BRITISH COLUMBIA ADMIRALTY DISTRICT

MARPOLE TOWING LTD .....PLAINTIFF;

AND

BRITISH COLUMBIA TELEPHONE COMPANY and all other persons claiming or being entitled to claim damages by reason of or arising out of the navigation of the tug *Chugaway II* resulting in the collision on June 23rd, 1966 between the barge *V.T. NO. 154* in tow of the said tug, and the Fraser Street fixed span bridge in the Fraser River .....DEFENDANTS.

Vancouver 1969

Sept. 16-17 Oct. 1

Shipping—Ship colliding with bridge—Limitation fund—Whether "actual fault or privity" of owner—Canada Shipping Act, R.S.C. 1952, c. 29, s. 657(2) am. 1960-61, c. 32, s. 32—Whether Provincial Crown bound by limitation of liability—Damage caused by barge under tow of tugboat—Calculation of liability—Only tonnage of tugboat taken into account.

Crown—Costs—Ship causing damage to property of Province—Whether Crown affected by statutory limitation on shipowner's liability—Provincial Act depriving Crown of costs of litigation—Effect on federal cause of action—Crown Costs Act, R.S.B.C. 1960, c. 87, s. 2.

On June 23, 1966, a chip barge being towed up the Fraser River by a tugboat struck the Fraser Street Bridge, causing injuries to persons on the bridge and damage to the bridge and other property. The tug was owned by plaintiff company which was under the supervision of *L*, who with his son held all its shares and was its president and general manager. The master and crew of the tug were competent and experienced and the tug was well found. The accident occurred because the tug's master, who estimated the clearance of the Fraser Street bridge by the navigators' usual practice of counting the visible planks of the preceding bridge, either miscounted or forgot the count. Plaintiff sued to limit its liability under s. 657(2) of the *Canada*

1969

MARPOLE TOWING LTD v. BRITISH COLUMBIA TELEPHONE Co. *et al*

Shipping Act. The only claimant who contested the action was the Crown in right of the Province of British Columbia, which owned the damaged bridge.

Held: (1) The accident occurred without the "actual fault or privity" of the tug's owner, whose liability was therefore limited by s. 657(2).

Robin Hood Mills Ltd v. Paterson Steamships Ltd (P.C.) [1937] 3 D.L.R. 1; 58 Ll. Rep. 33, applied.

(2) The provisions of the *Canada Shipping Act* for limiting liability are binding on the Crown in right of the Province.

Gartland Steamship Co. v. The Queen [1960] S.C.R. 315, followed.

(3) The amount of the liability under s. 657(2) is to be determined by reference to the tonnage of the tug alone, and does not include that of the tow in the circumstances of this case

The *Bramley Moore* [1963] 2 Ll. Rep. 429, followed.

(4) Whether or not the *Crown Costs Act*, R.S.B.C. 1960, c. 87, applies to this action, sec. 2 thereof, which provides that the Crown shall not pay or receive costs, may be given effect as declaring the Crown's policy, and the Crown directed to pay its own costs even though its defence was reasonably required.

ACTION for limitation of liability under *Canada Shipping Act*.

John R. Cunningham and *J. L. J. Jessiman* for plaintiff.

John I. Bird, Q.C., for the Crown in right of the Province of British Columbia.

SHEPPARD D.J.:—This proceeding is by the Marpole Towing Ltd. as plaintiff, to limit its liability under the Canada Shipping Act, R.S.C. 1952 c. 29, secs. 657 to 663 inclusive and amendments thereto, in respect of damages caused by the plaintiff's tug *Chugaway II* towing empty chip barge *V.T. No. 154* against the Fraser Street Bridge, Vancouver, B.C., the property of the Crown in the right of the Province.

On the 23rd June, 1966, the day in question, the weather was clear, the visibility good with slight wind. At 09:05 (daylight time) on that day the tug *Chugaway II*, owned by the plaintiff and of a tonnage of 9.87 took in tow the chip barge *V.T. 154* (of Vancouver Tug Boat Co. Ltd.) at Musqueam scow berth, Fraser River, Vancouver, B.C., for the purpose of towing her to New Westminster. On the tug were Captain Forsyth, the master, at the wheel, and a full crew consisting of Mr. Taylor, the mate, who initially remained aft at the winch, and a deckhand. The Fraser River at the relevant places flows generally from east to

