THE STATE OF CANADIAN MARITIME LAW - ARE WE IN HARMONY

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INTRODUCTION

This paper reviews a number of Maritime decisions, both foreign and Canadian which lend themselves to a discussion of the current state of Canadian Maritime Law. Cases concerning procedure, jurisdiction, duty of care, enforceability of foreign arbitration clauses and maritime offshore oil and gas are discussed.

1. Procedure

Circumstances under which a ship can be arrested, the requirements to get it released, and the consequences of a wrongful arrest, are well established in international maritime law. This consistency is necessary since the security provided to release a vessel, and the circumstances under which that security may be called upon, are well understood by marine insurance companies generally called upon to provide security. One case from Australia and one from Canada illustrate some divergences in matters relating to Procedure.

Australia - Freshpack Machinery PTY Ltd. v. The "JOANA BONITA"[1]

In this 1994 decision of the Federal Court of Australia Sheppard, J. was faced with a disagreement as to the appropriate amount of security to be provided. There had initially been an issue as to whether the Plaintiffs were bound to accept a P&I Club letter of undertaking

[1](1994), 125 A.L.R. 683

as security but this matter was resolved in favour of a letter of undertaking given by the Britannia P&I Club pursuant to *Rule* 52 of the Australia *Admiralty Rules* which provide:

> 52(1) A party to a proceeding may apply to the court in accordance with Form 19 for the release of a ship or other property that is under arrest in the proceeding.
>
> (2) Where a caveat against release of the ship or property is in force, a copy of the application shall be served on the caveator.
>
> (3) On an application under subrule (1), the court may order the release from arrest of the ship or property on such terms as are just.

Rule 1005 of the *Federal Court Rules* are not as open ended as the Australian rule and do not provide the flexibility to accept a P&I Club letter. Our Rule is restricted to a bank guaranty or the bond of a surety company.

The practice in Canada when experienced maritime practitioners are involved in maritime disputes is generally for the plaintiff to accept a P&I Club letter as security. It is usually only when inexperienced counsel are involved that such letters are not accepted by plaintiff's counsel.

The Australian court resolved the question of the quantum of security by reference to a series of English cases frequently relied upon by counsel in Canada. Sheppard, J. turned to *The Moschanty*, a decision of Brandon, J. and held that in requesting security a plaintiff was:

> entitled to sufficient security to cover the amount of his claim with interest and costs 'on the basis of his reasonably arguable best

> case'. That passage is well known and has been applied in many cases since the decision in *The Moschanty*.[2]

This line of cases has been applied by the Federal Court of Canada.[3]

Canada - Chaleur Fertilizers Limited v. Armada Lines Limited[4]

The decision of the Federal Court of Appeal in *Chaleur Fertilizers Limited* must be considered an anomaly in the face of generally accepted rules concerning the consequences of a wrongful arrest of a vessel. In *Chaleur* the Court of Appeal awarded damages for wrongful arrest in circumstances where "the arrest was unlawful and the security unnecessary".[5]

This decision is out of step with well understood principles of maritime law in two respects. Firstly, the Court awards damages for wrongful arrest simply because the claim giving rise to the arrest was dismissed. Secondly, the Court concludes that the *in personam* jurisprudence relating to *Mareva* injunctions can be applied to the *in Rem* rules governing arrest of a vessel.

As to the first issue, it has never been doubted that damages are not awarded for wrongful arrest simply because the claim giving rise to the arrest has failed. There is an uncontradicted body of jurisprudence, commencing in the U.K. and adopted in Canada to the effect that:

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[2]*Id.* at p. 686

[3]*Ismail et al v. The "GOLDEN MED"*, Dubinsky, D.J. in T-3772-80, August 14, 1980

[4][1995] 1 F.C. 3

[5]*Id.* at p. 18

> Damages for arresting a ship are not, however, given, except in cases where the arrest has been made in bad faith, or with crass negligence.[6]

The decision of the House of Lords in the *"STRATHNAVER"*[7] an appeal from the Vice Admiralty Court of New Zealand is the most frequently cited decision in this respect. In discussing the issue of damages for wrongful arrest the Court states:

> Undoubtedly there may be cases in which there is *mala fides* or that *crassa negligentia* which implies malice, which would justify a Court of Admiralty giving damages.[8]

To award damages for wrongful arrest simply as a result of the failure of the claim is not in accord with established maritime jurisprudence on the issue.

