Date: 19961004
Docket: 10545
Registry: Vernon

IN THE SUPREME COURT OF BRITISH COLUMBIA

BETWEEN:

NIKKI DIANE COX

PLAINTIFF

AND:

ALBERT WILLIAM BROWN and ELAINE CHERYL WILSON

DEFENDANT

REASONS FOR JUDGMENT

OF THE

HONOURABLE MR. JUSTICE B.M. DAVIES

Counsel for the Plaintiff: D.G. Einfeld

Counsel for the Defendant: F.G. Potts and R.B. Lindsay

Place and Date of Hearing: Vernon, B.C.
May 1 and 10, 1996

[1] The defendant applies pursuant to Rule 18A of the Rules of Court for a declaration that if she is liable to the plaintiff in negligence, her liability is limited to an amount established pursuant to s. 575(d) of the Canada Shipping Act, calculated as at August 5, 1982.

BACKGROUND FACTS

[2] On August 5, 1982, the plaintiff, then aged 9, was swimming in Okanagan Lake when she was struck by a boat operated by the defendant who was then 19 years of age.

[3] The boat was a 1977 Traveller Motor Boat, powered by a 55 horsepower Chrysler engine. The registered owner of the boat was Albert William Brown.

[4] At the time of the incident the defendant had been dating Mr. Brown's son, Douglas Brown, for about two years.

[5] As a result of the incident, the plaintiff sustained various injuries, including broken ribs, a collapsed lung, and suffered serious cuts arising from contact with the boat's propeller. Although the cuts have now healed, scarring remains. The plaintiff alleges that she now suffers from fibromyalgia, post-traumatic stress disorder and chronic pain syndrome.

[6] It is suggested by the plaintiff's counsel that the injuries suffered by the plaintiff would be compensable at a level significantly in excess of the limitation established by s. 575(d) of the Canada Shipping Act.

[7] On August 31, 1993, this action was commenced against the defendant and also against Mr. Brown, as registered owner of

the boat.

[8] On May 16, 1995, as a result of an application brought by Mr. Brown pursuant to Rule 18A, the action against him was dismissed by consent.

[9] The defendant has issued third party proceedings against the plaintiff's mother alleging, inter alia, negligent supervision. I am advised that the third party supports the defendant in this application.

ISSUES

[10] Two issues arise for determination on this application:
(a) If the defendant is liable to the plaintiff for negligence, is she entitled to limited liability protection pursuant to ss. 575 and 577 of the Canada Shipping Act?; and
(b) If so, is the date of conversion of gold francs to Canadian dollars under the Canada Shipping Act the date of the accident, the date of issuance of proceedings or the date of judgment?

[11] The defendant says that even assuming negligence on her part, the combined effect of sections 575 and 577 of the Canada Shipping Act limit her liability. The defendant says that for her liability to be so limited, it is necessary to establish that:
(a) the Canada Shipping Act applies to inland waters;
(b) the pleasure craft involved in this accident is a "ship" as defined by the Canada Shipping Act; and
(c) in driving the boat, the defendant was "any person acting in the capacity of master or member of the crew of a ship...".

[12] On the basis of the existing case law, the plaintiff has correctly conceded that criteria (a) and (b) above have been met by the defendant.

[13] The parties disagree as to whether the defendant was at the time of the accident "acting in the capacity of master or member of the crew of a ship". They do agree, however, that if she was, she would be entitled to the protection of the limitation provisions in the Canada Shipping Act.

[14] The parties also agree that if the defendant is entitled to limitation protection, the Canada Shipping Act sets out a process to determine her maximum liability as follows:
(a) s. 575(d) of the statute provides that liability is restricted to an aggregate amount equivalent to 3100 gold francs for each tonne of the ship's tonnage;
(b) s. 579 provides that if the tonnage of the ship is less than 300 tonnes, it shall be deemed to be 300 tonnes;
(c) once the defendant's liability in gold francs is determined, it then becomes necessary to convert gold francs to Canadian dollars;
(d) pursuant to the Canada Shipping Act Gold Franc Conversion Regulations, the equivalent dollar value is determined by converting gold francs, at a specified exchange rate, to Special Drawing Rights of the International Monetary Fund ("SDRs"); and
(e) having then converted francs to SDRs, the Conversion Regulations provide that the SDRs shall be converted into Canadian dollars at the exchange rate established by the International Monetary Fund for SDRs and Canadian dollars.

[15] The defendant says that the appropriate conversion date is the date of the accident or alternatively, the date the action was commenced, while the plaintiff submits that the appropriate date for conversion is the date judgment is rendered.

[16] If the conversion date is determined to be August 5, 1982, (the date of the incident), the equivalent dollar value would be $83,730.84. If it is determined to be August 31, 1993, (the date the action was commenced), the equivalent dollar amount would be $114,692.59 and if it is determined to be the date of judgment, the equivalent dollar figure would be approximately $122,000 calculated as of the actual date of judgment.