west and the voyage of the tug and tow led easterly up the Fraser River successively past the following bridges; the Railway Bridge, also called the Marpole Bridge, the Oak Street Bridge with clearance of 66 feet above high water, and the Fraser Street Bridge with clearance of 24 feet above high water according to the chart 6. The tide at that time was approximately high. At Point Atkinson the tide was 10.8 feet at 07.05, 1.0 feet at 14.42 and as the Fraser Street Bridge is about one hour later the tide at the Fraser Street Bridge would be approximately full at 09.05, the time of the accident. The chip barge in tow was 27½ feet from the top of the box to the bottom of the barge, and being empty had a draught of 1½ feet, hence from the top of the box to the water line was 26 feet. Those dimensions of the chip barge were known to Captain Forsyth from the list, posted upon the tug and elsewhere.

Amongst those familiar with the navigation of the Fraser River it was common practice to determine the clearance of the Fraser Street Bridge by counting the visible planks of the Oak Street Bridge, allowing approximately one foot for each plank and adding 19 feet as indicating the height of the Fraser Street Bridge above the current level of the water.

The tug having picked up the chip barge at the Musqueam scow berth, proceeded up the Fraser River with the master, Captain Forsyth, at the wheel, and Mr. Taylor aft at the winch. At the Oak Street Bridge Captain Forsyth counted the visible planks and while at the trial he had forgotten the count, the mate reported the Captain had told him nine planks for nine feet plus nineteen feet (twenty-eight feet) as being the clearance of the Fraser Street Bridge. Having passed the Oak Street Bridge, the mate, Mr. Taylor, took the wheel and Captain Forsyth remained in the wheelhouse. The tug was then proceeding up the main channel for tugs and tows, to the south of Mitchell Island and having been told that nine planks were visible, the mate would expect that there would be a clearance of twenty-eight feet at the Fraser Street Bridge and therefore the tug and tow would have ample clearance to pass underneath the bridge. In the actual passing under the bridge the top eighteen inches of the chip barge then in tow struck the middle span and carried it into the river, fortunately without loss of life but with personal injury to those

1969

MARPOLE TOWING LTD v. BRITISH COLUMBIA TELEPHONE CO *et al*

Sheppard, D.J.

on the span and damage to the bridge and other property. The plaintiff has settled all claims of personal injuries of which the plaintiff had notice without exhausting the limited sum fixed by the statute. In December, 1968, the plaintiff applied under the *Canada Shipping Act* to limit its liability and gave notice to all the claimants of which the plaintiff had notice. The crown in the right of the Province alone appeared and contested the plaintiff's right to limit its liability. Then followed a statement of claim, and a statement of defence of the Crown in the right of the Province. A copy of the statement of claim was given to all the claimants and also notice of the date of trial. At the trial there appeared only counsel for the plaintiff and for the Crown in the right of the Province.

The onus is on the owner of the ship as applicant to bring himself within the sections of the *Canada Shipping Act*. Here Marpole Towing Ltd as owner seeks to limit its liability under the statute which reads in part as follows (R.S.C. 1952, c. 29, s. 657(2) as amended 1960-61, c. 32, s. 32):

> 657 (2) The owner of a ship, whether registered in Canada or not, is not, where any of the following events occur without his actual fault or privity, namely: . . .
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> (*c*) where any loss of life or personal injury is caused to any person not on board that ship through
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> (i) the act or omission of any person, whether on board the ship or not, in the navigation or management of the ship, in the loading, carriage or discharge of its cargo or in the embarkation, carriage or disembarkation of its passengers, or
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> (ii) any other act or omission of any person on board that ship; or
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> (*d*) where any loss or damage is caused to any property, other than property described in paragraph (*b*), or any rights are infringed through
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> (i) the act or omission of any person, whether on board that ship or not, in the navigation or management of the ship, in the loading, carriage or discharge of its cargo or in the embarkation, carriage or disembarkation of its passengers, or
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> (ii) any other act or omission of any person on board that ship;
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> liable for damages beyond the following amounts, namely:
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> (*e*) in respect of any loss of life or personal injury, either alone or together with any loss or damage to property or any infringement of any rights mentioned in paragraph (*d*), an aggregate amount equivalent to 3,100 gold francs for each ton of that ship's tonnage;

to be distributed 21/31sts to the claimants for loss of life or personal injuries and 10/31sts to claims for damage to property or infringement of rights. (Sec. 658 (1*a*), added by S. of C. 1964-65, c. 39, s. 34.)

