Privy Council Appeal No. 27 of 1984

Candlewood Navigation Corporation Limited *Appellant*

v.

Mitsui O.S.K. Lines Limited and Matsuoka Steamship Co. Limited *Respondents*

FROM

THE SUPREME COURT OF NEW SOUTH WALES

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 1ST JULY 1985

Present at the Hearing:

LORD FRASER OF TULLYBELTON
LORD ROSKILL
LORD BRANDON OF OAKBROOK
LORD TEMPLEMAN
LORD GRIFFITHS

*[Delivered by **Lord Fraser of Tullybelton**]*

In the early hours of 10th July 1981 two ships collided off Port Kembla in New South Wales. One of them, the motor vessel Ibaraki Maru, was at anchor waiting for a berth in the Port. The other, the Mineral Transporter, had also been at anchor, slightly more than a mile from the Ibaraki Maru, when her starboard anchor failed, for reasons not attributable to negligence by her owners or crew, and she drifted until she collided with the Ibaraki Maru. In proceedings in the Supreme Court of New South Wales the trial judge (Yeldham J.) held that there had been negligence by those on board the Mineral Transporter in failing to take steps, after the anchor had failed, to avert the collision. He also held that there had been no contributory negligence by those on board the Ibaraki Maru, and therefore that the Mineral Transporter was wholly to blame for the accident. No appeal has been brought from those findings of fault.

[21] The present appeal by the owners of the Mineral Transporter (defendants in the action) comes directly from Yeldham J. to the Board. It raises two

questions with regard to the assessment of damages. One of the questions involves an important issue of principle. The other, although financially important to the parties, is of less general application. The issue of principle arises in this way. At the time of the collision the Ibaraki Maru was the subject of a bareboat (or demise) charter from the first respondent, her owner, to the second respondent. She was also the subject of a time charter of the same date from the second respondent to the first respondent. The first respondent was accordingly both owner and time charterer of the ship. Their Lordships find it convenient to refer to the first respondent as "the time charterer" and to the second respondent as "the bareboat charterer". The dates of the bareboat charter and the time charter are the same, and the dates of three addenda to each of these charters, by which the period of each charter was extended and the rate of hire was varied, are also the same. These and other facts show that the two charterparties were prepared in close connection with one another, but their Lordships see no reason to regard them as other than *bona fide* contracts which should take effect according to their respective terms.

Under the bareboat charter the bareboat charterer was liable, as against the owner (who of course was the time charterer), to bear the cost of repairs resulting from the collision, and it has done so. It was agreed, after some dispute, probably attributable to difficulties of translation from the Japanese language, that the daily hire payable under the time charter was reduced while the ship was undergoing repairs to about one-quarter of the normal daily rate. It was in fact reduced to Yen 544,000, which was the same amount as the daily hire payable under the bareboat charter. This is one of the other facts, referred to above, which indicates the close connection between the two charterparties. The bareboat charterer claimed from the appellants, and was held entitled to recover, the cost of temporary repairs to the Ibaraki Maru effected in Australia and of final repairs effected in Japan, as well as the amount by which the hire payable to it under the time charter was reduced while the ship was not operational. The time charterer claimed, and was also held entitled to recover, the amount of the hire at the reduced rate which it had to pay to the bareboat charterer while the ship was not operational ("the wasted hire") and also the profits which it lost during the same period.

The first issue in the appeal is whether the time charterer is entitled to recover from the appellants the economic loss made up of (1) the wasted hire, and (2) its loss of profits during the period while the Ibaraki Maru was not operational.

The second issue arises because the period for which the Ibaraki Maru was not operational included a period of 32.79 days during which repairs to her in Australia were delayed by reason of what has been called a "black ban" by the Painters and Dockers Trade Union. A similar ban was imposed on the Mineral Transporter. The bans were designed to persuade the owners of the vessels to have the permanent repairs as well as the temporary repairs effected in Australia. They were part of a campaign by the union to persuade foreign vessels trading regularly to Australia to have repair work done in Australia. The second issue is whether the learned trial judge was right to include the 32.79 days lost because of the black ban in quantifying the damages due to the bareboat charterer (and to the time charterer if it is entitled to damages at all). It will be apparent that the second issue concerns, or may concern, both respondents, while the first issue affects only the time charterer.