[17] A further issue related to the question of any interest which might be awarded to the plaintiff in the event that the defendant is found to be liable, was raised before me but not fully argued and will not be addressed until the issues raised

by this application have been determined.

Issue #1: If the defendant is liable to the plaintiff for negligence, is she entitled to limited liability protection pursuant to ss. 575 and 577 of the Canada Shipping Act?

[18] Generally, s. 575 of the Canada Shipping Act provides that the owner of a ship is not liable for damages beyond specified amounts for any personal injuries to any person not on board that ship caused by the act or omission of any person, whether on board the ship or not, in the navigation or management of the ship, provided that such personal injury occurs without the owner's actual fault or privity.

[19] Pursuant to s. 577 of the Canada Shipping Act, limitation provisions are extended to three categories of "quasi owners", again provided that such personal injury occurs without those persons fault or privity. Further and most importantly for the determination of this case, limitation protection is extended to:

"any person acting in the capacity of master or member of the crew of a ship and to any servant of the owner or of any person described in paragraphs (a) to (c) where any of the events mentioned in paragraphs 575(1)(a) to (d) occur, whether with or without his actual fault or privity". (Emphasis added)

In short, the limitations set out in the statute are available to an owner who is without fault or privity and to any person acting "in the capacity of master or member of the crew of a ship" regardless of fault.

[20] In this case, the issue is whether the defendant was acting "in the capacity of master".

[21] A "master" is defined by s. 2 of the Canada Shipping Act as including "every person having command or charge of any ship, but does not include a pilot".

[22] In essence, the defendant submits that whether a person is acting "in the capacity" of a "master" requires only a functional analysis of the task undertaken.

[23] In answer, the plaintiff submits that the person performing the task must have the owner's authority or consent and says that the defendant was not acting "in the capacity of master" because Mr. Brown did not consent to her operating the boat.

[24] The issue of consent being central to the plaintiff's position on this application and the facts being in dispute, I adjourned the defendant's application which was initially heard on May 1, 1996, to allow viva voce evidence to be adduced on the issues before me and to allow cross-examination on the affidavits filed. The defendant and Mr. Brown testified and were cross-examined on affidavits sworn by each.

Evidence

[25] What is established by the evidence is that:
(a) in paragraph 19 of his affidavit sworn January 3, 1995, and filed in support of his application to be removed as a defendant and also in evidence before me on this application, Mr. Brown deposed that:

" ... at no time did I consent to Elaine (the defendant) operating the boat without Doug (his son) being present. On August 5, 1982, Elaine operated the boat totally without my consent or permission. It was a complete surprise to me when I found out that she had operated the boat on that day.";

(b) neither the owner of the boat, Mr. Brown, nor his son, Douglas Brown, nor any other member of his family were in attendance at the time the plaintiff was injured;
(c) when the boat was not in use, it was dragged onto the beach for storage, the key to its ignition was hidden in a cabin owned by Mr. Brown near the beach and its fuel tank and battery were removed;

(d) the boat was a heavy boat and not easily moved off the beach into the water;
(e) the cabin was not locked because that would invite breakins;
(f) the location of the key in its hiding place was known to regular attendees at the cabin including the defendant;
(g) Mr. Brown's son, Douglas Brown, was the family's primary operator of the boat and he had Mr. Brown's permission to use the boat provided Mr. Brown's specific instructions as to its use were complied with by him;
(h) Mr. Brown's instructions dealt primarily with issues of safety and he was satisfied from his observation and from his teaching and also from his assessment of Douglas Brown's character that Douglas Brown could be entrusted with the supervision of the operation of the boat;
(i) from time to time other people, including the defendant, might actually operate the boat, but that operation was always to be in Douglas Brown's presence and under Douglas Brown's control or supervision;
(j) when asked whether he had ever told his son, Douglas, that he could lend the boat to someone else, Mr. Brown testified, "No, I never told him he could lend it to anybody else";
(k) while Douglas Brown was at work on August 5, 1982, two of his friends, Garth Mowatt and Douglas Andres, attended at the cabin with the intention of going waterskiing;
(l) the defendant was convinced by Garth Mowatt and Douglas Andres to take the boat off the beach, get the key from the cabin and drive the boat notwithstanding the absence of Douglas Brown;
(m) in paragraph 42 of her affidavit sworn May 9, 1996, deposed:

" I verily believe that if I had spoken with Mr. Brown or Doug Brown prior to the accident and told either of them that I would like to operate the boat in the presence of Garth Mowatt and Doug Andres, then Mr. Brown or Doug Brown would have provided me with their express permission to do so";

(n) under cross-examination the defendant also testified that:

"my preference would have been to wait until Doug was there. And they convinced me it would be a safe situation to all go together at this point"; and

(o) at the time of the accident, the defendant was driving the boat, Douglas Andres was a passenger and the "spotter" and Garth Mowatt was waterskiing.