Here the real issue turns upon the words "without his actual fault or privity" (657(2)). Those words have been defined in *Robin Hood Mills Ltd v. Paterson Steamships Ltd*[1] by Lord Roche as follows:

> The meaning of fault and privity in s 502 of the Act, which in that respect is identical with s 503, has been authoritatively declared by the Court of Appeal and the House of Lords in the case of *Lennard's Carrying Co Ltd v Asiatic Petroleum Co. Ltd,* [1914] 1 K B 419 and [1915] A C 705 'The words "actual fault or privity" . . . infer something personal to the owner, something blameworthy in him, as distinguished from constructive fault or privity such as fault or privity of his servants or agents' (per Buckley, L J [1914] 1 K B at p 432). 'Actual fault negatives that liability which arises solely from the rule "respondeat superior"' (*per* Hamilton, L J (p. 436). So in the case of a company 'it must be the fault or privity of somebody who is not merely a servant or agent for whom the company is liable upon the footing respondeat superior, but somebody for whom the company is liable because his action is the very action of the company itself (per Viscount Haldane, L C, [1915] A C, at pp 713-4) The burden of showing that no such fault or privity subsisted was said in *Lennard's* case to rest upon the shipowners and the respondents here did not seek to question that proposition as applying to the present case But another and very important principle is to be derived from a consideration of the section, namely, that the fault or privity of the owners must be fault or privity in respect of that which causes the loss or damage in question, a proposition which was acted upon and illustrated in *Lennard's* case.

The duties of the owner have been defined as follows: In the Norman [1960] 1 Lloyd's Rep. 1, Lord Keith of Avonholm stated at p. 16:

> One of the clear duties of an owner is to provide the ship with navigational aids reasonable for and appropriate to the nature and purpose of the voyage One of the most obvious of these is an up-to-date chart
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> Where the owners were in touch with the Norman by radio as they were here, and the crew were engaged in a hazardous occupation off a hazardous coast I think there was a duty to communicate to the ship the latest information that would assist navigation including anything relating to the chart with which she was sailing In failing to do so, the owners, in my opinion, were in fault and I am unable to say that this fault did not conduce to the disaster of the vessel

In the *Lady Gwendolen* [1965] 1 Lloyd's Rep. 335, Sellers, L.J. stated at p. 339:

> In their capacity as shipowners they must be judged by the standard of conduct of the ordinary reasonable shipowner in the management

[1] (P C) [1937] 3 D L R 1 at p 6, 58 Ll L Rep 33 at p. 39

1969

MARPOLE TOWING LTD v. BRITISH COLUMBIA TELEPHONE CO. et al

Sheppard, D.J.

and control of a vessel or of a fleet of vessels. A primary concern of a shipowner must be safety of life at sea. That involves a seaworthy ship, properly manned, but it also requires safe navigation

and Winn, L.J. at p. 348:

> in a number of different sets of circumstances and situations Courts have determined the presence or absence of such actual fault or privity, it appears to me that two guiding principles are plain
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> First, an owner who seeks to limit his liability must establish that, although for the immediate cause of the occurrence he is responsible on the basis of respondeat superior, in no respect which might possibly have causatively contributed was he himself at fault. An established causative link is an essential element of any actionable breach of duty; therefore "actual fault" in this context does not invariably connote actionable breach of duty.
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> Second, an owner is not himself without actual fault if he owed any duty to the party damaged or injured which (a) was not discharged, (b) to secure the proper discharge of which he should himself have done but failed to do something which in the given circumstances lay within his personal sphere of performance.

In the *Anonity* [1961] 1 Lloyd's Rep. 203, Hewson J. stated at p. 209:

> Having reached that conclusion, it is for the plaintiffs to satisfy me that if such a notice had been issued it would have made no difference on the fateful day.

and on appeal reported at [1961] 2 Lloyd's Rep. 117, Willmer, L.J. stated at p. 124:

> I cannot but feel that the situation that now exists could and should have been produced before. It was reasonably foreseeable how dangerous it was to have the galley fire on at an oil jetty. The circular does not seem to me an adequate way of dealing with the situation.

