

Federal Court



Cour fédérale

**Date: 20120921**

**Docket: T-1174-07**

**Citation: 2012 FC 1110**

**Ottawa, Ontario, September 21, 2012**

**PRESENT: The Honourable Mr. Justice Lemieux**

**ADMIRALTY ACTION *IN REM* AGAINST THE SHIP “DUBAI FORTUNE”**

**BETWEEN:**

**GRIEG SHIPPING A/S**

**Plaintiff**

**and**

**THE OWNERS AND ALL OTHERS  
INTERESTED IN  
THE SHIP “DUBAI FORTUNE”,  
FORTUNE MARITIME LTD.,  
THE OWNERS AND ALL OTHERS  
INTERESTED IN THE “TIGER SHARK 2”,  
^, SMIT HARBOUR TOWAGE VANCOUVER  
INC., and BRAD DUESTERDIEK**

**Defendants**

**REASONS FOR JUDGMENT AND JUDGMENT**

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I. Introduction and Background

[1] In this action the Plaintiff, Grieg Shipping A/S (Grieg Shipping) sues the ship Dubai Fortune (Dubai Fortune) and its owner Fortune Maritime Ltd. (Fortune Maritime) on the basis they are vicariously liable for the negligence of a tug assisting in the berthing of the Dubai Fortune, at the time under compulsory pilots having conduct of that ship. On the morning of June 22, 2007, at about 10:14 a.m., the tug Tiger Shark 2 (Shark) struck the propeller of the M.V. “Star Hansa” (Star Hansa), also an ocean going bulk carrier, at the time safely moored at the Lynnterm Berth #1. The owner of the Star Hansa, Grieg Shipping, commenced an action claiming damages of \$2,700,000, plus interest. In addition to suing the Dubai Fortune and Fortune Maritime it also sued Smit Harbour Towage Vancouver Inc. (Smit), the owner of the Shark and of two other tugs, namely, the Tiger Spirit (Spirit) and the Tiger Sun (Sun) who also assisted in the berthing of the Dubai Fortune at Neptune Berth #3 located directly opposite the Lynnterm Berth.

[2] This Court is concerned only with the question of liability; the damage claim is to be determined at a later date, if necessary. Only two issues were raised as to liability:

- i. Is Fortune Maritime., the owner of the Dubai Fortune, vicariously liable to the Plaintiff for the damage caused by the Shark to its vessel the Star Hansa; and
- ii. If so, is the liability of the Dubai Maritime according to the tonnage of that ship, (27,000 tons) or to the tonnage of the Shark which is less than 100 tons.

[3] The determination of liability issue at the trial was simplified for the following reasons:

- i. First, in December 2011, Smit and Fortune reached an agreement to settle the issues between themselves. Smit admitted the damage to the Star Hansa was caused by the negligent manoeuvring of the Shark and agreed its owner Smit was entitled to limit its liability on the basis of the Shark's tonnage pursuant to the *Marine Liability Act* (SC 2001, c 6) (*MLA*) which, in its Schedule 1, incorporated into Canadian maritime law the Convention on Limitation of Liability for Maritime Claims (the 1976 Convention). According to section 29 of the *MLA*, Smit's maximum liability was \$500,000 because the Shark was less than 300 tons in gross tonnage.
- ii. Second, the Plaintiff, Grieg Shipping accepted Smit's tender of the \$500,000 on the express understanding it could press its claim against Fortune Maritime on the basis it was vicariously liable for the negligence of the Shark's Master. Claims against the other tugs were discontinued. Smit did not participate in the trial of the remaining issues which concerned only Grieg Shipping and Fortune Maritime and the Dubai Fortune.
- iii. Third, in closing arguments, counsel for Grieg Shipping conceded there had been no negligence on the part of the two pilots or any other person on the Dubai Fortune in berthing it. That concession left only the issue of vicarious liability alive in terms of liability.
- iv. Fourth, the parties agreed Fortune Maritime was entitled to limit its liability with the only question to be dealt with on that point was the size of its monetary limit, which as

noted, depends on which tonnage applies: the tonnage of the vessel being berthed or that of the Shark, the tug causing the damage. Fortune Maritime says the relevant tonnage to calculate its maximum liability is the tonnage of the offending tug, the Shark and therefore \$500,000 together with interest and costs to December 16, 2011. Fortune Maritime further argues the *MLA* and the Convention contemplates only one limitation fund for each distinct occurrence with the result that any liability it is obligated to pay is already subsumed by the \$500,000 payment Grieg Shipping received from Smit. On the other hand, Grieg Shipping says the relevant tonnage to fix Fortune Maritime's maximum liability is the tonnage of the vessel being berthed. If that is the case, the limitation fund would be sufficient to cover the damages suffered to the Star Hansa.

- v. Fifth, counsel for the Plaintiff and for the Defendants, the only remaining parties before me, submit the foundation for a finding of vicarious liability is grounded in the law of tug and tow which turns on the legal relationship between a tug and the vessel being towed or berthed, such legal relationship being predicated on the determination of whether, at the relevant time, the tug was the servant of the vessel being towed or berthed, a question decided by applying the test of who was in control of the damage causing manoeuvre of the Shark so as to make that person responsible at law for the Shark's negligence.

[4] Counsel for Grieg Shipping placed substantial reliance on the Federal Court's decision in *Canada v Delta Pride (The)*, 2003 FCT 11 (the Delta Pride) while counsel for Fortune Maritime stressed the importance of the U.K. decision in the "M.S.C. Panther" and the *Ericbank*, Vol 1, 1957, p 57, Lloyd's List Law Reports (the Panther) (*MSC Panther*).

## II. The berthing of the Dubai Fortune

[5] The berthing of the Dubai Fortune at Neptune Berth #3 situated in the confined waters of the basin in which are located both the Neptune and Lynnterm Berths took place, as noted, under compulsory pilotage governed by the *Pilotage Act* (RSC, 1985, c P-14). Its section 25, provides that subject to exemptions provided in the General Pilotage Regulations which have no application in this case, “no person shall have the conduct of a ship within a compulsory pilotage area (here the Port of Vancouver) unless the person is a licensed pilot.” Three tugs were necessary for the berthing of the Dubai Fortune: the Shark, the Spirit and the Sun, all owned and supplied by Smit. They had the following tasks:

- i. The Shark was designated as the line tug. It was not made fast to the Dubai Fortune by a line and thus could move freely. The Shark had a number of duties in relation to the berthing. It was to provide relevant ongoing information to the pilots on the progress of the berthing as the Dubai Fortune is a very large ship and the pilots, who worked in its stern area, could not assess what is happening in the bow area as the ship moves into its berth. In short, the Shark is to act as the eyes of the pilots as the Dubai Fortune advances into its slim berth at Neptune Berth #3 which has been described as a “finger berth” located next to the Lynnterm Berth #1 occupied by the Star Hansa, leaving only a narrow channel between the two ocean going bulk carriers for any movement of vessels or tugs.
- ii. The Shark had a second function. Once the Dubai Fortune was in about final position in its berth, the Shark was to take the ship’s bowlines dropped from the Dubai Fortune’s bowdeck and run them to the Neptune dock where waiting longshoremen

would tie them to bollards in order to secure the Dubai Fortune in place. Once the bowlines run and tight, the Shark was to depart from the Dubai Fortune's bow, travel down the narrow channel between the Dubai Fortune and the Star Hansa, passing behind the sterns of the Spirit and the Sun in order to run the Dubai Fortune's stern lines to the Neptune dock to secure the ship's stern.

- iii. The Spirit and the Sun operated as bow and stern assist tugs respectively. The Spirit's location was on the Dubai Fortune's starboard side bow area while the Sun was in the ship's starboard stern area. Both of these assist tugs were fastened by tug lines to the Dubai Fortune. The basic function of these two tugs was to respond to orders of the pilots to provide needed pushing or holding power in combination, if need be, with the Dubai Fortune's engines in order to place and hold the ship in its proper final position in the berth until the ship was securely moored.
- iv. The berthing operation was complicated by the appearance of another Smit tug, the Pacific Tyee (the Tyee); the Tyee was to replace the Shark as line tug since the Shark's Master was close to the end of his 12-hour shift which began the previous night at 10:00 p.m.