Legal Analysis

[26] The defendant submits that on the plain, clear and unambiguous wording of the statute, as interpreted by the Supreme Court of Canada and the British Columbia Court of Appeal, the functions undertaken by the defendant on the day in issue, namely, being seated in the driver's seat of the boat, steering it while under way and controlling the boat's speed and direction, cause her to be a "person acting in the capacity of master of a ship".

[27] The defendant relies primarily upon the decisions of the British Columbia Court of Appeal in Whitbread v. Walley, (1988) 26 B.C.L.R. (2d) 120 and Chernoff v. Chilcott, (1988) 27 B.C.L.R. (2d) 283 in asserting what I shall for convenience call the "functional approach" to the interpretation of the phrase "any person acting in the capacity of master ... of a ship". For determination by me is whether the "functional approach" precludes any consideration of the manner by which the defendant gained control of the vessel. In other words, am I entitled to consider the question of whether the defendant had the owner's consent?

[28] While the defendant submits that the aforementioned decisions preclude such consideration, the defendant also says that in this case, the defendant had Mr. Brown's implied consent to take and operate the boat on the date in question. The defendant relies upon Aarsen v. Deakins, [1971] S.C.R. 609 and Palsky v. Humphrey, (1964) 48 W.W.R. 38, both decisions of the Supreme Court of Canada involving implied consent in motor vehicle cases, for the proposition that Mr. Brown's implied consent would be sufficient and says that the defendant's

subjective view of whether Mr. Brown would have consented to her taking of the boat on the day in issue, should be determinative.

[29] In Chernoff v. Chilcott (supra) and the cases which it considered, the issue to be determined was whether an "owner" of a ship who was at the time of the alleged negligence also "acting in the capacity of master" could be entitled to the more generous limitation provision applying to a "master". Obviously no issue of consent could arise in such a case. The "functional analysis" undertaken had to do with the factual question of whether the negligent action was undertaken by the owner in his capacity functioning as owner or in his capacity functioning as master.

[30] In determining whether the issue of consent was determined by the British Columbia Court of Appeal in Whitbread v. Walley (supra), it is necessary to review in some detail the facts of that case and its history as an application pursuant to Rule 18A before the courts.

[31] The facts considered by the Court of Appeal can conveniently be taken from the judgment of the court delivered by Madam Justice McLachlin (as she then was) at p. 512:

" On March 27, 1983, the plaintiff Whitbread took a 32-foot pleasure craft called the "Calrossie" from its moorings in Coal Harbour and set out for the Wigwam Inn at the north end of Indian Arm, a navigable arm of the sea. In the course of the trip, he asked one of his passengers, the defendant Walley, to take over the helm. Whitbread moved to a seat away from the controls and went to sleep.

The "Calrossie", with Walley still at the controls, ran aground on the east shore of Indian Arm. Whitbread suffered spinal injuries resulting in quadriplegia.

Whitbread brought an action against Walley and the owners of the "Calrossie", Greenwood and Horn. In their defence Greenwood, Horn and Walley assert that their liability is limited under ss. 647 and 649 of the Canada Shipping Act, R.S.C. 1970, c. S-9. On a preliminary point of law, MacKinnon J. rejected the defendants' contention that the Act limited their liability. He held that Parliament did not intend ss. 647 and 649 to apply to pleasure craft such as the Calrossie, and "read down" the sections to exclude limitation of liability in respect of non-commercial ships used exclusively for pleasure. This appeal is from that ruling [45 D.L.R. (4th) 729, 19 B.C.L.R. (2d) 120]. "

[32] This recitation of the factual circumstances under consideration by the court is necessary because I was advised by counsel for the defendant that the issue of consent may have been before MacKinnon J. In an affidavit filed by counsel for the defendant, reference is made to the Plaintiff's Memorandum of Argument filed on the motions before Mr. Justice MacKinnon which included a statement of facts which suggests a dispute as to the question of whether the plaintiff Whitbread had the implied consent of the owners to take out the Calrossie that day with his friends.

[33] It is clear from MacKinnon, J.'s his reasons that whether or not the issue of consent was before him, he did not consider it. In his reasons for judgment reported at (1988) 19 B.C.L.R. (2d) 120, at page 132 MacKinnon, J. stated:

" In view of the finding I make respecting the validity of the limitation sections insofar as pleasure craft are concerned, I find it unnecessary to resolve the issue as to whether or not ss. 647 and 649 (now 575 and 577) offend s. 1(b) of the Canadian Bill of Rights, and the further question of whether or not the defendant Walley was a master of the Calrossie." (Emphasis added)

[34] On appeal, however, Madam Justice McLachlin overruled Mr. Justice McKinnon's reading down of s. 647 and s. 649 as not

applying to pleasure craft which then raised the following issue for determination:

" As a matter of construction, does the limitation of liability conferred by ss. 647 and 649 apply to the activities of Walley?"