As to the second issue, there is a considerable body of law and academic comment which seeks to maintain the distinction between the admiralty *in Rem* arrest procedure and the pre-judgment attachment procedure exemplified, *inter alia*, by the requirements for the issuance of a *Mareva* injunction.[9] The Court of Appeal in *Armada* indicates that the guidelines for the issuance of a *Mareva* injunction "are consistent with the criteria established by *Rule* 1003".[10] The requirement of the *Mareva* procedure to give an undertaking in damages is carried into the procedures of *Rule* 1003 by the Court of Appeal which concludes:

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[6]E.C. Mayers, *Admiralty Law and Practice* (1916) at p. 228

[7](1875) Appeal Cases 58

[8]*Id.* at p. 67

[9]See, for instance Bohmann, *Applicability of Shaffer to Admiralty in Rem Jurisdiction*, 53 Tulane Law Review 135 (1978); McCreary, *Going for the Jugular Vein: Arrests and Attachments in Admiralty*, 28 Ohio State Law Journal 19 (1967)

[10]*Supra*, note 4 at p. 20

> While *Rule* 1003 does not specifically require an undertaking as to damages for wrongful arrest, I think it to be a necessary inference that the plaintiff assumes the consequences of such an arrest. The English authority support the view that damages are payable where the arrest is without a proper legal foundation. In my view, when the plaintiff seeks to arrest a ship or its cargo pursuant to *Rule* 1003, the plaintiff carries the burden of showing that the arrest was lawfully carried.
>
> If, however, subsequent illegality with respect to the arrest is shown, the plaintiff must suffer the consequences of that illegality.[11]

To confuse the *in personam Mareva* procedures with the well established *in Rem* arrest procedures is to fundamentally change the consequences of a wrongful arrest. Having done so in *Armada* the Federal Court is out of step with recognized principles of maritime law.[12]

2. Jurisdiction - Australia - The Owners of "SHIN KOBE MARU" v. Empire Shipping Co. Inc.[13]

This November 1994 decision of the High Court of Australia demonstrates that issues of the extent of admiralty jurisdiction have not been restricted to Canada. The resolution

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[11] *Id.* at p. 20

[12] The Court of Appeal refers to the "CHESHIRE WITCH", 167 E.R. 402 in support of its conclusion. That case had to do with an award of damages where a vessel was kept under arrest during the period of time following judgment when the Plaintiff was trying to decide whether or not to appeal. The vessel was kept under arrest during the pendency of the action from August to November but it was recognized that no damages would be awarded for that arrest. The Court of Appeal also refers to D.C. Jackson, *Enforcement of Maritime Claims* at p. 178. With respect, this section of Jackson supports the traditional view that in order to award damages a claim must be malicious or there must be some element on the conduct of the person arresting apart from a simple attempt to enforce his claim.

[13] [1994] 181 C.L.R. 404

of the issue in Australia is interesting as it mirrors in some respects the approach taken by the Canadian Federal Court over the years.

In *Empire Shipping* the High Court of Australia considered an action *in Rem* brought by Empire against the owners of the "SHIN KOBE MARU" which asserted that these owners had "wrongfully refused to re-transfer the ownership" of the vessel to a third party.

Two jurisdictional issues were raised. First was that the claim was not a "proprietary maritime claim" as contemplated by s. 4(2) of the *Admiralty Act*, 1988. The second issue was that the Australian Constitution restricted the conferring of jurisdiction to matters contained in paragraph 76(2) or (3) of the Constitution which encompassed matters "arising under any laws made by the Parliament" and matters "of Admiralty and maritime jurisdiction".

