights. In the case at bar, no claim for property damage is made. Accordingly, the above-stated statutory apportionment has no application.

[59] The onus is upon the owner of the ship to bring himself within the above-noted section of the Act. The real issue turns upon the words "without his actual fault or privity" as they appear in s. 647(2) (*supra*). (*The Chugaway* [1969] 2 Ll. L. Rep. 526, Sheppard D.J.)

[60] 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 the fault or privity of his servants or agents. (Per Buckley L.J. — *Asiatic Petroleum Co. v. Lennard’s Carrying Co.*, [1914] 1 K.B. 419 at p. 432.)

[61] Thus, in the case of a company “... It must be ... the fault or privity of somebody who is not merely a servant or agent for whom the company is liable upon the footing respondeat superior, but somebody for whom the company is liable because his action is the very action of the company itself....” (Per Lord Haldane L.C. — *Lennard’s Carrying Co. v. Asiatic Petroleum Co.*, [1915] A.C. 705 at p. 713.)

[62] A number of cases through the years have discussed the duties of the owner. Thus the case of *Northern Fishing Co. v. Eddom (The Norman)*, [1960] 1 Ll. L. Rep. 1 , held that one of the clear duties of an owner is to provide the ship with navigational aids reasonable for and appropriate to the nature and purpose of the voyage and that up-to-date charts would be one of the most obvious of such navigational aids.

[63] In the *Lady Gwendolen* [1965] 1 Ll. L. Rep. 335 at p. 339, Lord Justice Sellers said:

> 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. That involves a seaworthy ship, properly manned, but it also requires safe navigation.

[64] In the case of *The Anonity* [1961] 1 Ll. L. Rep. 203, the point in issue was whether adequate instructions had been given by shipowners to their servants as to extinguishing galley fires when the ship was lying alongside an oil jetty. The court held that the owners had not given

adequate instructions, and that accordingly the resultant fire and damage did not occur without the shipowner's actual fault or privity and limitation of liability was therefore denied.

[65] To summarize the authorities, the onus is on the defendant here (plaintiff by counterclaim) to prove:

> (1) The person whose very action is the action of the company.
>
> (2) That such person has not been guilty of a fault or privity as previously defined.
>
> (3) If there be a fault, it did not contribute to the accident.

[66] It is thus necessary to consider the relevant facts in the case at bar in the light of these principles.

[67] Peter Shields is the President, a director and the manager of both the defendant Egmont Towing and the defendant Shields Navigation. Mr. Shields has a degree in Civil Engineering. Upon graduation from University he was in the construction business for seven years. He has been in the towboat business since 1966 but acknowledges that he is not "a towboat man". At all relevant times the tugboat *Storm Point* was owned by the defendant Egmont Towing and operated by the defendant Shields Navigation under a verbal charterparty. Shields Navigation managed and operated said tugboat for Egmont Towing.

[68] The evidence discloses that the operation of this tugboat business was, to say the least, performed in a loose and somewhat casual fashion. There were no Masters' meetings; there were no discussions on the length of tow-lines to be used in Vancouver Harbour; there were no standing orders for Masters. It was not established in evidence that there were even copies of

either the Collision Regulations or the National Harbours Board Regulations aboard the vessel. As a matter of fact, Captain Greenfield said that Shields Navigation did not even maintain a current copy of the National Harbours Board Regulations in its office to his knowledge.

[69] The evidence establishes that the minimal crew required was three for the *Storm Point* . A copy of the last inspection certificate issued for the *Storm Point* was received in evidence as Exhibit 64. The certificate is dated December 19, 1968 and is valid until September 3, 1972. The pertinent portions of said certificate are as follows:

> This is to Certify:
>
> 1. That the above mentioned ship has been duly inspected in accordance with the provisions of the *Canada Shipping Act*, that the provisions of that Act respecting the inspection of steamships that are applicable to such ship have been complied with and that the ship is, subject to such limitations as may be specified herein, fit to ply as a tug. The number of persons, including the master, comprising the crew, is ... "3 persons for periods not in excess of 12 hours operation in 24 hour period; and 4 persons for periods of operation in excess of 12 hours.