### III. The Case put forward by the Parties

#### 1. For the Plaintiff Grieg Shipping A/S

##### a. On Vicarious Liability

[6] Counsel for the Plaintiff states the Fortune Maritime is responsible for the negligence of the Shark, the sole cause of the damage suffered by its vessel the Star Hansa. He argues vicarious liability exists, as a matter of law, in connection with a berthing operation under conduct of

compulsory pilots. He also submits this case is indistinguishable from that of the Delta Pride and also relies on other authorities, such as *Hamilton Marine & Engineering Ltd. v CSL Group Inc.* [1995] FCJ No 739 (*Hamilton Marine*). He further submits vicarious liability has also been made out even on the “narrow” test where the conduct of the Shark’s Master must be analysed in its constituent parts in order to determine whether the specific negligent conduct fell within the jurisdiction or province of the Pilot or was a matter which was within the scope of the tug Master’s purview, beyond the pilot’s control.

[7] He submits, on the evidence before me, the Master of the Shark was negligent in departing the berthing operation early, without the permission of the pilots, and this; (1) before the bowlines had been run, (2) while the Dubai Fortune was still not in her final berth position, and (3) while the Spirit and the Sun were pushing to hold the Dubai Fortune against the Neptune dock creating turbulent water wash from their sterns. The evidence shows, he states, if the Master of the Shark had requested permission to depart early, the pilots would not have granted that authorization because of the very risk which eventually materialized; the fact it was unsafe to have a tug transiting the narrow channel between the Dubai Fortune and the Star Hansa when the berthing of the Dubai Fortune was not completed.

b. On the Limitation of Liability

[8] As noted, the only issue related to this question is the calculation of the Dubai Fortune’s limitation – is the limitation based on the tonnage of the Shark in which case the Plaintiff’s claim in vicarious liability, if successful, is limited to \$500,000 or is the limitation, as counsel for the



Plaintiff argues, based on the tonnage of the Dubai Fortune which would cover the damages to the Star Hansa.

[9] Counsel for Grieg Shipping relies on the Convention in 1976 as amended by the Protocol of 1996. As stated, the Convention was given force of law as Schedule 1 to the *MLA*. He cites:

- i. Chapter I of Schedule 1 headed “The Right to Limitation”, its Article 1 dealing with persons entitled to limit liability, and its Article 2 concerning claims subject to limitation;
- ii. Chapter II headed “Limits of Liability”, its Article 6 entitled “The General Limits”, and its Article 9 concerning the Aggregation of Claims.

[10] He notes the Convention contemplated the possibility signatories could enact an additional limits for owners of small ships and that Canada did so by enacting section 29 of the *MLA* which provides as follows:

Other claims

29. The maximum liability for maritime claims that arise on any distinct occasion involving a ship of less than 300 gross tonnage, other than claims referred to in section 28, is

- (a) \$1,000,000 in respect of claims for loss of life or personal injury; and
- (b) \$500,000 in respect of any other claims.

[Emphasis added]

Autres créances

29. La limite de responsabilité pour les créances maritimes — autres que celles mentionnées à l'article 28 — nées d'un même événement impliquant un navire d'une jauge brute inférieure à 300 est fixée à :

- a) 1 000 000 \$ pour les créances pour décès ou blessures corporelles;
- b) 500 000 \$ pour les autres créances.

[Notre soulignement]

[11] He submits the Plaintiff's position on limitation is straightforward: (1) The berthing operation was governed from the Dubai Fortune under the charge of two pilots in control of the berthing operation and the tugs assigned to assist in that operation; (2) that fact gives rise to liability on the part of the owner of the Dubai Fortune; and (3) if Fortune Maritime is liable, there is simply no basis on the words of the Convention, in policy or case law to apply a limitation based on tonnage of a vessel other than that of the Dubai Fortune. Fortune Maritime is clearly a shipowner as defined in the Convention. Grieg Shipping's claim is an eligible claim referred to in Article 2 thus qualifying it to avail itself of the limitation of liability provided for in the Convention and the limitation is calculated according to the tonnage of "the ship" which can only be the Dubai Fortune. He notes that Article 2 of the Convention applies to all claims in the categories referred to "whatever the basis of liability may be..." i.e. a claim based on vicarious liability. Counsel further relies on academic publications to support his argument.

2. For the Defendant Fortune Maritime, the owner of the Dubai Fortune

a. On Vicarious Liability

[12] Counsel for Fortune Maritime argues his client is not vicariously liable for the admitted negligent manoeuvring of the Shark's Master, which caused the damage to the Star Hansa. His argument is based on the nature of the act which caused the damage i.e. the negligent manoeuvre of the Shark - in his view the question is whether that act fell within the province of the pilots' on board, or as he claims, within the province of the Master of the Shark? He quotes the following extract, from the Panther, where Mr. Justice Willmer, the presiding judge, applied the principles

which the House of Lords had enunciated in *Mersey Docks & Harbour Board v Coggins & Griffiths (Liverpool) Ltd.* [1947] AC 1 (*Mersey Docks*):

- a) but, as against a third party who is injured by the act of a servant, the question which of two possible masters is liable (the regular employer or the temporary employer to whom the servant is loaned) does not depend on the terms of the contract made between the respective employers: it depends upon which employer has the right to control the servant, not only as to what he is to do, but as to the way in which he is to do it. Moreover, it has been held that where the servant of one employer is temporarily loaned to another, it requires cogent evidence to prove that the latter has acquired such a degree of control over the servant as to render him, rather than the regular employer, liable in the event of negligence on the part of the servant.
- b) But it is not enough that the task to be performed should be under his control, he must also control the method of performing it. It is true that in most cases no orders as to how a job should be done are given or required: the man is left to do his own work in his own way. But the ultimate question is not what specific orders, or whether any specific orders, were given but who is entitled to give the orders as to how the work should be done. Where a man driving a mechanical device, such as a crane, is sent to perform a task, it is easier to infer that the general employer continues to control the method of performance since it is his crane and the driver remains responsible to him for its safe keeping.
- c) It has been argued for the plaintiffs that the defendants, the owners of the *Ericbank*, are liable for that fault, firstly, because, in law, the crew of the tug are to be regarded as the servants of the owners of the tow, and secondly, because on the facts it is contended that it was within the province of the pilot on board the *Ericbank* to order the tug's engines to be stopped. So far as the latter point is concerned, it is, I think, unarguable. No pilot can possibly be expected to control the individual manoeuvres of his two tugs. The evidence shows that, in practice, the detailed manoeuvres of the tug are, and must be, left to the discretion of the tug-master, the duty of the pilot being confined to giving general directions, such as to start or stop towing, or to tow in this or that direction. I do not see how a pilot on the bridge of a large ship can possibly be expected to direct the engine movements of a stern tug, operating some three or four hundred feet behind his back, and mostly out of sight, or even to know who the engines of the tug are working at any particular moment.

d) It seems to me that what applies to a crane and its driver should apply equally to a tug and its master or officer in charge. Accordingly, applying the principles there stated to the facts of this case I find myself quite unable to hold that the crew of the *M.S.C. Panther* became in law the servants of the owners of the *Ericbank*, so as to render the latter, and not the former, liable for a faulty manoeuvre within the province of the man in charge of the tug. The position would, I apprehend, be different if the faulty manoeuvre were one within the province of the pilot or officer in charge of the tow, e.g., if the tug failed to carry out an order, or negligently executed without orders a manoeuvre which it was within the province of those in charge of the tow to order. Here, however, the faulty manoeuvre of failing to stop the port propeller in time was a matter which concerned the tug alone and not the tow, and in such circumstances I hold that the liability for the negligence of the mate of the *M.S.C. Panther* rests with his regular employers, the owners of the *M.S.C. Panther*.