The first issue - the time charterer's claim for economic loss

This issue is one of fundamental importance in maritime law and in the law of negligence generally. There is a long line of authority in the United Kingdom for the proposition that a time charterer is not entitled to recover for pecuniary loss caused by damage by a third party to the chartered vessel. The reason is that a time charterer has no proprietary or possessory right in the chartered vessel; his only right in relation to the vessel is contractual - see Scrutton on *Charterparties* 19th edition page 47. The proposition in relation to a time charterer is thus only one example of the more general principle stated by Scrutton LJ. in *Elliott Steam Tug Co. Ltd. v. The Shipping Controller* [1922] 1 K.B. 127, 139 in these words:-

> "At common law there is no doubt about the position. In case of a wrong done to a chattel the common law does not recognize a person whose only rights are a contractual right to have the use or services of the chattel for purposes of making profits or gains without possession of or property in the chattel. Such a person cannot claim for injury done to his contractual right: see on this point the judgment of Blackburn J. in *Cattle v. Stockton Waterworks Co.* (1875) L.R. 10 Q.B. 453, where a contractor making a tunnel on K's land claimed against a wrongdoer to K's land, whose wrong made his contract less profitable, and was held not entitled to recover. It is for this reason that underwriters cannot sue directly a wrongdoer against property they have insured, but must proceed in the name of the assured, as explained by Lord Penzance in *Simpson v. Thomson* (1877) 3 App. Cas. 279. It is for this reason

> also that charterers under a charter not amounting to a demise do not and cannot sue in the Admiralty Court a wrongdoer who has sunk by collision their chartered ship. The same principle was applied by Hamilton J. in *Remorquage a Helice (Societe Anonyme) v. Bennetts* [1911] 1 K.B. 243, to prevent the owner of a tug suing the wrongdoer who had sunk his tow, whereby he had lost the benefit of his contract of towage."

The general principle was stated in *Cattle v. Stockton Waterworks Co.*, *supra*, a case which had nothing to do with ships or maritime law. The facts have been summarised sufficiently for the present purpose in the passage just cited from Scrutton LJ.'s judgment in *Elliott*'s case. The reason for the decision appears from the following passage from the judgment of the Court of Queen's Bench which was delivered by Blackburn J. at page 457 where, after stating that the court would have been glad to avoid giving effect to the rule against permitting the contractor to sue, he went on to say this:-

> "But if we did so, we should establish an authority for saying that, in such a case as that of *Fletcher v. Rylands* (1865) L.R. 1 Ex. 265, the defendant would be liable, not only to an action by the owner of the drowned mine, and by such of his workmen as had their tools or clothes destroyed, but also to an action by every workman and person employed in the mine, who in consequence of its stoppage made less wages than he would otherwise have done. And many similar cases to which this would apply might be suggested. It may be said that it is just that all such persons should have compensation for such a loss, and that, if the law does not give them redress, it is imperfect. Perhaps it may be so. But, as was pointed out by Coleridge J. in *Lumley v. Gye* (1853) 2 El and Bl. 252 courts of justice should not 'allow themselves, in the pursuit of perfectly complete remedies for all wrongful acts, to transgress the bounds, which our law, in a wise consciousness as I conceive of its limited powers, has imposed on itself, of redressing only the proximate and direct consequences of wrongful acts.' In this we quite agree. No authority in favour of the plaintiff's right to sue was cited, and, as far as our knowledge goes, there was none that could have been cited."

It is apparent from that citation that the Court in *Cattle*'s case regarded the rule as a pragmatic one dictated by necessity.