As to the issue concerning the scope of s. 4(2) of the *Admiralty Act*, 1988 it defines a "proprietary maritime claim" as including a claim relating to "title to, or ownership of, a ship or a share in a ship". This is strikingly similar to s. 22(2)(a) of the *Federal Court Act*:

> Any claim with respect to title, possession or ownership of a ship or any part interest therein or with respect to the proceeds of sale of a ship or any part interest therein...

In concluding that s. 4(2) of the *Admiralty Act*, 1988 included claims relating to ownership asserted by a third party and also included the remedy of specific performance, the Australian court referred to the decision of the Supreme Court of Canada in the *Antares Shipping Corporation* case while noting that this case did not involve the exercise of jurisdiction where the plaintiff asserted not its own ownership but that of a third party. The Court also referred

to the *Antares* case for support in its conclusion that a claim for specific performance was included and that "historical considerations did not dictate to the contrary".[14]

On the second issue concerning the construction of the Australian Constitution, the Court spent some time discussing the American cases. This was required because the Australian Constitution is modelled on that of the United States. The Australian court concluded that the word "maritime" in the Australian Constitution:

> Serves to equate the jurisdiction there referred to that of maritime nations generally, there is no basis for any qualification or limitation based on jurisdictional divisions.[15]

The constitutional analysis in the *Empire Shipping* case is consistent with the process followed by the Canadian Federal Court of Canada in determining whether or not any particular claim is in fact "maritime".[16]

3. Duty of Care - England, Marc Rich & Co. v. Bishop Rock Marine Company Limited[17]

This July 1995 decision of the House of Lords concluded that a marine classification society does not have a duty of care to a cargo owner to take reasonable care in the conduct of a survey carried out by the classification society. For the purposes of this case, the classification society had accepted that the damage suffered (the ship had sunk with total loss

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[14]*Id.*, at p. 422

[15]*Id.* at p. 426

[16]In the sense that the process followed by the Canadian Federal Court requires an analysis of the grant of jurisdiction to the court contained in s. 91 of the *Constitution Act* followed by a further analysis as to the subject matter jurisdiction granted in s. 22 of the *Federal Court Act*

[17][1995] 3 W.L.R. 227

of the cargo) was physical damage and that it had been foreseeable that lack of care by the society was likely to expose the cargo owners' property to the risk of physical damage.

Shipowners had loaded the plaintiff's cargo under Bills of Lading incorporating the *Hague Rules*, in consequence of which they owed a non-delegable duty to the cargo owners to make the vessel seaworthy at the commencement of the voyage. In mid-voyage, the ship was put into port because of a crack in the hull. A surveyor employed by the classification society recommended permanent repairs. This would have necessitated discharging the cargo. The shipowners balked as this would have involved drydocking. The surveyor was prevailed upon to change his mind and he then pronounced the vessel fit to proceed after completing some temporary repairs to the shell plating. The vessel sailed the same day. The next day the welding in way of the temporary repairs cracked and a few days later the vessel sank.

Lord Steyn rendered the majority judgment for the House of Lords. He considered a number of factors in reaching his conclusion that there was no duty owed by the classification society to the cargo owners and concluded that the existence of the Bill of Lading contracts, the position and role of the classification society and other policy factors affecting the role of the classification society weighed in favour of finding no duty. Lord Steyn concluded:

> The dealings between shipowners and cargo owners are based on a contractual structure, the *Hague Rules*, and tonnage limitation, on which the insurance of international trade depends: Dr. Malcolm Clarke, "Misdelivery and Time Bars" [1990] L.M.C.L.Q. 314. Underlying it is the system of double or overlapping insurance of cargo. Cargo owners take out direct insurance in respect of the cargo. Shipowners take out liability risks insurance in respect of breaches of their duties of care in respect of the cargo. The insurance system is structured on the basis that the potential liability of shipowners to cargo owners is limited under the *Hague Rules* and by virtue of tonnage limitation

provisions. And insurance premiums payable by owners obviously reflect such limitations on the shipowners' exposure.