[Emphasis added]

[13] Counsel for Fortune Maritime argues the evidence in this case is clear. Immediately before striking the Star Hansa, the Shark bumped the stern of the Sun which was tied to the starboard stern quarter of the Dubai Fortune. This bumping of the Sun caused the Shark to veer sharply across the narrow channel separating the two ocean bulk carriers. He quotes the Master of the Shark as testifying that “if I had not contacted the Sun, I would have been on my proper line-up and probably gotten out.” In counsel’s view, but for that collision between the Shark and the Sun, the damage to the Star Hansa would not have happened. In sum, it was this negligent manoeuvring of the Shark which was the ultimate cause of the damage; a manoeuvre which could not be possibly controlled by the pilots on board the Dubai Fortune. Manoeuvring a tug is within the province of the operator of the tug.

b. On the limit of liability

[14] Counsel for Fortune Maritime argues his client is able to rely on Smit's limitation fund. He relies on the Supreme Court of Canada's decision in *Rhône (The) v Peter A.B. Widener (The)*, [1993] 1 SCR 497 (*Rhône*) which interpreted the limitation of liability provisions then contained in the *Canada Shipping Act* (RSC, 1970, c S-9), particularly in sections 647 and 649. The *Rhône* suffered damage when moored; it was struck by the *Widener* a dumb barge with a captain on board and was being towed by four tugs owned by three different companies. The cause of the accident was the result of navigation errors by the captain of the lead tug described as the "de facto master of the flotilla."

[15] Counsel quotes paragraph 66 of the *Rhône* decision as indicating the intent of subsection 647(2) of the *Canada Shipping Act* was to:

... limit liability for navigational errors according only to the tonnage of those vessels causing the alleged damage. Apart from the vessel responsible for the overall navigation of a flotilla, only those vessels of the same shipowner which physically caused or contributed to the resulting damage form the unit for which liability is limited.

[Emphasis added]

[16] Counsel in the *Rhône* decision had argued liability should be calculated based on the tonnage of the lead tug alone "as it would be counter to the intent of these limitation of liability provisions to include within the unit of limitation a helper tug not committing a fault of its own or otherwise physically causing the impugned damage." That is the circumstance of the innocent *Dubai Fortune* submits counsel for Fortune Maritime. He relies on a number of decisions of this Court which followed the *Rhône*.

IV. The Evidence at Trial

[17] The following witnesses were called by counsel for Grieg Shipping: (1) the Shark's Master, Captain Duesterdiek, (2) the Spirit's Master, Captain O'Brien, (3) the two pilots on board the Dubai Fortune, Captains Roman and Rayner. Counsel for the Defendant Fortune Maritime called Captain Broderick, the Sun's Master. Neither party called the captain of the Tyee as a witness.

[18] I also mention counsel for Grieg Shipping proposed to advance the testimony of an expert witness. After reading his proposed testimony, hearing a summary of his proposed evidence, followed by his cross-examination on that summary and hearing both counsels' submissions, I declined to accept his need as an expert witness on the sole grounds his testimony had been overtaken by direct evidence at trial presented by the tug masters and by the pilots. Had I not received this direct evidence from previous witnesses I would have heard him.

[19] I now to briefly summarize the *viva voce* evidence noting an agreed statement of facts is in the record.

[20] It is appropriate to first summarize the pilots' evidence noting Captain Rayner was in charge of the berthing. Because he was an apprentice pilot (very close to completing his apprenticeship), he was under the supervision of Captain Roman who testified Captain Rayner had conducted the berthing of the Dubai Fortune very well.

### 1. The testimony of Captain Roman

[21] Captain Roman was the senior pilot supervising Captain Rayner. He stated the following on direct examination: (1) with a ship docked at the opposite berth, he considered the berthing at Neptune 3 or Lynnterm 1 “one of the two most difficult berths to deal with on a day to day basis in Vancouver Harbour” (Transcript p. 281), (2) the significance of a confined berth in the berthing process arises from the fact a large ship displaces water as it advances into a berth; that water has to go somewhere usually running ahead of the ship and must dissipate “so it has to run between you and the ships or inside the berth creating a “flushing effect” (Transcript p. 282), (3) the time it took to berth the Dubai Fortune was normal but what was unusual it was having a bit of a problem because it kept sliding back in the berth which he attributed probably to the water displacement. The ship’s engine was used to kick the ship ahead (Transcript p. 283), (4) it was then he heard over the radio channel one of the assist tugs was powering down or reducing its RPM to let the Shark go by, which he thought unusual, because the headlines still had not been run; the Shark, being the line tug, was needed as the eyes of the pilots since they could not see beyond the ship’s bow it being so high; although the ship was alongside and the spring lines had been run but not made fast (Transcript p. 311), the Dubai Fortune was still shifting back and Captain Rayner had not dismissed the Shark or talked to it (Transcript pp. 283-284), (5) usually in a case where a tug has to leave or depart, the line tug stays to run the headlines, the arriving tug does the stern lines in order to avoid the interaction of tugs departing and passing especially at a confined basin. He stated the pilot really needed the line tug there all the time until the ship is safely secured (Transcript pp. 284-285), (6) a finger berth is one which has a dead end; the Neptune berth faces north/south and when entering it there is actually no place to go if anything goes wrong; the ship is more subject to change and shift as compared to a standard berth where manoeuvrability is greater or where it can ride with

the current (Transcript p. 287), (7) from a safety viewpoint, it would not be prudent for tugs to be going back and forth through the wash, i.e. the transit of a departing line tug passing the ship being berthed in the confined space when another ship is berthed at Lynnterm 1 and this before the bowlines are run (Transcript p. 293), (8) with the Dubai Fortune still moving into final position and the bowlines not run, if the Shark had called him for permission to depart, he would ask why it needed to depart and probably would have refused permission unless the Shark provided him with an urgent reason related to safety. (Transcript p. 295), (9) he reiterated the line tug was important being the eyes in the berthing process and the ship would not have been secured until the bow and stern lines were on the dock and tight; in other words, the job was not yet completed (Transcript p. 295), (10) having two tugs running back and forth was an unnecessary risk because something may go wrong (Transcript pp 296-297), (11) after he found out the Shark had departed he called the tug but received no reply, (12) he called the Shark because he was upset since the Shark had departed from the berthing operation without asking permission and Captain Rayner had not dismissed him from performing his duties (Transcript p. 298); he had previously said that subsequently he had spoken to other tug captains who indicated they had never heard of a line tug leaving operations without advising or asking for permission to leave (Transcript p. 291).

[22] On cross-examination, Captain Roman; (1) acknowledged the Shark had not been used in the berthing that day (Transcript p. 302), (2) the pilots had not issued any instructions to the Shark “in so far as the berthing was concerned” (Transcript p 302), (3) the Dubai Fortune was in final position in its berth i.e. when the ship’s gangway is positioned on the dock (Transcript p. 308), (4) generally after finishing the bow lines, the line tug automatically goes to do the stern lines, (5) a pilot does not manage or direct how a line boat would transit from bow to stern (Transcript p. 310),