The same appears even more clearly from the other foundation case in this branch of the law, *Simpson v. Thomson* (1877) 3 H.L. 279 which was a Scottish appeal arising out of a collision between two ships belonging to the same owner. The House of Lords held that the underwriters, who had paid the insurance due on one of the ships which was lost and which was not to any extent to blame for the accident, had no right of action against the owner of the other ship which was solely to blame, because they (the underwriters) had no independent right of action but only such right as they might have derived from the owner of the lost ship in whose place they stood. He had no right of action, as owner of the innocent ship, against himself as owner of the negligent ship. Lord Penzance, at page 46 (page 289 of 3 App. Cas.), gave a rather fuller statement of the reasons behind the rule against allowing the underwriters to sue in the following words:-

> " But in the argument at Your Lordships' Bar the learned Counsel for the Respondents took their stand upon a much broader ground. They contended that the underwriters, by virtue of the policy which they entered into in respect of this ship, had an interest of their own in her welfare and protection, inasmuch as any injury or loss sustained by her would indirectly fall upon them as a consequence of their contract; and that this interest was such as would support an action by them in their own names and behalf against a wrongdoer. This proposition virtually affirms a principle which I think Your Lordships will do well to consider with some care, as it will be found to have a much wider application and signification than any which may be involved in the incidence of a contract of insurance.
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> The principle involved seems to me to be this - that where damage is done by a wrongdoer to a chattel not only the owner of that chattel, but all those who by contract with the owner have bound themselves to obligations which are rendered more onerous, or have secured to themselves advantages which are rendered less beneficial by the damage done to the chattel, have a right of action against the wrongdoer although they have no immediate or reversionary property in the chattel, and no possessory right by reason of any contract attaching to the chattel itself, such as by lien or hypothecation.
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> This, I say, is the principle involved in the Respondents' contention. If it be a sound one, it would seem to follow that if, by the negligence of a wrongdoer, goods are destroyed which the owner of them had bound himself by contract to supply to a third person, this person

as well as the owner has a right of action for any loss inflicted on him by their destruction.

But if this be true as to injuries done to chattels, it would seem to be equally so as to injuries to the person. An individual injured by a negligently driven carriage has an action against the owner of it. Would a doctor, it may be asked, who had contracted to attend him and provide medicines for a fixed sum by the year, also have a right of action in respect of the additional cost of attendance and medicine cast upon him by that accident? And yet it cannot be denied that the doctor had an interest in his patient's safety. In like manner an actor or singer bound for a term to a manager of a theatre is disabled by the wrongful act of a third person to the serious loss of the manager. Can the manager recover damages for that loss from the wrongdoer? Such instances might be indefinitely multiplied, giving rise to rights of action which in modern communities, where every complexity of mutual relation is daily created by contract, might be both numerous and novel."

These two cases of *Cattle* and *Simpson* have stood for over a hundred years and have frequently been cited with approval in later cases, both in the United Kingdom and elsewhere. They show, in their Lordships' opinion, that the justification for denying a right of action to a person who has suffered economic damage through injury to the property of another is that for reasons of practical policy it is considered to be inexpedient to admit his claim. It is unnecessary to refer to all the many cases in which either or both of the cases of *Cattle* and *Simpson* have been cited but their Lordships will mention a few cases which have special relevance to the instant appeal or which show how widely the decisions in *Cattle* and *Simpson* have been accepted as applied. In *Remorquage a Helice (Societe Anonyme) v. Bennetts*, *supra*, where the owner of the tug was held not entitled to claim for economic loss caused by the collision of another ship which had sunk his tow, Hamilton J. relied *inter alia* on the case of *Cattle*. Reference has already been made to *Elliott Steam Tug* case which rested on the same principle. In *"The World Harmony"* [1967] P. 341, 362 Hewson J. said:-

"There is no reported case, so far as I am aware, in the long history of chartering where a time charterer has recovered damages for pecuniary loss because of damage by a third party to the chartered vessel."

In *Reavis v. Clan Line* (1925) S.C. 725, 740 in the Inner House of the Court of Session in Scotland, the

Lord President cited with approval a passage from the judgment of Lord Penzance in *Simpson v. Thomson cit. supra*. As regards Canada, this Board approved of, and relied on, *Cattle*'s case in *McColl v. Canadian Pacific Railway Company* [1923] A.C. 126, 130. *Cattle*'s case was also referred to without disapproval by the Supreme Court of Canada in *Rivtow Marine Ltd v. Washington Iron Works* (1973) 40 D.L.R. (3d) 530. In the United States, Holmes J. delivering the opinion of the Supreme Court in *Robins Dry Dock and Repair Company v. Flint* (1927) 275 U.S. 303 cited *Elliott Steam Tug Co., supra*, as one of his authorities for holding that time charterers had no right of action against a wrongdoer whose fault had caused them loss by delaying repairs to the chartered ship, and for a more general rule to the effect already explained - see page 309. The decision in the case of *Robins Dry Dock and Repair Company* was followed by the majority in the United States Court of Appeals, Fifth Circuit, in the recent case of *State of Louisiana ex rel. Guste v. M/V. Testbank* 752 F.2d 1019 (1985).