[70] Thus, said certificate shows that a minimum crew for the *Storm Point* was three, and yet when the tug and barge left Johnston Terminals outbound for Bel-Aire shipyards in North Vancouver on the day of the accident, the total crew was only two — Helsing as Captain and the deckhand Iverson as crew. Peter Shields admitted in evidence that the size of the crew was his responsibility and that the number of men on the tug for this portion of the voyage was his decision. When the *Storm Point* docked at Johnston Terminals and commenced unloading the barge, Captain Greenfield went ashore and phoned Peter Shields who was at that time on Vancouver Island. Peter Shields at that time authorized Helsing and Iverson to resume the voyage as a total crew of two.

[71] In taking such action, Peter Shields was, in my view, guilty of negligence. He knew or should have known that Helsing had never taken a tug and tow out of False Creek as Master before. He knew or should have known that Helsing had only sailed as Master of the *Storm Point* once before and that was on June 23, 1970 when he brought the tug and tow across from Sidney on Vancouver Island. He knew that there would be considerable sailboat traffic in English Bay; he was a sailboat enthusiast himself. He admits knowing there was no legal authority to operate the *Storm Point* with a crew of two; he admits that this lack of legal authority crossed his mind; he acknowledges now that he was probably sending Helsing, an inexperienced Master, into a potentially difficult situation. His exact words were “You have to be ready for anything in English Bay.”

[72] I have the firm view that the negligence of Shields as set out *supra* contributed to the accident. Peter Shields explained his decision by saying that the trip to North Vancouver was only a two-hour trip, and that since it was an off-watch for Captain Greenfield, he would be sleeping anyway and thus, he did not see much point in his remaining aboard. However, Captain Greenfield testified that *once they proceeded out to Burrard Bridge*, (italics mine) he would have been taking a nap. The important point here is that Helsing’s negligent handling of the tug and tow began before they were out to Burrard Bridge. I found *supra* that Helsing was negligent in letting his tow-line out too soon and that this action was completed by the time the tug was just west of Burrard Bridge. I also found *supra* that Helsing was negligent in proceeding at an excessive rate of speed. He also embarked on this course of conduct at or just shortly after Burrard Bridge. I think it likely that if Captain Greenfield had been aboard, this collision would never have occurred. He would have been in a position to advise Helsing as to proper normal

navigating procedures before he went to take a sleep and this would probably have prevented the accident.

[73] Peter Shields, as President and Manager of the two defendant corporations, was guilty of further negligence in allowing the *Storm Point* to operate without a whistle control of any kind on the flying bridge. The evidence is that the purpose of the flying bridge is that it can be used by the Master in close quarters situations for docking and loading, etc., because of the improved ability to see in all directions, as compared to the wheelhouse, where the visibility is to some extent restricted. The evidence was also that the flying bridge is generally not intended for use in outside waters. However, Peter Shields acknowledged that there would be times coming out of False Creek with the Master on the flying bridge when the whistle should be blown from the flying bridge. The only controls on the flying bridge were the throttle, gear and wheel.

[74] Helsing testified that he had been on the flying bridge some of the time after leaving Johnston Terminals, but that he was in the wheelhouse conversing with the deckhand Iverson as they were leaving False Creek and proceeding into English Bay. When they were about 900 to 1,000 feet from the Stein sailboat, he became concerned about a collision and then went to the flying bridge. Even at that late point in time, a whistle control on the flying bridge would have been useful. I am advised by the assessors that it is normal practice to have duplicate controls on the flying bridge, that is, the same controls as are in the wheelhouse, and that includes a whistle control. This view is confirmed to some extent by the affidavit of Robert K. Dalgleish, the marine superintendent of Georgia Towing Company who deposed that his Company in 1970 had 14 tugs fitted with flying bridges and in all 14 tugs the flying bridges were fitted with whistle controls.

[75] I have the view that this failure to equip the flying bridge with a whistle control was to some extent causative.

[76] Helsing said that he left the wheelhouse to go to the flying bridge because of his concern about a possible collision. He also admitted that he had no possible way of knowing at that time whether or not those on the sailboat were aware of the barge (questions 426 to 428 inclusive, discovery). Had he been able to blow the whistle from the flying bridge, he might well have taken this means of alerting the sailboat. He should have blown his whistle earlier from the wheelhouse but even at the later time from the flying bridge, any signal of alarm or alert may well have been productive.