(6) the Tye finished the job of running bow and stern lines and that created no problem (Transcript p. 312), (7) the Tye was able to transit without issue south to the north (Transcript p. 313), (8) it was usual for a line boat to do the stern lines after running the bow lines even with two vessels in the basin; it is standard procedure adding “with the headlines tight there is no issue with the tugs powering down” but without the headlines up, the assist tug must (upon direction) push to hold but how much power they apply to hold is up to them, which varies depending on the size of the tug. It is in their control. (Transcript pp. 313-314), (9) the line tug does not ask the pilot for permission to head to stern because he knows his job and how to do it but it is standard procedure to advise that the headlines were done (Transcript pp. 314-315), (10) the pilot cannot control how a tug master undertakes his job (Transcript p. 315), (11) a pilot provides general orders or requests to the assist tugs (Transcript p. 315), (12) the tug captain manoeuvres his vessel to carry out those general directions (Transcript p. 315), (13) and he would do that in a manner he or she saw fit (Transcript p.315), (14) a pilot does not provide instructions to a tug captain on how to run their tugs (Transcript p. 315), (15) a pilot cannot control how a captain of a tug actually controls his tug except the only way he could is if he said push half and it is more than he wanted them he would order to drop it down to easy. Captain Roman said “So I will direct him on the amount of push that he has” (Transcript p. 316), (16) that is a general direction and the tug captain would then use his discretion to determine how best to carry out that command (Transcript p. 316), (17) the line tug is somewhat secondary to a berthing operation (Transcript p. 317), (18) line tugs do their job without a lot of communicating with the pilot in respect of running his lines but the other side of the equation the pilot is communicating with him on the distance ahead, how close are the ship is to the derrick barge – the line tug is their eyes especially in this berth (Transcript pp. 317-318), (19) they control their tug in the way they do their job; in handling the lines; how to deal with the current or wash; how to

manoeuvre his tug between the bow and the stern of a vessel; a pilot can't control how a tug captain actually manoeuvres his vessel (Transcript p. 319), (20) "Sometimes the headlines get jammed on an anchor and the line boat will have departed before the lines are tight in which case I will say go back, we have a problem, we have a hang up with a line" [Emphasis added] (Transcript p. 320), (21) he acknowledged a line tug can depart before the headlines are tight "It does happen yes" (Transcript p. 230), (22) the assignment of an assist tug to the bow (the Spirit) or the stern (the Sun) with the Shark off berth is up to the pilot (Transcript pp. 321), (23) on questioning by the Court, Captain Roman conceded the Tiger Shark was engaged in berthing because he had the job of running the bow and stern lines and bringing them to the dock but the Shark left before doing that and Captain Roman is mad about that.

## 2. The testimony of Captain Rayner

[23] As noted, Captain Rayner was in command of the berthing of the Dubai Fortune on June 22, 2007; he was an apprentice pilot who became a pilot on July 9, 2007 (Transcript p. 330); he had berthed 113 ships in the course of his apprenticeship and was under the supervision of Captain Roman.

[24] On direct examination Captain Rayner testified: (1) during the course of the berthing he heard from the working channel the Shark was either proposing to depart or departing and the Spirit was powering down to let the Shark pass (Transcript p. 333), (2) "at the same time or shortly thereafter the pilots heard the Tyee, another line boat, coming into the conversation on the working channel" (Transcript p. 333), (3) he had not received any prior call from the Shark concerning its departure and it seemed strange what was going on (Transcript p. 336), (4) he had no knowledge the

Tyee was coming (Transcript p. 337), (5) the bow lines had not been run, (6) it was not an appropriate time for it to depart for a number of reasons, namely, it was a tight spot to get into; as the berthing vessel moves into the berth, the line tug moves ahead of the ship since there is virtually no room to get by so he stays forward to take the headlines with the additional fact the bow assist tug, secured to the ship's starboard bow, is a blocker which the line tug generally cannot get by without manoeuvring quite carefully. He is also the pilots' eyes – a safety check for issues in the bow area (Transcript pp 337-338), (7) if he had received a call from the Shark requesting to leave prior to the headlines being run he would have deferred to the senior pilot, but if alone, would have asked him why he needed to leave and if he answered “a shift change” he would have refused him permission to depart (Transcript pp 338-339).

[25] On cross-examination, Captain Rayner testified; (1) the pilots chose the tugs that they felt were required for the job (Transcript pp 342-343), (2) the tide was not significant, it was not of concern that day but still had to be accounted for on the approach to the berth (Transcript p. 345), (3) the visibility was good; the weather was pleasant (Transcript p. 346), (4) he did not use the assist tugs on the approach to berth; there was no wind and the current minimal; he used the ship's engine and rudders to manoeuvre into the entrance of the berth (Transcript p. 351), (5) he was aware of the presence of the Star Hansa, (6) the Dubai Fortune lined up well; it was not setting much at all (Transcript p. 354); he did not have any concern with the Star Hansa given the width of the Dubai Fortune its parallel position advancing into the berth, the small amount of current and tide, and his ship was close to the side of the Neptune 3 dock (Transcript pp. 354-355), (7) as the Dubai Fortune was moved in final position he used the assist tugs a few times either to back or to push in order to keep the Dubai Fortune parallel to the dock; he also confirmed he used the Dubai Fortune engines to

kick it astern alongside the berth to ensure a perfect fit with the gangplank and he had to make a further adjustment by ordering at 10.13.5 the Dubai Fortune to kick forward a few metres.

(Transcript pp. 358-366), (8) he did not give the Shark any instructions at this stage of the process since his remaining task was to run the headlines and the Shark was not taking part in what the Dubai Fortune was doing at that stage (Transcript p. 366), (9) he agreed, at this stage of the Dubai Fortune's berthing, the Sun was at idle; it was a powerful tug and anything more than idle would have been unnecessary (Transcript pp. 367-368), (10) he did not have any communication with the Shark before its departure (Transcript p. 368), (11) he had no knowledge with respect to the Tyee at that time but acknowledged the Tyee was present at the bow of the Dubai Fortune to run the lines at the appropriate time, that is, after the gangway was all set up. The timing of the Tyee's positioning was just fine. His only duties were to run the headlines (Transcript p. 369), (12) after the Tyee came into the basin the pilots told its Master where matters stood; the Tyee went in, did the job and then went to do the after lines; he did not tell the Tyee to do the lines; its Master knew his job; he did not need the pilot to direct him and he did not control the Tyee in any way adding because Neptune 3 is a tight spot "we had set the headlines to make sure they were tight and secure; the Tyee had to get by the Spirit (Transcript pp. 370-371), (13) he assumed the Tyee, once the headlines were on shore, would have waited for the Spirit to power down for him to get past; the Spirit would have been pushing at that time (Transcript p. 371), (14) tug captains are experienced and competent; the pilot does not direct a tug engine's movement; a tug captain is master of his own vessel "so generally they will judge if it is safe to go behind another tug in that tight spot" but he acknowledged if a tug had been tasked to push a ship alongside and felt it might affect the ship's position he may or should contact the pilot for permission to power down to let the other tug boat behind him by, (15) he did not give any directions to the Shark or the Tyee and would not tell the skippers of any of those tugs

how to operate their vessels and would not have the expertise to do so and do not control his tug (Transcript pp. 374-375), (16) “we give them orders how to manoeuvre our ship” [Emphasis added] and if he feels such order will jeopardize the safety of his tug he will say so. “How they accomplish our orders is their responsibility” and within their own skill and judgment (Transcript p. 376), (17) on a question from the Court, Captain Rayner admitted he knew the Shark had departed; he saw the Tyee, a line boat, coming in and knowing the Dubai Fortune was already safely alongside the switch by the Tyee with the Shark was okay because he had his two docking tugs and being safely alongside he could sit there for half an hour waiting for a line tug replacement. (Transcript pp. 377-379).

[26] On re-examination, Captain Rayner testified: (1) at the time of the Shark’s departure his direction to the Spirit and the Sun was to push to hold the ship in the berth (Transcript p. 380); (2) did not recall instructing the Spirit to give the Dubai Fortune a little push up the berth; (3) it was standard practice for the line tug to advise the pilot the headlines were ashore; (4) if the headlines were slack he would instruct the line tug to wait at the bow of the ship until they had tightened up so as to enable the bow assist tug to ease off and even be let go (Transcript pp. 380-382).

### 3. The testimony of Captain Duesterdiek, the Master of the Shark

[27] The Master of the Shark was called under the adverse witness rule with the consent of both parties as provided for in the *Canada Evidence Act* (RSC, 1985, c C-5). He is a qualified and experienced Tug Master in Smit’s employ since 2002. He was the skipper of the Shark on July 22, 2007 having starting his 12-hour shift at 10:00 p.m. the previous evening and was due to be relieved at 10:00 a.m. the day of the incident.