If a duty of care by classification societies to cargo owners is recognised in this case, it must have a substantial impact on international trade. In his article Mr. Cane described the likely effect of imposing such duty of care as follows [1994] L.M.C.L.Q. 363, 375:

> "Societies would be forced to buy appropriate liability insurance unless they could bargain with shipowners for an indemnity. To the extent that societies were successful in securing indemnities from shipowners in respect of loss suffered by cargo owners the limitation of the liability of shipowners to cargo owners under the *Hague(-Visby) Rules* would effectively be destroyed. Shipowners would need to increase their insurance cover in respect of losses suffered by cargo owners; but at the same time, cargo owners would still need to insure against losses about the *Hague-Visby* recovery limit which did not result from actionable negligence on the part of a classification society. At least if classification societies are immune from non-contractual liability, they can confidently go without insurance in respect of third-party losses, leaving third parties to insure themselves in respect

> of losses for which they could not recover from shipowners."[18]

The decision of the majority seems predicated on the idea that to impose a duty on a classification society would involve wide ranging exposure to the classification societies rendering them "potential defendants in many cases".[19]

A strong dissenting judgment was rendered by Lord Lloyd of Berwick who concluded:

> In physical damage cases proximity very often goes without saying. Where the facts cry out for the imposition of a duty of care between the parties, as they do here, it would require an exceptional case to refuse to impose a duty on the ground that it would not be fair, just and reasonable. Otherwise there is a risk that the law of negligence will disintegrate into a series of isolated decisions without any coherent principles at all, and the retreat from *Anns* will turn into a rout...I can see no good reason why, on the facts of this case, ordinary well established principles of the law of negligence should not be allowed to take effect.[20]

The *Marc Rich* decision is predicated on the assumption that the loss in question was "physical damage". The decision is however clearly influenced by the current retreat of the English Courts in the economic loss cases culminating in *Murphy v. Brentwood District Council*.[21] It seems unlikely that a Canadian court would utilize the same reasoning to follow

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[18]*Id.*, at p. 250

[19]*Id.*, at p. 252

[20]*Id.*, at p. 241

[21][1991] 1 A.C. 398

the *Marc Rich* decision particularly bearing in mind the recent Canadian cases on economic loss including *CNR v. Norsk.*[22] The Canadian cases clearly evince a disassociation from the English retreat.

It does not, however, necessarily follow that a Canadian court would find in favour of the cargo owner. Litigation against classification societies has proliferated in recent years and for the most part claims against the Classification Societies have been unsuccessful.[23] In a paper given recently to the New Directions in Maritime Law Conference in Halifax, Wm. Moreira, having reviewed the existing cases concluded as follows[24]:

> The cases support the proposition that for civil liability purposes, the classification society has performed its duty when it has detected and reported the defect, regardless whether, through the imposition of a condition, it requires the owner to immediately correct it. The shipowner is the person responsible to cargo, passengers, the environment, and the world at large for the seaworthiness of his vessel, and responsibility for a negligent failure to correct (immediately or at all) known defects should rest with the shipowner alone.
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> The issue of statutory immunity is obviously beneficial to the societies (one could argue unduly prejudicial to plaintiffs) where it is available; however this is of relatively limited value in overall

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[22][1992] 1 S.C.R. 1021

[23]See e.g. "TRADEWAYS II", [1973] A.M.C. 1755 (2nd Cr.); The "AMOCO CADIZ", [1986] A.M.C 1945 (N.D. Ill.); The "MORNING WATCH", [1990] 1 Lloyd's Rep. 547 (Q.B. Comm. Ct.); The "THOMAS K", [1990] A.M.C. 139 (ED Tex., 1989); The "SUNDANCER", [1992] A.M.C. 2946 (SDNY, 1992), affirmed on appeal [1994] 1 Lloyd's Rep. 183 (2nd Cir., 1993), cert. denied, 114 S.Ct. 1399 (1994); The "SCANDINAVIAN STAR", Florida District Court, 11th Judicial Circuit Case Number 92-7959 (Decision of Circuit Judge Rothenberg, June 4, 1993, unreported)

[24]Wm. Moreira, *Setting and Enforcing Standards for Maritime Industry: An Overview of Recent Developments*, 1995 New Directions in Maritime Law Conference Proceedings at p. 13-14

terms because of the small number of flag states which confer such immunity and also because of the relatively small proportion of classification society work which relates to statutory (as opposed to other) surveys or inspections. In Canada, for example, the societies do not enjoy statutory immunity, although public servants who issue statutory certificates on the basis of class inspections are so protected.