[77] Management was guilty of further negligence in not having an alternative means of activating the whistle — that is an alternative to the electrical button in the wheelhouse. On this vessel, if the electrical system failed, there was no mechanical or manual means of blowing the whistle. One of the assessors advises me that in all of his years of experience, he has never been on a vessel where there was not an alternate method of activating the whistle. His experience was that there was usually a manual means as well as a mechanical or electrical means. The other assessor's experience was similar excepting that he had sailed on some vessels where there were not two means of blowing the whistle but on all such vessels, the means of activating was manual. This would eliminate the possibility of not being able to blow the whistle through electrical or mechanical failure. This negligence was not causative of the collision in this case but it is further indication of the rather casual and careless manner in which this Company and its vessels were being operated.

[78] In conclusion, I find that Peter Shields, the President and manager of the two corporate defendants was guilty of the faults and negligence herein set out and that at least some of these faults contributed to the accident.

[79] In proceedings such as this, the onus is on the owner to show that he had nothing to do with the cause of the accident — to show that he did not contribute in any way to what happened. (Hamilton L.J. — *Lennard's* case (*supra*) [1914] 1 K.B. 419 at p. 436.)

[80] In the case at bar, the owner has not discharged that onus.

[81] There will therefore be judgment as follows:

> (a) Liability for the collision is apportioned on the basis of 75% to the tugboat *Storm Point* and 25% to the Stein sailboat.
>
> (b) The counter-claim is dismissed in so far as Egmont Towing and Sorting Ltd., and Shields Navigation Ltd., are concerned. They will not be allowed to limit their liability. Under the provisions of s. 649(1) of the *Canada Ship ping Act*, the defendant Helsing as Master of the tug is entitled to limit his liability. For the purposes of calculating the limitation of liability in Helsing's case, I hold that the calculation should be on a tonnage of 600 tons. Under s. 651(1) of the *Canada Shipping Act* since the tonnage of both the tug and tow are under 300 tons, they are deemed to be 300 tons.

[82] I hold also that plaintiffs are entitled to calculate on the basis of the combined tonnage of tug and tow. Liability must be calculated on the aggregate tonnage of the wrong-doing mass. (*Pacific Express v. The Salvage Princess*, [1949] Ex.C.R. 230 at p. 234. See also: *Monarch Towing v. B.C. Cement Co.*, [1957] S.C.R. 816.)

> (c) The plaintiffs will have judgment against both corporate defendants and the defendant Helsing for damages to be assessed by a Judge of this Court.

> (d) Costs — The costs of both the action and the counter-claim will be apportioned on the same basis as liability has been apportioned in accordance with (a) hereof.

[83] Pursuant to Rule 337(2)(*b*), counsel for the plaintiffs may prepare a draft of an appropriate judgment to implement the Court's conclusions and move for judgment accordingly.

[84] The invaluable assistance of the assessors Captain R.W. Draney and Captain J.A. McLeish is gratefully acknowledged.

"Darrel V. Heald"
Judge

Ottawa, Ontario
May 2, 1972

FEDERAL COURT

SOLICITORS OF RECORD

STYLE OF CAUSE:	MARJORIE HEXTER STEIN, FOR HERSELF AND AS THE WIDOW OF CHARLES SIMMON STEIN, DECEASED, AND AS A CO-EXECUTOR OF THE ESTATE OF THE SAID DECEASED, AND MAURICE SCHWARZ AND WILLIAM I. STEIN, COEXECUTORS OF THE SAID ESTATE (PLAINTIFFS) v THE SHIPS "KATHY K" (ALSO KNOWN AS "STORM POINT"), AND "S.N. NO. 1", EGMONT TOWING & SORTING LTD., SHIELDS NAVIGATION LTD., LEONARD DAVID HELSING AND JAMES IVERSON (DEFENDANTS)
PLACE OF HEARING:	VANCOUVER, BRITISH COLUMBIA
DATE OF HEARING:	APRIL 4, 5, 6, 7, 8, 9, 10, 11 AND 12, 1972
REASONS FOR JUDGMENT:	HEALD, J.
DATED:	MAY 2, 1972

APPEARANCES:

J. Cunningham and P. Bernard	FOR THE PLAINTIFFS
D. Brander Smith and J.A. Hargrave	FOR THE DEFENDANTS

SOLICITORS OF RECORD:

J. Cunningham and P. Bernard	FOR THE PLAINTIFFS
D. Brander Smith and J.A. Hargrave	FOR THE DEFENDANTS