[35] In answering that question, Madam Justice McLachlin stated at p. 516:

" Section 649 limits the liability of "any person acting in the capacity of master or member of the crew of a ship". The question is whether Walley, who was at the helm of the "Calrossie" when she ran aground, falls within this provision.

   I am satisfied that he does. It is not necessary to show that Walley was formally employed as the master of the vessel. The words "in the capacity of" clearly indicate the intention of Parliament that the applicability of ss. 647 and 649 is determined, not by a person's formal designation, but by what function he or she is carrying out. As stated in The Alastor,supra, at p. 585:

> The word "capacity" is an ordinary English word whose meaning is clear in the context in which it is used in the Act. If any exegesis is necessary I would say simply that acting in the capacity of an owner means doing things which are usually done by an owner and correspondingly with the capacity of a master or crew member.

   The function of a master of a vessel relates to the operation and navigation of a vessel: Walithy Charters Ltd. v. Doig, supra; Holm v. Underwriters Through T.W. Rice and Co. Inc., (1981), 124 D.L.R. (3d) 463 at p. 469.

   It has been held that a person in a similar situation to Walley (a friend operating a boat) was a master or crew member within the Act: Chamberland v. Fleming, supra.

   In short, the facts permit no other conclusion but that Walley was acting in the capacity of master or crew member at the time of the accident. Accordingly, he is entitled to the limitation of liability conferred by ss. 647 and 649." (Emphasis added)

[36] The Supreme Court of Canada dealt primarily with the various constitutional issues raised before MacKinnon, J. and the British Columbia Court of Appeal. As to the issue of whether Walley could rely on the limitation of liability provisions of the Canada Shipping Act, LaForest, J. simply stated at p. 203 of the Supreme Court of Canada's decision in Whitbread v. Walley, reported at (1991) 2 W.W.R. 195 that:

" McLachlin, J.A. then quickly disposed of the question whether, on the facts, the respondent Walley was entitled to rely on s. 649. She noted at s. 647 limits the liability of "any person acting in the capacity of master or member of the crew of a ship" and concluded that Walley was in fact acting in the capacity of master at the time of the accident in which the appellant Whitbread was injured. " (Emphasis added)

[37] The present sections 575 and 577 of the Canada Shipping Act are identical to ss. 647 and 649 respectively in the referenced quotations.

[38] In the absence of the Court of Appeal's decision, in Whitbread, I would have determined that in the absence of the owner's actual or implied consent to the taking of the boat, the defendant is not entitled to the protection of the limitation provision of the Canada Shipping Act.

[39] In my judgment, the defendant did not have either the

express or implied consent of the owner to take the boat on August 5, 1992. Mr. Brown did not give his express consent and the circumstances of the taking of the boat, including the defendant's obvious reluctance to do so without Douglas Brown being present, preclude a finding of implied consent even if the subjective assessment suggested by Aarsen v. Deakins, (supra) or Palsky v. Humphrey, (supra) is applied.

[40] My concerns with limitation of liability protection applying in the absence of the owner's consent include the following:
(a) There is the potentiality for serious mischief in that a thief or "pirate" could obtain the protection of a statute which limits liability of shipowners, masters and others for obvious commercial reasons and in my view, it is doubtful that the Parliament of Canada intended such a result when enacting such legislation; and
(b) A tortfeasor could be allowed to gain advantage from his or her wrongdoing. While the maxim ex turpi causa nor oritur actio generally applies to plaintiffs seeking to benefit from their own wrongdoing, it can in some circumstances be applied to preclude the setting up of a defence or limitation of liability: Schwartz v. Wallis, an unreported decision of Mr. Justice Paris, (May 21, 1993, British Columbia Supreme Court, Vancouver Registry Nos. B914366 and B913031).

[41] Although I received submissions from counsel for the defendants on August 6, 1996, with which counsel for the plaintiff agreed that in their view the issue of the owner's "consent" is still an open one in that it had not been specifically addressed by Madam Justice McLachlin in Whitbread, I am not at all certain that the issue was not considered or encompassed by Madam Justice McLachlin in the functional analysis undertaken in Whitbread.

[42] It may be that upon further consideration of the issue of consent in circumstances such as those in this case or in even more egregious circumstances, i.e. the theft of a boat by a complete stranger, the Court of Appeal would limit the functional approval in Whitbread to situations of consensual operation in the capacity of master. I do not, however, consider that it is open for me to do so and it is accordingly my determination that the defendant is entitled to the protection of the limitation provision of s. 575 of the Canada Shipping Act.