Counsel for the time charterer, which is the only one of the respondents concerned in this question, sought to avoid the effect of that formidable volume of authority on three main grounds. The first two grounds involved distinguishing the present appeal on its facts from *Cattle* and the later cases that followed it.

Counsel's first submission was that the time charterer, being also the owner of the Ibaraki Maru, had a reversionary interest in her and that this reversionary interest was enough to give him a title to sue for damages arising out of physical injury to the ship. This submission was made to the learned judge, but not decided by him, as he based his decision in favour of the time charterer on other grounds. In the opinion of their Lordships this submission is not well-founded because the first respondent's claim is made exclusively in respect of losses which it suffered as time charterer. It suffered no loss as owner of the Ibaraki Maru. If for some reason it had suffered loss in its capacity as owner, say because the bareboat charterer had failed to repair the damage to the vessel caused by the collision, it might perhaps have been entitled to recover such loss. That is a question which does not arise in this case, and their Lordships express no concluded view upon it. In their view the fact that the time charterer was also the owner of the Ibaraki Maru is, in the circumstances of this appeal, irrelevant.

The second submission on behalf of the time charterer was that the general proposition ought not to apply in the circumstances of this case because

the consequences of applying it would be unreasonable. Mr. Gleeson mounted a powerful argument to the following effect. If the time charterers, in their capacity as owners, had themselves been operating the Ibaraki Maru, they would clearly have been entitled to recover the whole cost of repairing the collision damage, and also their whole loss of profits while the ship was non-operational. Because the ship was the subject of the bareboat charter and the time charter, the loss of profits was divided between the bareboat charterers (as disponent owners) and the time charterers, but the loss was the same and should be recoverable by the party on whom it happened to fall. Mr. Gleeson pressed the argument to its logical conclusion by submitting that, if there had been a chain of sub-charterers and sub-sub-charterers, each party in the chain would have been entitled to recover his particular loss of profit. The argument is not without its appeal which is particularly strong in this case where the whole loss falls on only two parties, namely the two respondents. It may be asked, and Mr. Gleeson did ask rhetorically, why the wrongdoer should escape paying for part of the loss for which he is responsible merely because the loss is divided between two victims. One answer was given by Holmes J. in the case of *Robins Dry Dock and Repair Company*, *supra*, where, at page 309, he said that:-

> "... justice does not permit that the petitioner [wrongdoer] be charged with the full value of the loss of use unless there is someone who has a claim to it <u>as against the petitioner</u>" (emphasis added).

If the bareboat charter and the time charter are accepted as valid and effective contracts, it cannot be right to disregard them or to treat claims from parties to them as if the contracts did not exist. Another, and perhaps less technical, answer is that the argument, if accepted, would have far-reaching consequences, which would run counter to the accepted policy of the law. If this exception to the rule against allowing recovery by persons who are in merely contractual relationship with the injured party were admitted, there appears to be no reason why contracts under time charters should be treated differently in this regard from other contracts between the owner or disponent owner of a ship and other parties. In the, not uncommon, case where the damaged vessel is the subject of a chain of sub-charters and sub-sub-charters, made at different dates, some of the charters may be profitable to the charterer though the respective rates of profit may be different, and some charters may result in a loss to the charterer. Is a sub-charterer who is wholly or partly released from a loss-making charter to be expected to contribute to the damages fund, in order

to relieve the wrongdoer *pro tanto*? That would be surprising, yet it seems to be the logical consequence of treating the damages as a fund which is divisible among those who have suffered loss in proportion to their loss. And if claims for economic loss by sub-charterers are to be admitted, why not also claims by any person with a contractual interest in any goods being carried in the damaged vessel, and by any passenger in her, who suffers economic loss by reason of the delay attributable to the collision? An exceedingly wide new range of liability would be opened up. Their Lordships accordingly reject this submission.