That onus therefore requires the plaintiff to prove:

(1) the person whose very action is the action of the company (*Robin Hood Mills Ltd. v. Paterson Steamships Ltd., supra*);

(2) that such person has not been guilty of a fault or privity as previously defined (*Robin Hood Mills Ltd. v. Paterson Steamships Ltd., supra, The Norman, supra, The Lady Gwendolen supra*);

(3) or if there be a fault it did not contribute to the accident (*Robin Hood Mills Ltd. v. Paterson Steamships Ltd., supra, The Anonity, supra,* per Hewson J. at p. 209, *The Norman supra*).

In the light of these principles it remains to consider the relevant facts of this case. Whether there was fault or privity of the plaintiff must depend upon whether there was such a fault or privity of Captain Lowry. He was president and general manager of the plaintiff. In 1934

he started the business in a partnership. In 1953 the plaintiff was incorporated and Capton Lowry and his son were the owners of all the shares at the time of the accident. Captain Lowry, being the president and general Manager, has been throughout the supervisor for the plaintiff. He had issued no written standing orders but had from time to time issued oral instructions to the various masters as to the use of life jackets, bridles, travelling at reasonable speed, authority to the masters to employ help if needed and instructed to navigate at safe speed. Within these limits the master was to have discretion in navigation.

The master and crew of the tug were competent. Captain Forsyth as the master was experienced in river navigation. He had twenty-one years' experience on tugs sailing the Fraser River and he was master thereof for eighteen years. During that period he had navigated the river continuously and this was the only accident during that period. The mate, Mr. Taylor, had ample experience on the river as he had sailed thereon for five or six years and he had been nine months with the plaintiff. At the time of the trial, Mr. Taylor owned and operated his own towing business which was engaged in towing on the river. The crew was not overworked or tired. Immediately before the day of the accident they had had four days off and had returned to work at 07.00 hours. Hence they had only worked two hours prior to the accident. It was customary to work five days in the week, on shifts of six hours on and six hours off.

The tug, *Chugaway II* was well found. The mate, Mr. Taylor, gave evidence that the navigation equipment was very good and the navigation aids were also good. This included chart, radar, compass, and everything required.

The arguments of the defendant were as follows:

That Captain Forsyth should have been instructed to use the chart going under Fraser Street Bridge, as the chart showed the clearance of the Fraser Street Bridge to be 24 feet at high water. Hence this argument is that the use of the chart would have warned the master that there was not sufficient clearance of 26 feet for the tow. On the other hand, the chart had been supplied to the tug and the chart table was in the wheelhouse. The use of a chart on any occasion is a matter for the master: it is a matter of navigation in which he has to use his discretion based on his experience, and a master knows what a chart is for without

1969

MARPOLE TOWING LTD v BRITISH COLUMBIA TELEPHONE Co *et al*

Sheppard, D J

being told. Moreover, the master would acquire no additional knowledge from the use of the chart. The master knew the actual clearance of the Fraser Street Bridge. He had measured it four or five times and had checked the measured clearance against the Oak Street Bridge. This had been done for the benefit of new crews. In that way he knew the clearance of the Fraser Street Bridge was determined by counting the visible planks of the Oak Street Bridge and adding nineteen feet. Further, the master had tested this method of measuring the clearance of the Fraser Street Bridge on hundreds of times in navigating the Fraser River. Again, his actual experience was superior to any knowledge to be learned from the chart. From the chart he could learn the clearance of the Fraser Street Bridge was 24 feet at high water but that was not necessarily true because the wind could raise the waters of the Fraser River two feet and that would reduce the clearance. Moreover, the master knew that the chart was also fallible in that the channel of the river changed from time to time. As the Oak Street Bridge was closer to the mouth of the Fraser River than the Fraser Street Bridge, any tide would be registered at the Oak Street Bridge before reaching the Fraser Street Bridge. Freshets at that time of the year would be no problem as they would amount to only four or five inches and would be registered at the Oak Street Bridge. Hence the counting of the visible planks at the Oak Street Bridge and adding nineteen feet would be more precise and accurate than the chart.

This accident was due to Captain Forsyth failing to count accurately the number of planks or failing to remember the actual count. The failure was not in any sense due to the method employed by the master for deciding the clearance of the Fraser Street Bridge.

The defendant contends that the plaintiff was at fault in that Captain Lowry should have instructed the masters that at high water or in the event of a tide of ten feet at Point Atkinson, the masters were not to tow under the Fraser Street Bridge but were to proceed up the channel to the north of Mitchell Island and thereby through swing bridges and not through the usual channel to the south of Mitchell Island through the Fraser Street Bridge. However, there were difficulties in using the other channel to the north of Mitchell Island. The channel was called 'the

slough'. It was narrow, and there were five or six lumber mills thereon, each with log berths which might have blocked the channel and in any event would require the tug and tow to proceed slowly so the wash could cause no damage in such narrow waters. Hence that channel was not usually used by tugs and tows.