Issue #2: Is the date of conversion of gold francs to Canadian dollars the date of the accident, the date of issuance of proceedings or the date of judgment?

[43] In submitting that the appropriate date for the conversion of the gold francs referred to in s. 575 of the Canada Shipping Act to Canadian dollars is either the date of the loss or the date of the commencement of the action, the defendant relies upon The Custodian v. Blucher [1927], 3 D.L.R. 40, Gatineau Power Co. v. Crown Life Insurance Co., [1945] S.C.R. 655, both decisions of the Supreme Court of Canada, N.V. Bocimar, S.A. v. Century Insurance Co., (1984) 53 N.R. 383, a decision of the Federal Court of Appeal, Shibamoto & Co. Ltd. v. Western Fish Producers Inc., (1991) 48 F.T.R. 176, a decision of the Federal Court (Trial Division) and Chamberland et al v. Fleming, (1984) 12 D.L.R. (4th) 688, a decision of the Alberta Court of Queen's Bench.

[44] In submitting that the appropriate conversion date is the date of judgment, the plaintiff relies upon Banque Indosuez v. Canadian Overseas Airlines Ltd., (1990) 40 C.P.C. (2d) 33, Salzburger Sparkasse v. Total Plastics Service Inc., (1988) 27 B.C.L.R. (2d) 333, Prasad & Prasad v. Frandsen et al, (1985) 60 B.C.L.R. 343 and Meeker Log & Timber Ltd. v. "Sea Imp VIII" (The), (1995) 8 B.C.L.R. (3d) 320, all decisions of the Supreme Court of British Columbia.

[45] The resolution of this dispute requires analysis of apparently conflicting authority and issues of stare decisis.
[46] As will be seen, the decisions of the Supreme Court of Canada in The Custodian v. Blucher, (supra), and Gatineau Power Co. v. Crown Life Insurance Co., (supra), have not been consistently followed. They were, however, reluctantly followed by the Federal Court of Appeal in N.V. Bocimar, S.A. v. Century Insurance Co., (supra), wherein Hugesson, J.A. (for the court) said at p. 392:

" The rule adopted and approved by the Supreme Court of Canada in cases of this sort has heretofore been

> "...that conversion into the currency of the forum is to be made as of the date of the breach."

Gatineau Power Company v. Crown Life Insurance Company, [1945] S.C.R. 655, per Rand, J., at 658; see also The Custodian v. Blucher, [1927] S.C.R. 420).

Defendant invites us to follow the lead set by the House of Lords in England and to depart from the old breach-date rule in favour of one that is more flexible. The leading English cases are Miliangos v. George Frank (Textiles) Ltd., [1976] A.C. 443 (H.L.), and "Despina R", [1979] 1 All E.R. 421 (H.L.).

Not without regret, I do not think it is open to this court to change the rule adopted by the Supreme Court. If we were to do so, I would have little hesitation in ordering that the conversion be effected at today's rates. All the equities point that way: the plaintiff is a Belgian company, most of the general average loss was incurred in Belgian funds, and there is no reason to think that, if payment had been made on the due date of February 1, 1980, the plaintiff would have speculated against its own national currency by buying Canadian funds, which is in effect the result of our continuing to apply the breach-date rule. In the present climate of large and rapid currency fluctuations, a rule as rigid as the old one appears to me to be inappropriate. I repeat, however, that I do not think it is for us to change it. "

[47] Earlier in Batavia Times Publishing Co. v. Davis (1978), 88 D.L.R. (3d) 144, Mr. Justice Carruthers of the Ontario High Court whose decision was subsequently confirmed by the Ontario Court of Appeal had stated (at p. 151) that:

" The decision of the House of Lords in Miliangos [Miliangos v. Frank (George) (Textiles), [1976] A.C. 433, [1975] 3 All E.R. 801 (H.L.)] has reversed the English cases, and in particular, the rule of law upon which the Canadian cases, including those of the Supreme Court of Canada to which I have referred, have proceeded. Although strictly speaking Miliangos has not overruled those decisions of the Supreme Court of Canada including the decision of the Judicial Committee of the Privy Council in SS. 'Celia' v. SS. 'Volturno', (1921) 2 A.C. 544 (H.L.), and they therefore remain today as authorities binding upon the lower Courts of Canada, I find it difficult to accept that those cases should now be applied by the lower Courts. Apart from the fact that the 'breach-day' rule which they applied no longer exists in England, when I consider that justice requires that a creditor should not suffer by reason of a depreciation of the value of currency between the due date on which the debtor should have met his obligation and the date when the creditor was eventually able to obtain judgment, I think what Lord Wilberforce had to say, at p. 814 of the Miliangos case, is most pertinent:

> " 'The law on this topic is judge made; it has been built up over the years from case to case. It is entirely within this House's duty, in the course of administering justice, to give the law a new direction in a particular case where, on principle and in reason, it appears right to do so. I cannot accept the suggestion that because a rule is long established only legislation can change it - that may be so when the rule is so deeply entrenched that it has infected the whole legal system, or the choice of a new rule involves more far-reaching research than courts can carry out.' "

and had held (at p. 153) that:

" As I find the situation in Canada at this time, then, there are no authorities which bind me in determining the conversion date in a case such as we are dealing with here. I am then in my opinion free to adopt that date which in my view 'avoids an injustice' and is 'in step with commercial needs'. Neither of the parties should be adversely affected by fluctuating currencies. "

[48] In Williams & Glyn's Bank Ltd. v. Belkin Packaging Ltd. (1979), 18 B.C.L.R. 279, which also predated N.V. Bocimar, S.A., Mr. Justice McKenzie in following Batavia stated (at p. 281):

" I am wholly in agreement with the reasons for judgment given by Carruthers J. including the justifications he made for not following the Supreme Court of Canada decision. "

[49] In Prasad, Prasad and Prasad v. Frandsen, (supra), which followed but did not consider N.V. Bocimar, S.A., after reviewing the decision of Mr. Justice McKenzie in Williams & Glyn's Bank Ltd. v. Belkin Packaging Ltd., Mr. Justice Mackoff stated (at p. 358):

" The Batvia judgment [(1978), 20 O.R. (2d) 437, 7 C.P.C. 105, 88 D.L.R. (3d) 144 (H.C.)] was considered in Am-Pac Forest Products Ltd. v. Phoenix Doors Ltd. (1979), 14 B.C.L.R. 63, 12 C.P.C. 97 (S.C.). Kirke Smith J. concluded that in the factual situation before him he regretfully felt that he had no option but to apply the Supreme Court of Canada decisions. With all due respect I agree with McKenzie J. in his acceptance of the reasoning in Batavia. In any event, none of the above cases have application here because they were all commercial cases. " (Emphasis added)

[50] In Salzburger Sparkasse v. Total Plastics Service Inc., (supra), which considered N.V. Bocimar, S.A., Mr. Justice Bouck analyzed conflicting decisions and at p. 339 provided the following useful analysis of the then existing state of the law:

" Examining Canadian case law on the subject, one finds considerable differences when a court is called upon to select a date for calculating a rate of exchange. Here is my analysis in summary form:

A. Actions on a foreign judgment

  The date for calculating the exchange rate can be one of the following three:

(a) The date of the Canadian judgment: Batavia, supra, at p. 154;

(b) The date of the foreign judgment: Nat. Westminster Bank Ltd. v. Burston (1980), 28 O.R. (2d) 701 at 703, 16 C.P.C. 27 (Master Sedgwick, M.C.);

(c) The date of the issuance of the writ in Canada: Airtemp Corp. v. Chrysler Airtemp Can. Ltd. (1981), 31 O.R. (2d) 481 at 484, 23 C.P.C. 322, 121 D.L.R. (3d) 236 (Div. Ct.).

B. Actions on a foreign debt or contract payable in a foreign currency

  The date for calculating the exchange rate can be one of the following two:

(a) The date of the Canadian judgment: Royal Bank v. Paletta; Royal Bank & Trust Co. v. Paletta (1983), 44 O.R. (2d) 29 at 31-32, 40 C.P.C. 55 (M.C.); Williams & Glyn's Bank Ltd. v. Belkin Packaging Ltd., supra: Dillingham Corp. Can. v. The Shinyu Maru, [1980] 1 F.C. 303 at 308, 13 C.P.C. 38, 101 D.L.R. (3d) 447 (Walsh J.l, T.D.).

(b) The date of the breach giving rise to the cause of action: Custodian, supra; Gatineau Power, supra; Oshawa Group Ltd. v. Great Amer. Ins. Co., 36 O.R. (2d) 424

at 437, [1982] I.L.R. 1-1492, 132 D.L.R. (3d) 453 (C.A.); N. V. Bocimar S.A. v. Century Ins. Co. of Can., supra, at pp. 392-93; Am-Pac Forest Prod. Inc. v. Phoenix Doors Ltd. (1979), 14 B.C.L.R. 63 at 67, 12 C.P.C. 97 (Kirke Smith J., S.C.).