The third argument for the time charterers is quite different from those that have so far been considered. It started by accepting that historically the policy of the common law in the United Kingdom and the United States of America, and also in the Australian States, has been to impose strict rules limiting the right to recover compensation from a wrongdoer for loss caused by his fault. In particular liability was limited by the rule that a plaintiff was not entitled to recover for economic or financial loss which was not consequential upon damage to his person or property. That limit was breached by the decision of the House of Lords in *Hedley Byrne and Co. Ltd v. Heller and Partners Ltd* [1964] A.C. 465, and arguably in the earlier case of *Morrison Steamship Company Ltd v. Greystoke Castle* [1947] A.C. 265. Mr. Gleeson submitted that further breaches in the restrictive rules had been made by later cases especially by *Caltex Oil (Australia) Pty Ltd v. The Dredge "Willemstad"* (1976) 136 C.L.R. 529 and by *Junior Books v. Veitchi* [1983] 1 A.C. 520 [1982] S.L.T. 492. The consequence of these cases was, he said, that the absolute rule against admitting claims for loss arising solely from contractual relationship between the claimant and the victim of a negligent third party could no longer be supported. It was enough now that the loss was a direct result of a wrongful act and that it was foreseeable. If those two tests were passed the party suffering loss was entitled to claim.

It is undoubtedly true that a title to sue a wrongdoer is now admitted in cases where it would not have been admitted sixty years ago. The history of the development of the law in this respect has been reviewed in several recent cases including *Caltex, supra*, (a decision of the High Court of Australia), *Margarine Union G.m.b.H. v. Cambay Prince S.S. Co. Ltd.* [1969] 1 Q.B. 219 (a decision of Roskill J. as he then was in the Queen's Bench Division in England, when *Simpson v. Thomson, supra*, was applied) and *"The Aliakmon"* [1985] 1 Lloyds Rep. 199 (a decision of the Court of Appeal in England). Their Lordships do not find it necessary to repeat the historical

review. The position reached by the law in the United Kingdom, and also their Lordships consider in Australia, by 1978 was stated by Lord Wilberforce in the well-known passage from his speech in *Anns v. Merton L.B.C.* [1978] A.C. 728, 751 where he said this:-

> "Through the trilogy of cases in this House - *Donoghue v. Stevenson* [1932] A.C. 562, *Hedley Byrne and Co. Ltd v. Heller and Partners Ltd* [1964] A.C. 465 and *Dorset Yacht Co. Ltd v. Home Office* [1970] A.C. 1004, - the position has now been reached that in order to establish that a duty of care arises in a particular situation, it is not necessary to bring the facts of that situation within those of previous situations in which a duty of care has been held to exist. Rather the question has to be approached in two stages. First, one has to ask whether, as between the alleged wrongdoer and the person who has suffered damage there is a sufficient relationship of proximity or neighbourhood such that, in the reasonable contemplation of the former, carelessness on his part may be likely to cause damage to the latter - in which case a *prima facie* duty of care arises. Secondly, if the first question is answered affirmatively, it is necessary to consider whether there are any considerations which ought to negative, or to reduce or limit the scope of the duty or the class of person to whom it is owed or the damages to which a breach of it may give rise: see *Dorset Yacht Co.* case per Lord Reid at page 1027. Examples of this are *Hedley Byrne*'s case where the class of potential plaintiffs was reduced to those shown to have relied upon the correctness of statements made, and *Weller & Co. v. Foot and Mouth Disease Research Institute* [1966] 1 Q.B. 569; and (I cite these merely as illustrations, without discussion) cases about 'economic loss' where, a duty having been held to exist, the nature of the recoverable damages was limited: see *S.C.M. (United Kingdom) Ltd v. W.J. Whittall and Son Ltd* [1971] 1 Q.B. 337 and *Spartan Steel and Alloys Ltd v. Martin and Co. (Contractors) Ltd* [1973] Q.B. 27."