[28] In his direct examination (Transcript p. 141) he testified:

- i. The three tugs were necessary to berth at Neptune an ocean carrier such as the Dubai Fortune.
- ii. The pilot is in charge of berthing the vessel and issues commands as appropriate.
- iii. As the line tug, the Shark's duties were to act as the eyes of the pilot providing him with all relevant information such as the ship's distance to the end of the berth; after the ship is alongside the dock (in final position or virtually so) to take the headlines from the bow of the ship to the dock then move to the stern of the ship to do the stern lines (Transcript pp. 151, 153).
- iv. The Neptune 3 berth was a confined finger berth with the Shark backing in the basin rather than being alongside the Dubai Fortune because there was not a lot of space up there with the Dubai Fortune, the Star Hansa and a derrick barge present (Transcript p. 162).
- v. He departed his position at the bow on the starboard side of the Dubai Fortune after that ship was in position (Transcript p. 163); however, shortly before leaving to get out in order to let the Tyee take his place he told the crew of the ship to stop lowering the headlines from the Dubai Fortune's bow deck into the water. He did so because the Spirit was pushing (and would be until the headlines were on the dock) creating a wash and a risk the lines could get into the Spirit's wheel. The spot to bring the Dubai Fortune headlines on board the deck of the Shark was not a good one and, in any event, he was not taking the lines and was leaving because the Tyee was to replace

him and there was no room for three tugs and the derrick barge in that area of operation. When he departed his position off the starboard side of the Dubai Fortune, the Tyee was in the channel between the Dubai Fortune and the Star Hansa, halfway between the position of the Sun and Spirit (Transcript pp. 167-171).

- vi. He acknowledged the Tyee was not just sitting at that point before the Shark passed her stern on its way out of the basin because, as it was coming towards the bow of the Dubai Fortune there was a constant flow of water from the two assist tugs pushing the Dubai Fortune which meant the Tyee would have to be dealing with turbulent water (Transcript p. 171).
- vii. After departing, he went past the Spirit and had to deal with its wash adding that was normal in the sense there will always be a degree of wash from tugs (Transcript p. 171); it was a matter of steering the tug (Transcript p. 174).
- viii. He confirmed, on a normal day as opposed to June 22, 2007, he would not exit the bow area until he had completed running the headlines to the dock. The assist tugs would push until the pilot told them to stop pushing which would not be until the ship was fully secure (Transcript p. 172).
- ix. H confirmed, after passing the stern of the Spirit, he was in the vicinity of the Tyee, which, at the time was between the Spirit and the Sun. At that spot, he said the Shark was influenced by the outflow of water displaced by the Dubai Fortune advancing into the berth and from the wash from the tugs (Transcript p. 175). The presence of the Tyee caused him to change his line-up for exiting the basin (Transcript p. 176). After passing the Tyee, he was within a matter of seconds of approaching the Sun.

- x. Counsel for Grieg Shipping suggested to him that, after passing the Tyee he had limited control of the Shark (Transcript p. 176) to which the Master replied:

Well, my position was not where it would normally be if there wasn't a tug there. My line-up would have been different. I had to manoeuvre around the Tyee and past the Tyee. So my position wasn't perfect to exit out, but you are committed in that scenario because the sheer turbulence is kind of let you go out and you are already going, and there is delays on throttles on the tug and so I caught the side of the Sun on the way out.

[Emphasis added]

- xi. He agreed he was nosing out with the current (Transcript p. 177).
- xii. It was suggested to him he had less control when nosing out of a current to which his response was:

A. Well, there's not a steady current. It's turbulent.

Q. Yes.

A. So it's not like a constant steady. You still have wheel wash from the Sun bouncing off the Star Hansa as well.

Q. And you had to -- did you have to change your course somewhat from normal because of the location of the Tyee?

A. In that space you're adjusting your throttles and steering accordingly. You work by feel.

[Emphasis added]

- xiii. It was suggested to him there were differences on June 22, 2007 notably the presence of the Tyee, a fourth tug sitting between the two assist tugs to which the Shark's Master answered "correct" (Transcript p. 178).

- xiv. It was suggested to the Shark's Master that prior to contacting the Sun "you were essentially spinning or losing control to some extent of the Shark" to which he responded that he was always in control of the Shark (Transcript p. 182).



- xv. In the dialogue between Grieg Shipping's counsel and the Master of the Shark about his manoeuvres to pass the stern of the Sun (Transcript p. 191) Captain Duesterdiek said (1) after passing the Tyee "I was turning back to get on my line-up to get out" (Transcript p. 182); (2) "normally when you are passing a tug that is pushing you try to pass as close as you can to the stern because the wheel wash is not as strong right at the stern... so the tighter you pass the stern, the less effect you are going to have" (Transcript p. 183); (3) passing the stern of a pushing tug he would be kicked portside but would steer to counteract; (4) he did not have a good line alongside the Sun's stern in part due to the Tyee and the volume of water (Transcript p. 184); (5) that striking the Sun actually helped him just slightly which prevented the Shark from hitting the Star Hansa at 90° (Transcript p. 184); (6) if he had not contacted the Sun "I would have been on my proper line-up and probably gotten out" [Emphasis added] adding he was not properly lined up leaving (at a bit of an angle) and being on a boat moving through the water he contacted the Sun stern to stern (Transcript p. 185); (7) in normal circumstances passing a stern tug he would "be blown some distance" across the water of the basin in this area (Transcript p. 186) which in discovery he acknowledged would be ten feet depending on the horsepower of the Sun. If it was a 5000 horsepower he would have been blown 40 feet; (8) in any event he could not stop the Shark from moving towards the Star Hansa but, in control of his tug, attempted to steer right to lessen the damage (Transcript p. 188); (9) he had berthed many ships at Neptune 3 and never struck a vessel (Transcript p. 189); (10) he did not recall, at Neptune 3, ever departing the bow before running the headlines (Transcript p. 191); (11) he left the bow of the Dubai Fortune without asking the pilot but added he let the

pilot knew that a crew change was coming, and upon further questioning on this point, the Shark's Master admitted there was no discussion with the pilot that he might be departing before the bow lines had been run (Transcript p. 197-198); (12) asked by counsel for Grieg Shipping whether there was nothing he could have done differently that day that would have made a difference to the outcome he responded the controls were working fine and upon a further question said "I could have not left the bow" [Emphasis added] (Transcript p. 199-200); (13) in terms of actual manoeuvring or handling the Shark he responded "I've done the same manoeuvre many times before and since and I haven't had that result (Transcript p. 200); (14) after the accident, Smit held a safety meeting; there was no criticism of his handling of the Shark. The focus of that meeting was in respect of confined berths in Vancouver Harbour. The result was a change in procedure. The Tyee was to be the line tug because it was smaller. The line tug would be required to run the bow lines; wait until they were secured tight; have the bow assist tug stop pushing before departing to the stern and no crew changes could take place in confined berths (Transcript pp. 2002-2004).