C. Actions on a tort committed in Canada where the future damages will be payable in a foreign currency

(a) The date for conversion is the date of the Canadian judgment: Prasad, supra, at p. 358. "

[51] Having concluded that analysis, Mr. Justice Bouck decided (at p. 341) that:

" Faced with this conflicting case law, it seems the correct approach is to try and do justice on the facts confronting me. Obviously it is unjust if the plaintiff only recovers one half of its rightful debt because of fluctuations in exchange rates over which it had no control. On the other hand, the defendant had the opportunity to pay the debt at any time after 26th December 1984 in order to cut its losses. Instead, it chose to wait until judgment was entered against it. Weighing the equities, the scales are balanced heavily in favour of the plaintiff. Since there is no compelling authority deciding otherwise, I find for the plaintiff and fix the currency exchange rate at the date of the judgment or the date of these reasons. "

[52] Finally, in Banque Indosuez v. Canadian Overseas Airlines Ltd., (supra), Mr. Justice Donald, as he then was, stated (at p. 2):

" At one time the breach date was invariably chosen as the date of conversion: The Custodian v. Blucher [1927] S.C.R. 420, (1927) 3 D.L.R. 40; Gatineau Power Co. v. Crown Life Ins. Co. [1945] S.C.R. 655, [1945] 4 D.l.R. 1; and Am-Pac Forest Products Inc. (1979), 14 B.C.L.R. 63. A major shift occurred when international currencies began fluctuating dramatically. The prevailing view is now in favour of the date of judgment. The judgment date was the choice of this court in Salzburger Sparkasse (supra); William and Glyn's Bank Ltd. v. Belkin Packaging Ltd. (1979), 18 B.C.L.R. 279; and Prasad v. Frandsen (1985), 60 B.C.L.R. 343. I find the reasoning of Mackoff, J. in Prasad (supra) supports Mr. Nathanson's argument that the operative principle is to provide the successful litigant with sufficient Canadian funds to purchase the amount awarded in foreign currency at the time of judgment."

[53] The defendant says that notwithstanding the numerous decisions of the British Columbia courts to the contrary, I must in this case determine that the appropriate date for conversion is the date of the incident, giving rise to the claim. In making this submission, the defendant says that inasmuch as this matter is before me pursuant to the admiralty jurisdiction of this court, provincial legislation and ordinary common law rules give way to maritime law and that therefore the decision of the Federal Court of Appeal in N.V. Bocimar, S.A., is binding on this court and must be followed. The defendant also says that the decision of the Federal Court (Trial Division) in Shibamoto & Co. Ltd. v. Western Fish Producers Inc., (supra), as an admiralty decision must be given deferential consideration and that the numerous decisions of this court relied upon by the plaintiff and not consistent with N.V. Bocimar, S.A. and Shibamoto should not be followed by me.

[54] In support of those propositions, the defendant relies upon the decisions of the British Columbia Court of Appeal in Schulman v. McCallum, (1993) 79 B.C.L.R. (2d) 394 and of Wilson, J. (as he then was) in Re: Hansard Spruce Mills Ltd. (1954) 13 W.W.R., 285.

[55] In Schulman v. McCallum the plaintiffs appealed from an order to the effect that they could not claim damages under the British Columbia Family Compensation Act, where the death took place in a boating accident on Comox Lake. Under consideration

in Schulman v. McCallum was the decision of the Supreme Court of Canada in Whitbread v. Walley, (supra), and other decisions which had considered the exclusive jurisdiction of the Parliament of Canada in relation to maritime law. In delivering the judgment of the court, Hutcheon, J.A. stated at p. 397:

" I cannot agree that the pronouncement in Whitbread of the exclusive jurisdiction of Parliament in Canadian maritime law is obiter. That pronouncement was firmly based on the prior decisions in Ito and Chartwell and I must accept that it was intended to be binding on this Court. "

[56] In my judgment it does not necessarily follow that since Parliament has exclusive jurisdiction in maritime law, that maritime law decisions of the Federal Court of Appeal are binding upon this court in the same manner as are decisions of the British Columbia Court of Appeal. In the circumstances of this case, however, I need not determine that issue since in my judgment the Federal Court of Appeal's decision in N.V. Bocimar, S.A. is inapplicable to the facts at bar. In N.V. Bocimar, S.A. the Federal Court of Appeal only ruled upon the conversion date applicable in a breach of contract case and I refer once again to the decision of Mackoff J. in Prasad which, as noted by Bouck, J. in Salzburger Sparkasse considered the date of conversion to Canadian dollars when the action in issue was a tort committed in Canada with damages calculated in a foreign currency.

[57] In my judgment, since in this case I am also concerned with the date of conversion to Canadian currency in relation to a tort committed in Canada, neither the Federal Court of Appeal decision in N.V. Bocimar, S.A., nor the Supreme Court of Canada commercial cases of The Custodian or Gatineau Power which Huggesson, J.A. reluctantly followed apply.

[58] While I consider N.V. Bocimar, S.A. to be inapplicable in a case of conversion to Canadian currency in relation to a tort committed in Canada, I must still consider the applicability of the apparently conflicting authority of Shibamoto and Chamberland v. Fleming, (supra), as compared to the cases upon which the plaintiff relies.