The issue of enforceability or efficacy of contractual limitation or exclusion of liability provisions which most if not all societies are said to employ has yet to be directly addressed in either England or the United States. The dicta in the American cases comment both favourably and unfavourably on the proposition that societies should have the right to limitation as against their own clients. There is presently no guidance whether such limitation provisions would be effective at all as against a third party plaintiff suing a classification society in tort.

4. Foreign Arbitration Clauses - United States, The M/V "SKY REEFER"[25]

The *M/V "SKY REEFER"* is a June 19, 1995 decision of the Supreme Court of the United States which enforced a clause in a Bill of Lading calling for arbitration in Tokyo according to the law of Japan. The shipment in question was from Morocco to Massachusetts and was governed by the *Hague Rules*. The argument was made that the Japanese arbitration clause along with the choice of Japanese law contained in the Bill of Lading violated Article III, Rule 8 of the *Hague Rules*:

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[25]115 S. Ct. 2322 (1995)

> Any clause, covenant, or agreement in a contract of carriage relieving the carrier or the ship from liability for loss or damage to or in connection with the goods, arising from negligence, fault or failure in the duties or obligations provided in this section, or lessening such liability otherwise than as provided in this chapter, shall be null and void and of no effect.

An identical clause is contained at Article III, Rule 8 of the *Hague-Visby Rules* which currently have effect in Canada pursuant to the *Carriage of Goods by Water Act*.

The *SKY REEFER* case is consistent with the position of the Canadian Federal Court which has, on occasion, stayed proceedings in which there was a foreign arbitration and choice of law clause.[26] The reason articulated by the Federal Court is that a plaintiff who could not show strong reasons why it was not just or reasonable to keep to their jurisdictional promise must be held to that promise.

What is interesting about the *SKY REEFER* case is the argument that such a jurisdiction/choice of law clause violates the *Hague Rules* (or in Canada the *Hague-Visby Rules*).[27] Mr. Justice Stevens filed a strong dissenting judgment in the *SKY REEFER* in which he found that such a clause did indeed violate the *Rules*:

> From a practical standpoint, to require an American plaintiff to assert his claim only in a distant court lessens the liability of the carrier quite substantially, particularly when the claim is small. Such a clause puts 'a high hurdle' in the way of enforcing liability,

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[26]*Nissaho Iwai Corp. v. Paragon Grand Carriers Corp.* (1978), 11 F.T.R. 134; *Caribbean Ispat v. Companhia De Navegacao Lloyd Brasilairo* (1992) 59 F.T.R. 207

[27]In a comment in FairPlay Magazine (Oct. 5, 1995) Professor Tetley comments on the "SKY REEFER" and wonders what the effect of applying the *Hamburg Rules* would have been on the case. These *Rules* permit the claimant to choose the place of suit or arbitration from among five alternatives.

> Gilmore & Black, p. 125, and thus is an effective means for carriers to secure settlements lower than if cargo could sue in a convenient forum.[28]

The majority judgment had assumed that "lessening such liability" in Article III, Rule 8 referred only to the substantive rules that defined the carrier's legal obligations. In Mr. Justice Stevens' view:

> In my opinion, this view is flatly inconsistent with the purpose of COGSA s. 3(8). That section responds to the inequality of bargaining power inherent in Bills of Lading and to carriers' historical tendency to exploit that inequality whenever possible to immunize themselves from liability for their own fault.[29]

A similar argument was considered by the Federal Court of Canada in *Agro Co. of Canada Ltd. v. Owners and All Others Interested in the Ship "REGAL SCOUT"*[30]. In the *"REGAL SCOUT"* Mr. Justice Cattanach rejected an Application for a stay of proceedings on the basis of a jurisdiction clause which provided:

> Any dispute arising under this Bill of Lading shall be decided in the Tokyo District Court in Japan according to Japanese law, except only as otherwise agreed herein or as otherwise determined by controlling foreign law.