[29] On cross-examination, Captain Duesterdiek gave the following answers: (1) in the ordinary course he would have taken the lines the ship's crew had lowered in order to run them to the dock without any direction from the pilot because it was known he was there to take the headlines (Transcript p. 216); (2) in normal circumstances, at the stage of running the lines, the assist tugs would continue to push to hold the vessel to the degree directed by the pilot (Transcript p. 217) and to the extent ordered by the pilot would stay in that position while the line tug proceeded to the stern (Transcript p. 219); (3) As the time of his departure he believed the Spirit and the Sun were at idle or at easy which created significantly less wash than having it at half or full (Transcript p. 219); (4)

in the ordinary course, he would have done the stern lines without instructions; nobody need tell him to do it or how to do it; he knows his job (Transcript p. 220); (5) he drives his tug in accordance to his own judgment and skill as a tug master; he controls the driving of his tug; (6) if he operated his tug badly, his employer Smit would take action not the pilot (Transcript p. 221); (7) the timing of his departure to do the stern line is his decision but typically he would wait for the lines to tighten up (Transcript p. 222); (8) when he departed his bow position he was aware of the fact the Tyee was between the Spirit and the Sun and he controlled his vessel as it passed that tug (Transcript pp. 222-223); (9) he confirmed in the Dubai Fortune berthing operation he was not tied to that vessel (Transcript p. 225); that the tide was not of consequence; the Dubai Fortune's, line entering the basin, was excellent: by the time the ship's gangway is in a position where it can go on the pad the task of being the eyes of the vessel is well over "because you have given him his distances and counted down, he's aware" (Transcript pp. 226-227); (10) at that stage, the Dubai Fortune is safe from the Star Hansa; the ship is essentially in a fixed position with two tugs holding her and the spring lines are ashore (Transcript p. 227); (11) he confirmed his discovery answer, that for a line boat, the pilot does not issue specific commands unless the job is going wrong which was not the case on June 22, 2007; it was going well (Transcript pp.228-229); (12) he was not asked by the pilot to do anything (Transcript p. 232); nor given any directions or orders throughout (Transcript p. 233); essentially he was on his own; he knew what he had to do and used his own judgment in doing it (Transcript p. 233); (13) the Tyee's crew was going to do the lines (Transcript p. 235); (14) he told Captain Rayner sometime before the Dubai Fortune entered the basin the Shark was going to be relieved by the day shift crew if they arrived in time but he never told the pilot he would be leaving before the bowlines had been run (Transcript p. 237); (15) he admitted he got into a situation where he was a little bit too close to the Sun and the two tugs bumped (Transcript p. 244);

the striking of the Sun and the wash changed the whole situation; if it was just a wash he would likely have been moved 5 to 10 feet towards the Star Hansa, the space in the channel at that point being approximately 53 feet, he would have made a small correction in his steering to make sure he stayed starboard [as opposed to going to port transiting a considerable distance towards the Star Hansa] (Transcript pp. 245-246); he confirmed that a combination of the bump and what happened after that because of the Sun's wash which he knew how to deal with took him all the way across into the Star Hansa which was not a long distance adding the presence of the Tyee (affecting his line-up) was an additional factor (Transcript p. 246); (16) when asked the question there is nothing that the pilot said or did or did not do that caused what happened, he answered "that is correct" (Transcript p. 247); (17) he confirmed or re-confirmed that pilots do not tell him or try to tell him how to run his tug and if they did he would not take their direction (Transcript p. 252).

[30] Counsel for Grieg Shipping did not re-examine the Shark's Master.

#### 4. The testimony of Captain O'Brien, the Master of the Spirit

[31] Captain O'Brien was the Master of the Spirit on June 22, 2007. He has a wealth of experience on tugs, line, stern assist and bow assist tugs engaged in berthing in confined berths such as at Lynnterm /Neptune (Transcript p. 255).

[32] The main aspects of his direct evidence were: (1) the Lynnterm/Neptune basin is quite confined at the north end, a relevant consideration in terms of berthing ships in terms of safety of the operation (Transcript p. 256); (2) he has never left his station at the bow of a ship being berthed before running the lines at any berth in the Port of Vancouver unless the pilot told him to (Transcript

pp. 256-257) which happened when he was instructed by a pilot to do the stern lines first; (3) he would not necessarily communicate with the pilot once the bow lines had been run; he would naturally go to the stern (Transcript p. 258); (4) after running both the bow and stern lines, he would say to the pilot that the lines had been run and the pilot would relieve him (Transcript p. 258); (5) he would only push against the Dubai Fortune if instructed to do so by the pilot in accordance with the power the pilot wanted from the tug's engines (Transcript pp. 259-260); the pilot instructed him to push ahead and was pushing ahead when the Shark departed after its headlines had been dropped by the crew of the Dubai Fortune and taken back again (Transcript p. 263); (6) it was unusual for a line tug to depart from the bow before the headlines had been run and for the assist tugs to be pushing the ship ahead (Transcript p. 263).

[33] On cross-examination Captain O'Brien made the following points: (1) he would not necessarily wait for a pilot's order to run the lines (Transcript p. 266); (2) the crew of the Dubai Fortune dropped the bow lines to the Shark when the vessel was in position but not necessarily in position for her final mooring (Transcript p. 266); (3) the pilot does not tell him how to operate or drive the tug or run the lines (Transcript p. 268); (4) manoeuvring the tug when travelling from bow to stern to run the stern lines is not difficult in terms of the wash they create when the assist tugs are pushing to hold at easy or at idle (Transcript p. 268); (5) a line tug passing behind the stern of the stern assist tug such as the Sun would experience some wash and push him 5 to 10 feet but cause no problem because he was trained to manage the situation (Transcript p. 269).

##### 5. The testimony of Captain Broderick, the Master of the Sun

[34] Captain Broderick was the Master of the Sun, the stern assist tug which the Shark bumped into on June 22, 2007. He has been an employee of Smit since 1994 and has substantial tugboat berthing experience. He provided the following answers in direct examination: (1) he confirmed that a pilot would give a command he wanted to be followed but not how to do it; (2) the tug master manoeuvres the tug the way he thinks will do it best; (3) the pilot does not tell the tug master how to manoeuvre the tug; (4) that is a matter for his skill and judgment (Transcript p. 462); (5) prior to entering the Neptune 3 berth the pilot would instruct the tugs what he wanted from them at their assigned positions which in his case was as the stern tug secured to the Dubai Fortune by the Sun's line (Transcript p. 463); (6) once that occurred he would wait for the pilot's instructions (Transcript p. 464); (7) he could not recall specific orders from the pilot but they would be to push or pull, whatever was needed; (8) it was up to the tugmaster to use his throttles in order to develop the power the pilot was requesting (Transcript p. 465); (9) the main task of the assist tugs was to keep the Dubai Fortune parallel to the berth (Transcript p. 466); (10) he saw the Tyee pass his stern after coming into the basin at a time when he was probably more than idle; (11) the last time he saw the Tyee she was approximately half way up the channel between the Dubai Fortune and the Star Hansa on the side closest to the ship being berthed and the Tyee was between the Sun and the Spirit (Transcript pp. 466 – 468); (12) he felt a bump and looked behind, the Shark had bumped into his starboard stern, he was in the wheelhouse, 30-40 feet away he then saw the Shark heading straight towards the Star Hansa then saw it turning to starboard (Transcript pp. 470-471); (13) he confirmed that at the time the Shark struck him he was at idle which meant the Sun's wash was minimal (Transcript p. 472).

[35] On cross-examination Captain Broderick testified: (1) the first direction he received from the pilot was his place as stern assist tug; (2) he was under the pilot's direction during the berthing and at the end of the berthing process the pilot will give some direction to release him (Transcript p. 473); (3) the Sun was the largest tug in the Smit fleet at the time and when operating puts out substantial wash (Transcript p. 476); (4) he was idle on both propellers pushing in towards the Dubai Fortune so that his wash was all coming out towards the Star Hansa (Transcript p. 479); (5) as a line tug he would not depart the job without communicating with the pilots and he has never done so (Transcript p. 479); (6) on a question from the Court Captain Broderick confirmed the pilot does not tell him how to execute his command but tells him what operation to perform, he obeys the pilot's commands and if the pilot wants a correction he will so advise him (Transcript p. 481).

#### V. Some Principles

[36] Before embarking on the analysis, it is useful to set out certain principles underpinning this action.

[37] First, vicarious liability is a liability applied by the Courts, usually in tort actions, to various parties such as an employer even though that person is not personally at fault. Vicarious liability is also known as strict or no fault liability (See, *Bazley v Curry* [1999] 2 SCR 534 Reasons for Judgment by the Chief Justice at paragraph 1; see also *Viasystems (Tyneside) Ltd. v Thermal Transfer (Northern) Ltd & Ors* [2005] EWCA Civ 1151, a recent decision of the U.K. Court of Appeal at paragraphs 45 and 54 (*Viasystems*)).