The channel to the south of Mitchell Island was usually used by tugs and tows and the Oak Street Bridge was used as giving the correct clearance of the Fraser Street Bridge as Captain Lowry, Captain Forsyth and Mr. Taylor then knew.

The choice of channel was therefore a matter of navigation within the discretion of the master.

The defendant, however, contends that Captain Lowry should have given instructions not to take the barge through the Fraser Street Bridge at high water, that the oral instructions of Captain Lowry were directed to safety features such as the use of life jackets, bridles, the use of radar, moderate speed, but such instructions should have gone further and ordered the masters not to use the Fraser Street Bridge with a tow at high water. The defendant also contends that Captain Lowry admitted it would have been prudent to have instructed his masters not to take the barge through the Fraser Street Bridge at high water. On the other hand, such instructions as suggested by the defendant require the master to determine whether there was high water and that was properly determined by counting the visible planks of Oak Street Bridge and adding nineteen feet. Hence those instructions would not have avoided the possibility of the same mistake made by Captain Forsyth. Further, the accident was not due to the method used by the master in determining the clearance of Fraser Street Bridge but was due to the failure of the master to count accurately the visible planks at Oak Street Bridge or his failure to remember the count as made by him. That error of the master was not a matter which could be foreseen by Captain Lowry.

The question here is whether or not the care of "the ordinary reasonable shipowner in the management and control" of this tug had been exercised by Captain Lowry and it is evident that he could not have foreseen the mistake of the master but could foresee that the method used by the master was superior to the use of any chart. That method of estimating the clearance of Fraser Street Bridge

1969

MARPOLE TOWING LTD v. BRITISH COLUMBIA TELEPHONE Co. *et al*

Sheppard, D.J.

by counting the visible planks of Oak Street Bridge and adding nineteen feet was without objection and was in fact superior in that it showed the actual level of the water at the time of observation, and not at some time previously. Further, that method had been used and tested many times by Captain Forsyth without accident and there was no reason for Captain Lowry to have foreseen the mistake that led to this accident. Therefore Captain Lowry did use the care of the ordinary reasonable shipowner.

As to causation, there was no fault of Captain Lowry or of the plaintiff which contributed to the accident. The counting of the planks of Oak Street Bridge and adding nineteen feet was the proper method. The failure was that of the master in failing to count correctly or remember correctly and that could not have been foreseen by Captain Lowry. The judgments cited by the defendant are distinguishable.

In *Northwestern Dredging Co. v. Pioneer Towing Co.* [1959] 28 W.W.R. (N.S.) 140 a dredge blocked the narrow channel which the shipowner knew but failed to warn the master of that danger.

In the *Anonity* [1961] 2 Lloyd's Reps. 117, Willmer L.J. stated at p. 124:

> It was reasonably foreseeable how dangerous it was to have the galley fire on at an oil jetty.

Therefore the owner was held at fault in failing to have issued orders against such fire while at the jetty.

In the *Norman* [1960] Lloyd's Rep. 1, after the vessel had set sail the chart for the waters in which she was to navigate was amended so as to show the exact location of certain rocks, which amendment could have been communicated by the owner to the master by radio but which the owner failed to communicate. It was held therefore that the owner was at fault. Lord Keith of Avonholm said on page 16:

> In failing to do so, the owners, in my opinion, were in fault and I am unable to say that this fault did not conduce to the disaster to the vessel.

In the *Lady Gwendolen* [1965] 1 Lloyd's Reps. 335, the master was accustomed to sail at excessive speeds in fog in order to keep schedule, relying on the radar to provide the required safety from the danger of speed. That fault of the master could obviously be foreseen by the owner from

the log. In all these cases cited the error of the master was foreseen by the owner and could then have been avoided by forbidding this practice. In the case at bar the error of the master was on this one occasion, and not in his method, and therefore could not have been foreseen by Captain Lowry or the owner.