Cattanach, J. ruled that this clause did violate Article III of the *Hague Rules* which were applicable to the shipment in question. The judge had affidavit evidence that the outcome under

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[28] *Supra*, note 25 at p. 2333

[29] *Id.*, at p. 2334

[30] (1983), 148 D.L.R. (3d) 412

Japanese law would be to totally take away any claim advanced by the cargo owner. In ruling that the jurisdiction clause was invalid, Cattanach, J. relied on the decision of the English House of Lords in the *"MORVIKEN"*[31]. In that case the bill of lading contained a clause which provided that the law of the Netherlands would apply to the contract and that all actions under the contract of carriage would be brought before the court in Amsterdam. Lord Diplock concluded that the law of the Netherlands would result in a lower recovery to the cargo owner and accordingly he ruled that the clause violated Article III, Rule 8.

It is noteworthy that in the *"SKY REEFER"* the majority judgment took pains to point out that it was premature for the Court to decide whether or not the Japanese arbitrator would in fact apply Japanese law as opposed to the *Hague Rules*. In the *"REGAL SCOUT"* the Federal Court of Canada had evidence before it that a Japanese court, in applying Japanese law, would dismiss the claim of the cargo owner. The point that has not yet been argued in a reported decision in Canada is the argument adopted by the dissent in the *"SKY REEFER"*, that is that by simply forcing a plaintiff to a foreign jurisdiction the necessary expense, etc. would lessen the liability of the carrier. In the words of Mr. Justice Stevens:

> When one reads the statutory language in light of the policies behind COGSA's enactment, it is perfectly clear that a foreign forum selection or arbitration clause "relieves" or "lessens" the carrier's liability. The transaction costs associated with an arbitration in Japan will obviously exceed the potential recovery in a great many cargo disputes. As a practical matter, therefore, in such a case no matter how clear the carrier's formal legal liability may be, it would make no sense for the consignee or its subrogee to enforce that liability.[32]

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[31][1983] 1 Lloyd's Rep. 1

[32]*Supra, note 25 at p. 235*

5. Maritime Oil and Gas - Canada, Bow Valley Husky (Bermuda) Ltd. v. Saint John Shipbuilding[33]

There is a lot of oil and gas activity off the east coast of Canada. Nova Scotia has a producing oil field off Sable Island and plans are being made to bring natural gas from that field ashore through Nova Scotia. The Hibernia Project in Newfoundland will start production in the next couple of years and it is anticipated that other oil fields on the east coast will eventually go into production. There is also considerable speculation concerning the exploration activity of Hunt Oil on the west coast of Newfoundland. There are huge sums of money at issue in this industry and it is important for the participants to understand whether their activities are governed by maritime law or by some other body of law. In this area it is particularly important to strive for some basic consistency between Canada and the United States since much of the activity offshore Canada is derived from American oil companies and oil rig contractors.

The recent decision of the Newfoundland Court of Appeal in *Bow Valley Husky (Bermuda) Ltd. v. Saint John Shipbuilding* concerned a fire which occurred on a semi-submersible drilling rig located 185 miles offshore Newfoundland. Of particular interest to the issue of consistency between Canadian and American maritime law are the comments of the Court of Appeal concerning whether a fire on an offshore rig is a matter of maritime law and the court's discussion of the common law contributory negligence bar.

As to the maritime law issue, the Court of Appeal, in coming to its conclusion that the claim was indeed maritime, reviewed a number of American decisions and academic commentary. The Court concluded that:

> The activities of the Bow Drill 3 are essentially maritime in nature, albeit a modern view of maritime activity, and a tort

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[33](1995) 130 Nfld. & P.E.I.R. 92

> having resulted in damage to the vessel while at sea, maritime law governs.[34]

Some of the American authorities considered by the Court address the question of whether or not an offshore rig is maritime property. The American law has consistently found such rigs to be maritime property with the exception of situations involving fixed offshore platforms which are considered to be artificial islands.[35] The Court also considered American cases which had concluded that a products liability claim arising at sea was maritime notwithstanding the fact that the product was manufactured ashore.[36]