[59] I have previously analyzed the cases which have not followed the Supreme Court of Canada decisions in Custodian and Gatineau Power and to the extent that those decisions conflict, I have determined that the decision of Mackoff, J. in Prasad is applicable to the case at bar and not directly contradictory of The Custodian or Gatineau Power. The decision of Mackoff, J. in Prasad is also entirely consistent with the decision of Mr. Justice Lowry in Meeker Log & Timber Ltd. v. "Sea Imp VIII" (The), (supra), upon which the plaintiff also relies in this case. Prasad and Meeker Log are, however, both in direct conflict with Shibamoto and Chamberland, each of which determined that the applicable date for conversion in a tort action is the date that the incident occurred. As to Chamberland, I note that in Meeker Log, Mr. Justice Lowry determined Chamberland to be wrongly decided and that he would not follow it. For the reasons stated by Lowry, J. and also those which I shall detail below, I agree.

[60] Notwithstanding Lowry, J.'s refusal to follow Chamberland and notwithstanding that both Prasad and Meeker Log are decisions of this court, the defendant has urged me to follow Shibamoto on the basis that it is an admiralty decision of a court of concurrent original jurisdiction and therefore deserving of the same deference and subject to the same rules of comity and stare decisis as a decision of this court. The defendant points out that Prasad is not an admiralty case and that while Meeker Log is an admiralty case, the defendant suggests that on the principles enunciated in re Hansard Spruce Mills Ltd., (supra), Meeker Log should not be considered as correctly decided.

[61] In Hansard Spruce Mills (at p. 286) Wilson, J. stated:

"...I have no power to override a brother judge. I can only differ from him, and the effect of my doing so is not to settle but rather to unsettle the law, because, following such a difference of opinion, the unhappy litigant is confronted with conflicting

opinions emanating from the same court and therefore of the same legal weight. This is a state of affairs which cannot develop in the Court of Appeal.

Therefore, to epitomize what I have already written in the Cairney case, I say this: I will only go against a judgment of another judge of this court if:

(a) Subsequent decisions have affected the validity of the impugned judgment;

(b) It is demonstrated that some binding authority in case law or some relevant statute was not considered;

(c) The judgment was unconsidered, a nisi prius judgment given in circumstances familiar to all trial judges, where the exigencies of the trial require an immediate decision without opportunity to fully consult authority.

If none of these situations exists I think a trial judge should follow the decisions of his brother judges. "

[62] Counsel for the defendant suggests that I should not follow Meeker Log because:
(a) it did not consider The Custodian or Gatineau Power which were binding authority;
(b) it did not consider the admiralty cases of N.V. Bocimar, S.A. and Shibamoto and
(c) had Mr. Justice Lowry considered N.V. Bocimar, S.A. and Shibamoto, he would have followed Chamberland.

[63] In the alternative, the defendant says that Meeker Log wrongly proceeds on the assumption that an owner or master could choose to protect himself or itself against currency fluctuation by paying into the fund contemplated by s. 580 of the Canada Shipping Act. The defendant says that not only does this determination improperly analyse the interplay between s. 576 and s. 580 of the Canada Shipping Act but also that in any event on the facts of this case, the defendant could not have availed herself of any protection available under s. 580 by creating a fund for some eleven years after the incident during which time the bulk of the foreign currency increase occurred. The defendant relies upon that proposition in advancing the alternative argument that if Meeker Log is to be followed, it should on these facts result in a ruling that the date of conversion should be the date the writ was issued. I note that there is no other authority for that suggestion and I do not accept this alternative argument.

[64] Having considered all of these issues, I have determined to follow Meeker Log and Prasad. For reasons already stated, I do not consider The Custodian, Gatineau Power or N.V. Bocimar, S.A. to be applicable to a foreign currency case relating to a tort committed in Canada. Mr. Justice Lowry arrived at his conclusion in Meeker Log through detailed and careful statutory analysis which I consider to be correct. I note as well that it is the same as that arrived at by Mackoff, J. in Prasad through analysis of the differences between tort and contract and rationalization of the conflicting decisions. Shibamoto dealt with concurrent causes of action in negligence and breach of contract and is entirely devoid of any analysis with respect to the reasons for differentiation between the date of conversion in tort and in breach of contract cases. Accordingly, while Shibamoto is an admiralty case, I decline to follow it with respect to the issue of the date of conversion in cases sounding solely in tort.

[65] Having regard to all of the foregoing, it is my judgment that the appropriate date for conversion in this case, being a case of a tort committed in Canada is the date of judgment. If counsel cannot agree as to the amount, they may speak to the matter.

[66] The costs of this application will be left to the trial judge.

"B.M. DAVIES, J."

B.M. DAVIES, J.