It was further contended that the sections of the *Canada Shipping Act* do take away from the Crown in the right of the Province a cause of action vested in the Crown and therefore the statute purports to restrict the Crown's prerogative. That contention of the defendant fails for the reason that in *Gartland Steamship Co. v. The Queen* [1960] S.C.R. 315, it was held that these sections of the *Canada Shipping Act* do not take away any cause of action from the Crown so as to affect the prerogative but rather such sections merely define the extent of the liability of the shipowner. There, Locke, J. stated at page 345:

> The effect of the sections of the Canada Shipping Act, however, are to declare and limit the extent of the liability of ship owners in accidents occurring without their own fault and privity. It cannot be said, in my opinion, that the Royal prerogative ever extended to imposing liability upon a subject to a greater extent than declared by law by legislation lawfully enacted. The fact that liability may not be imposed upon the Crown, except by legislation in which the Sovereign is named, or that any of the other prerogative rights are not to be taken as extinguished unless the intention to do so is made manifest by naming the Crown, does not mean that the extent of the liability of a subject may be extended in a case of a claim by the Crown beyond the limits of the liability effectively declared by law.

The dissenting judgment of Locke J. was approved in this respect by the majority in that Judson J. for the majority stated at page 343:

> The respondent cross-appealed against that part of the judgment which declared the defendant entitled so to limit its liability. For the reasons given by my brother Locke, I would dismiss the cross-appeal with costs.

It follows that the sections in question do not affect the Crown's prerogative as they do not deprive the Crown of any cause of action but merely fix the liability of the owner of the tug under the circumstances.

In the *Bramley Moore* [1963] 2 Lloyd's Reps. 429, the tonnage to be applied is the tonnage of the towing tug alone and does not include that of the tow under the circumstances of this case. As the tonnage of the tug is 9.87 the tonnage will be taken at 300 tons as required by 661(1)(*a*).

1969

MARPOLE TOWING LTD v. BRITISH COLUMBIA TELEPHONE Co. *et al*

Sheppard, D. J.

In conclusion, it is declared that the liability of the Plaintiff as owner of the tug *Chugaway II* arising out of collision with the Fraser Street Bridge on 23 June, 1966 shall be limited to the sum computed by the multiple of 300 tons (661(1)(*a*)) and the sum fixed as the equivalent in Canadian dollars of 3100 gold francs. The amount in Canadian dollars will be determined later as required by the Statute as it was not available to the plaintiff at the time of the trial and that amount so fixed will be stated in the formal judgment. The plaintiff will publish a notice in the Vancouver papers, the Sun and Province, after one week and within two weeks from the date of entry of the formal judgment and a like notice one week later, calling upon all persons claiming for loss of life or personal injuries or loss or damage to any property or any infringement of any rights caused by the tow of the tug *Chugaway II* striking the Fraser Street Bridge on the 23rd June, 1966, to file their claims with the Deputy Registrar at the Court House, Vancouver, B.C. within one month from the date of such first notice. As the plaintiff will know the precise date of entry of the formal judgment, the plaintiff's counsel may substitute the precise dates for the publication of these notices and the date for filing claims with the Deputy Registrar.

The amount payable under all claims filed will be determined by the Registrar who will allow interest at 5 per cent per annum from the date of the accident. As no loss of life occurred and the plaintiff has settled all claims for personal injuries, it is not necessary that the plaintiff pay into court such amounts so disbursed and in respect of personal injuries the plaintiff will pay into court only such amounts as may be claimed pursuant to the notices aforesaid, up to the remainder of the sum as limited for the payment of personal injuries.

The plaintiff will pay into court the equivalent of 1000 gold francs for damage to property or infringement of other rights. The amount of these claims will be determined by the Deputy Registrar and the moneys in court for such claims will be paid out to each claimant for damage to property or infringement of rights at his ratable share of the equivalent of 1000 francs so limited for the owner's liability.

In respect of personal injuries, it is probable that no claims will be filed but the Deputy Registrar may fix the

amount which each such unpaid claimant is entitled to up to the limits fixed, and that amount will be paid to the claimants out of such monies in court. As to costs, the plaintiff is obtaining an order of the court fixing his liability and for such purpose will pay his own costs.

As to the costs of the defendant, the Crown in the right of the Province, the *Crown Costs Act*, R.S.B.C. 1960 c. 87, s. 2 provides that the Crown in the right of the Province shall not pay or receive costs. Irrespective of whether that statute here applies that section may be regarded as declaring the policy of the Crown in the right of the Province and may be given effect by providing that the Crown do pay its own costs irrespective of the defence being reasonably required in this instance. Liberty to all parties and claimants to apply.