The Court of Appeal was referred to the Federal Court decision in *Dome Petroleum v. Hunt International Petroleum*[37] in which the Federal Court, dealing with a claim for breach of contract relating to an offshore drilling program involving a drill ship had concluded that the matter was not maritime. Mr. Justice Dubé had said:

> By no stretch of the imagination can it be conceived that a 'drilling system' is navigating as it carries out its main function, drilling through land. Whatever be its configuration or position, above water or down below, it must be stationery. Any navigation necessary to tow it into position is merely incidental.[38]

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[34] *Id.* at p. 134

[35] See, for instance Gene Silva, *Admiralty Law and Offshore Drilling Units: An American Overview* in Offshore Petroleum Installations Law and Financing, International Bar Association (1986)

[36] This is consistent with the decision of the Supreme Court of Canada in *Wire Rope Industries of Canada (1966) Ltd. v. B.C. Marine Shipbuilding Ltd.*, [1981] 1 S.C.R. 363

[37] [1978] 1 F.C. 11

[38] *Id.* at p. 16-17

This "main function test" was rejected by the Court of Appeal which accepted the view of Michael Summerskill in **"Oil Rigs: Law and Insurance"** (London, Stevens, 1979). The Court of Appeal was of the view:

> That a system of law which classifies the Bow Drill 3 as a ship, subject to maritime law when travelling, and as something else, not subject to maritime law when it is not travelling, is unsatisfactory.[39]

Adopting Summerskill, the Court went on in quoting from p. 85 of that book:

> Such a drilling unit would be an indeterminate animal, subject to laws of limitation, salvage and the like at sometimes and not at others.[40]

This decision of the Court of Appeal is entirely consistent with the well developed body of American law relating to maritime law aspects of the offshore.

The Court of Appeal also concluded that the common law contributory negligence bar did not form part of Canadian maritime law. One of the grounds upon which this decision was reached was by reference to the American jurisprudence which the Court concluded had done away with the bar by the actions of Judges without the requirement of legislative action. The Court of Appeal referred to the United States Supreme Court decision in the *United States v. Reliable Transfer Company*.[41] Madam Justice Cameron speaking for the Court of Appeal continued:

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[39] *Supra*, note 30 at p. 131

[40] *Id.* at p. 131

[41] [1975] A.M.C. 541

> It seems to me that it is time for the Courts to respond to the injustice of the application of the contributory negligence bar and to declare that liability for tort, in maritime law, should be borne in relation to the degree of fault of the parties. If the contributory negligence bar was once seen by the judges who developed it as a fitting response to the problem of the defendant being held responsible for all the damage when it was in fact caused in part by the plaintiff and in part by the defendant, that should no longer be the case. I do not believe that it is necessary for this court to examine and declare what is to be done in respect of each problem which might arise in the field of maritime law with the elimination of the contributory negligence bar. Traditionally the common law has developed on a case by case basis, responding on an incremental basis to problems as they arise. I see no need to break with that tradition. Apportionment of fault has been the tradition of Maritime Law in collision cases. It seems to me to be a logical extension of that tradition to extend apportionment to other areas.[42]

Other decisions from the United States Supreme Court are in accord with this view.[43]

CONCLUSION

The practice of maritime law is international. Clients are very rarely from Canada, whether they be shipowners or their insurers. It is therefore important for there to be as much uniformity as possible in maritime law internationally so that there is as little

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[42] *Supra*, note 30 at p. 141

[43] eg. *"MAX MORRIS"* 137 U.S. 1 (1890); *Socony-Vacuum Oil Company v. Herbert A. Smith*, 305 U.S. 424 (1939)

uncertainty as possible as to the outcome of any particular factual situation. The Courts of some countries frequently cite maritime law cases from other jurisdictions. This is a helpful way of monitoring the uniformity (or lack thereof) of maritime law in any particular area. Examining the ways in which other jurisdictions address maritime law issues is a useful device for the Courts of any jurisdiction to assist in facilitating the carrying on of business in the maritime sector.

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