[38] Second, the imposition of vicarious liability requires justification. In the case of the negligence of an employee placing the responsibility for that fault on the shoulders of the employer is justified on the basis the employer has the right to control the manner in which the employee does his work. As explained by the House of Lords in the *Mersey Docks* case where Lord Uthwatt wrote the following at page 21 of the reported case:

To establish the power of control requisite to fasten responsibility upon him, the hirer must in some reasonable sense have authority to control the manner in which the workman does his work, the reason being that it is the manner in which a particular operation (assumed for this purpose to be in itself a proper operation) is carried out that determines its lawful or wrongful character. Unless there be that authority the workman is not serving the hirer, but merely serving the interests of the hirer, and service under the hirer in the sense I have stated is essential. Whether there is or is not such service in any particular case is a question of fact, the object being to ascertain the broad effect of the arrangement made.

[Emphasis added]

[39] In that same case Lord Porter, at page 18, wrote:

In the case before your Lordships the negligence of the workman lay not in the performance of any act which the respondents could and did direct and for which, because they procured it, they would be responsible, but in the manner in which that act was performed, a matter in which they could give no direction and for which they can have no responsibility.

The doctrine of the vicarious responsibility of the "superior," whatever its origin, is today justified by social necessity, but, if the question is where that responsibility should lie, the answer should surely point to that master in whose act some degree of fault, though remote, may be found. Here the fault, if any, lay with the appellants who, though they were not present to dictate how directions given by another should be carried out, yet had vested in their servant a discretion in the manner of carrying out such directions. If an accident then occurred through his negligence, that was because they had chosen him for the task, and they cannot escape liability by saying that they were careful in their choice.



Suppose that the negligence of the craneman had resulted in direct damage to the respondents, I do not see how the appellants could escape liability.

[Emphasis added]

[40] Third, the control test applies in maritime law to tug and tow cases in order to determine the liability of a blameless tow in respect of the tug who was towing her. In 1912, the House of Lords in the case of the *S.S. Devonshire and the Owners of the Barge Leslie* (H.L. (E) 1912) Lord Atkinson wrote, at page 654 of the reported case that the question:

[...] is whether or not the relation of master and servant existed between the owners of the tow and the persons in charge of the tug, that no general rule can be laid down, that the question whether the crew of the tug are the servants of the owners of the tow must depend upon the facts of each case. In that particular case it was clear that “although there were men on board the barge, the navigation was in the hands of the master of the tug, and the bargemen could do nothing to avoid collision.” They accordingly held that both on reason and authority the owners of the barge were exempt from liability for the negligence of the tug.

[Emphasis added]

[41] Fourth, Justice Nadon, then of the Federal Court Trial Division, commented on the Law of Tug and Tow in the case of *Hamilton Marine & Engineering Ltd. v CSL Group Inc.* [1995] FCJ No 739 (*Hamilton Marine*). In that case, the plaintiffs were the owners of the tug James E. McGrath which capsized and sank while assisting the defendants' ship the Hon. Paul Martin out of a fit out berth at the Port Weller Dry Docks. The plaintiff sued the owners of the Hon. Paul Martin in negligence alleging the ship's captain and pilot failed to allow the tug to get to a place of safety prior to putting the ship's engines ahead, thereby creating an excessive propeller wash. Justice Nadon dismissed the plaintiff's action having failed to prove negligence on the part of the tow but rather ruling the tug's capsizing resulted from the negligence of the tug's captain and his crew

members in that they failed to keep a proper look out and to advise the ship of their movements and whereabouts.

[42] In *Hamilton Marine*, Justice Nadon stated the case before him turned on the legal relationship between a tug and the vessel towed. He acknowledged the majority of the jurisprudence in this area of the law was developed in the United Kingdom. Citing various UK cases, he distilled the following propositions:

- i. In determining the duties and obligations between a tug boat and the vessel being towed “it is important to determine which has the control at the time of the incident”.
- ii. Generally a tow has control over a tug and is thus responsible for the negligent acts of the tug.
- iii. Citing the *S.S. Devonshire* case he stated “that the determination of which vessel is in control is a question of fact to be determined in every case”.
- iv. He wrote: “As the rule now stands, there is a general presumption that it is the tow which is in control of the tug” and “given that a tug is ordinarily under the direction of a tow, the former must obey the instructions of the latter.”

[43] Fifth, the UK cases stress the importance of focussing the inquiry, for vicarious liability purposes, on the relevant negligent act and then ask whose responsibility it was to prevent it, i.e. who was entitled to give orders as to how the work should be done in order to prevent the negligent act causative of injury (See *Viasystems* at pp 515, 518-519; *Mersey Docks* at p 10: “what is the

negligent act that causes the accident” and at p 11: “control the doing of the act would mean to control the way in which the act involving negligence was done”.

[44] Sixth;

- i. Counsel for the Defendants placed heavy reliance on the Admiralty Court’s decision of 1957 in *MSC Panther* p 571).
- ii. As noted, that case was decided by Mr. Justice Willmer. It is evident, upon reading his reasons for judgment, Mr. Justice Willmer synthesized the governing law as it stood.
- iii. The tug, the Panther, was acting as stern tug to the steamship Ericbank with a pilot on board. Tug and tow collided with the Trishna which sank upon being holed by the Panther’s propeller. The Trishna was found negligent of bad seamanship in passing the Ericbank in such a way and at such a speed that she was unable to bring her ship up; the Ericbank was found guilty of bad seamanship in failing to warn the Panther she was about to pass the Trishna and the Panther was negligent in keeping her port propeller turning after the collision occurred.
- iv. As previously noted, Justice Willmer applied to the law of tug and tow the principle of the House of Lords’ decision in *Mersey Dock* on vicarious liability; since I have already quoted in these reasons several extracts from Justice Willmer’s decision (See paragraphs a) to d), pages 9 – 11), I summarise below their main elements:
  - a) Detailed manoeuvres of tugs are very much left to the discretion of the tug masters so long as they carry out the general orders given by the pilots.

- b) The argument that the owners of the Ericbank were liable at law for the fault of the master of the Panther in not switching off the tug's engines more promptly was not sustainable because no pilot can possibly be expected to direct the engine movements of a stern tug; the duty of a pilot is confined to giving general orders as the evidence shows. The master's faulty action was not within the province of the pilot but within the province of the Panther.
- c) In any event, the evidence at trial established that the crew of the Panther did not become at law the servant of the owners of the Ericbank since the right to control the faulty action of not shutting off the Panther's engines did not reside with the pilot and as a result, the Ericbank's owners could not be made liable for such negligence. He added the outcome would have been different if the faulty manoeuvre had been one within the province of the pilot or the officer of the tow, for example, if the tug failed to carry out an order, or negligently executed, without orders, a manoeuvre which was within the province of the person in charge of the tow to give.

[45] As noted, counsel for Grieg relied heavily on the decision of my colleague the late Madame Justice Layden-Stevenson (the trial judge) in *Canada v Delta Pride*. It is appropriate to draw out the main features of her decision:

- i. The Delta Price is an ocean going bulk carrier who had been berthed at Pacific Coast Terminals (PCT) in the Port of Vancouver for the purpose of taking on a load of sulphur. It is owned by the defendant Tristar Shipping Lines Ltd. (Tristar). On January 10, 1995, at 13:54 hours, loading complete, she was exiting her berth with a

compulsory pilot on board; she was also assisted by two tugs: the Falcon and the Hawk. The pilot gave instructions to back the Delta Pride away from its berth to a position on the range lights in the designated deep water preferred channel since turning the ship close to the berth was not feasible because (1) the tide was falling; and (2) the ship was fully loaded. After the ship stopped moving backwards, the pilot instructed the Falcon to push on her starboard bow and the Hawk to push on the port quarter so that the Delta Pride's bow faced north. The pilot noticed her stern was moving in the direction of a breakwater owned by Canada located next to PCT and a marina. The pilot instructed the ship's crew to engage the vessel's engines first at slow, then half and briefly to full ahead. The Delta Pride moved forward and away from the breakwater not coming into contact with the floating breakwater protecting the marina but the evidence accepted by my late colleague showed, one of the assist tugs came into contact with it causing damage which its owner Canada sued the Delta Price *in rem* and its owners Tristar claiming as the Delta Price departed from its berth at PCT it was operated in an improper manner by the pilot on board which made the defendants responsible for the damage caused.

- ii. Justice Layden-Stevenson made the following critical findings:
  - a) What might have been a simple case became a complex one largely due to the evidence which was missing (See paragraphs 47 – 52).
  - b) Accepted the evidence established the stern tug had made contact with the breakwater (See paragraph 62), noting however that its captain had not been called to testify (See paragraph 53).

- c) Found the pilot on board the Delta Price not negligent in making a turn to starboard once out of the berth and therefore its owners not negligent, adding that her finding, because there was contact, gives rise to a presumption of fact against the moving object (the tug) that collides with an immovable one (the floating breakwater) (See paragraph 57).
- d) Considered the issue of liability for contact citing Justice Nadon's decision in *Hamilton Marine* and UK learned authors on the law of tug and tow in terms of vicarious liability (see paragraphs 63 – 66). In particular, she quoted an extract from Robert Grime, *Shipping Law*, 2nd ed. (London: Street and Maxwell, 1991) on the fact there were many varieties of towage, his stating the maxims "The tug is the servant of the tow" and "Tug and tow are one ship" which he said described for a common type of towage i.e. "a vessel navigated in confined water with the help of tugs, the operation being under single command with that command placed on the vessel in tow which would justify the placing of vicarious liability in the event of negligence on board the tug (See paragraph 65).
- e) Found the tugs were in the control of the Delta Pride for three reasons; (1) there was no evidence to support the notion that the tugs were not under the control of the vessel referring to the evidence of the pilot having issued directions to the tugs and that the presumption the Delta price was not in control of the tug had not been rebutted (See paragraph 69); (2) the Delta Price was under the command of the pilot who, on cross-examination, acknowledged he had the *de facto* control of the Delta Price; and (3) stated the evidence before her did not

support a finding of anything other than a common type of towage (See paragraph 68).

- f) Concluded at paragraph 71 of her reasons: “Having found that contact between the tug and the breakwater did occur and having found that the tug was in the control of the tow, it follows that the defendants were negligent.

[46] In the balance of her reasons, Justice Layden-Stevenson tackled the issue of causation on the basis that the general, but not conclusive, test for causation is the “but for” test finding that but for the tug’s contact and the wash from the tug and vessel played a minor role with the primary cause of the damage being the condition of the breakwater (See paragraph 94).

## VI. Conclusions

[47] The first question to be answered is whether the owner of the Dubai Fortune, who is without fault, is vicariously liable (or responsible) for the damages suffered by the owners of the Star Hansa (equally faultless) caused by the negligent manoeuvre of the master of the Shark during the berthing of the Dubai Fortune.

[48] In these circumstances, the law of vicarious liability is settled law. In order for a person to be vicariously liable requires justification. In negligence cases, that justification resides in the concept of control, the giving of orders or direction, at the time of incident, over how or manner the relevant negligent act was to be performed.

[49] The question of control, in the law of tug and tow, is expressed in employment terms such as the tug is the servant of the tow. The law is also clear the question of which vessel is in control is a

question of fact to be determined in every case. In other words, the focus of the inquiry is on the relevant negligent act in question, who was entitled to give orders to prevent the negligent act causative of the injury, i.e. control the doing the act; the way in which the act involving the negligence was done.

[50] In this case, we have had the benefit of several witnesses to the berthing of the Dubai Fortune and from read-ins on the discovery of others. In my view the testimony of all of those witnesses is credible although the Plaintiff argued that in respect of some elements there may have been exaggeration, a matter going to weight. Appreciating the evidence as a whole, the evidence of the pilots and all of the tug masters involved in the berthing of the Dubai Fortune was unanimous on one point. The pilots did not give the tug masters engaged in the berthing anything but general orders to the assist tugs and none to the line tug, the Shark. The pilots conceded they do not control how a tug master manoeuvres or drives his tug; it is within the prerogative of the tug masters to implement the pilots general orders. The evidence is overwhelming the control test was not made out by the Plaintiff.

[51] The reliance placed by counsel for the Plaintiff on the Delta Pride is to a large extent misplaced for several reasons:

- i. Justice Laydon-Stevenson did not rule simply because there was a compulsory pilot on board who had conduct of the Delta Pride that the two tugs involved in the deberthing of the Delta Price were automatically the servants of the Delta Pride making that ship vicariously liable for the tug who damaged the breakwater. To the contrary, she applied the traditional control test for vicarious liability and criticised the parties for



not calling any evidence from the master of the tug involved (see her paragraphs 66 to 74 of her reasons).

[52] The evidence is also clear on another point. The captain of the Shark admitted one of his tasks was to run the bowlines from the Dubai Fortune to the dock so when tied to the bollards the ship was secure. He admits not having asked the pilots for permission to depart before having run the headlines.

[53] In his closing argument, counsel for Grieg Shipping argues that captain Duesterdiek's negligence in this case was departing early without authorization. That departure caused a series of events to occur such that the "bump" on the stern of the Sun was unavoidable.

[54] In my view, the evidence relied upon by counsel for the Plaintiff ignores other critical evidence which points to the negligent act being the manner in which he manoeuvred his tug causing the Shark to bump the stern of the Sun and then being propelled across the narrow channel.

That evidence shows:

- i. The Shark did not abandon the Dubai Fortune when it departed. It had the presence of the Tyee whose mandate it was to replace the Shark and complete the Shark's remaining tasks which the pilots testified was done by the Tyee in a timely and satisfactory way.
- ii. While it is true the pilots had not been forewarned of the Tyee being the Shark's replacement they saw the Shark after it left its position on the starboard side of the Dubai Fortune and did not intervene to order the Shark back to its original position which they could have done and in different circumstances in other cases had so

ordered. Captain Rayner's view was the switch was okay because the Dubai Fortune was safely alongside the dock and had the assistance of the Spirit and the Sun.

- iii. While it is correct to say the presence of the Tyee caused the Shark not to have a proper line when passing the Tyee, Captain Duesterdiek testified he never lost control of his tug, and testified if he had not contacted the Sun he would have been on his proper line and probably gotten out. He admitted he manoeuvred the Shark close to the stern of the Sun in order to minimize the Sun's wash and got in a situation where he was a little bit too close to the Sun and the two tugs bumped.

[55] This evidence convinces me that the cause of the damage to the Star Hansa was the way in which the captain of the Shark manoeuvred his tug after it passed the Tyee. That manoeuvre was negligent and there is no evidence which would reasonably support any other conclusion.

[56] I therefore conclude the Plaintiff has not established the foundation to support a finding of vicarious liability against the remaining defendants. In the circumstances the Plaintiff's action must be dismissed. Not having made out a case for liability any finding in this case as to what the Dubai Fortune limit of liability is, is moot.

**JUDGMENT**

**THIS COURT’S JUDGMENT is that** the Plaintiff’s action is dismissed with costs to be assessed in accordance with the maximum units in Column IV of the Court’s Tariff B.

“François Lemieux”

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Judge

**FEDERAL COURT**  
**SOLICITORS OF RECORD**

**DOCKET:** T-1174-07

**STYLE OF CAUSE:** GRIEG SHIPPING A/S v THE SHIP "DUBAI FORTURNE" et al

**PLACE OF HEARING:** Vancouver

**DATE OF HEARING:** January 10, 2012

**REASONS FOR JUDGMENT AND JUDGMENT:** LEMIEUX J.

**DATED:** September 21, 2012

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