Their Lordships are mindful of the warning given by Lord Keith of Kinkel in *Peabody Donation Fund (Governors of) v. Sir Lindsay Parkinson Limited* [1984] 3 W.L.R. 953, 960 of the need to resist the temptation to treat these passages from Lord Wilberforce's speech as being of a definitive character. They are in any event not directly applicable to the facts of the instant appeal, because none of the trilogy of cases referred to by Lord Wilberforce was dealing with claims against a wrongdoer by a person who was not the victim of his

negligence but by a third party whose only relation to the victim was contractual. Nor was the case of *Anns* itself concerned with such a claim. Except in so far as these cases indicate a tendency by the courts to extend the class of persons to whom a duty is owed by wrongdoers, they do not help to answer the present question. But the passages from Lord Wilberforce's speech contain a useful reminder of the part played by policy in decisions as to how far the liability of a wrongdoer should extend. That was a matter to which he returned in *McLoughlin v. O'Brian* [1983] 1 A.C. 410.

Mr. Gleeson argued that in the *Caltex* case the High Court of Australia had decided, as a matter of policy for Australia, that the liability of wrongdoers ought to be extended one stage further by recognising a right in the owner of an oil terminal, which had not sustained physical damage, to recover for purely economic damage which did not flow from loss of their oil. Yeldham J. accepted a submission to that effect, and his decision against the appellants was largely based on his reading of the decision in *Caltex*. It is therefore necessary for their Lordships to consider that decision with care. The facts of that case, as conveniently summarised in the headnote, were as follows:-

> "In the course of its operations a dredge fractured an oil pipeline laid in the bed of a bay which connected an oil refinery on the southern shore with an oil terminal on the northern shore. The refinery and the pipeline were owned by an oil refining company. The terminal was owned by another company. There was an arrangement between the owner of the terminal and the refiner under which the former supplied crude oil to the refinery for processing, and the refined product was delivered through the pipeline to the terminal. The refined oil carried through the pipeline was the property of the owner of the terminal, but the terms of the arrangement provided that the risk of loss or damage rested with the refiner. The damage to the pipeline was attributable to the negligent navigation of the dredge and to defects in a chart prepared by a marine surveyor. The owner of the terminal incurred expense in transporting refined oil from the refinery to the terminal while the pipeline could not be used. *Held* that the owner of the terminal was entitled to recover the expense from the dredge and the marine surveyor as damages for negligence."

The judgments in the High Court contain exhaustive reviews of the relevant law and of the problems to which it gives rise, but their Lordships have not been able to extract from them any single *ratio*

decidendi. Gibbs J. (as he then was) and Mason J. held that the defendants, the owners of the dredge, were liable on the ground that they knew, or had the means of knowing, that a particular individual (the owner of the terminal) and not merely a member of an unascertained class would be likely to suffer in consequence of the negligence. The following passage from the judgment of Gibbs J. at page 555 appears to their Lordships to express his *ratio decidendi*:-

> "In my opinion it is still right to say that as a general rule damages are not recoverable for economic loss which is not consequential upon injury to the plaintiff's person or property. The fact that the loss was foreseeable is not enough to make it recoverable. However, there are exceptional cases in which the defendant has knowledge or means of knowledge that the plaintiff individually, and not merely as a member of an unascertained class, will be likely to suffer economic loss as a consequence of his negligence, and owes the plaintiff a duty to take care not to cause him such damage by his negligent act. It is not necessary, and would not be wise, to attempt to formulate a principle that would cover all cases in which such a duty is owed ..."

Mason J., after saying at page 592 that the delimitation of the duty of care in relation to economic damage through negligent conduct should be expressed in terms closely related to "the principal factor inhibiting the acceptance of a more generalised duty of care in relation to economic loss, that is, the apprehension of an indeterminate liability", went on to say this at page 593:-

> "A defendant will then be liable for economic damage due to his negligent conduct when he can reasonably foresee that a specific individual, as distinct from a general class of persons, will suffer financial loss as a consequence of his conduct. This approach eliminates or diminishes the prospect that there will come into existence liability to an indeterminate class of persons; it ensures that liability is confined to those individuals whose financial loss falls within the area of foreseeability; and it accords with the decision in *Rivtow Marine Ltd v. Washington Iron Works* (1973) 40 D.L.R. (3d) 530."

Rivtow is a decision of the Supreme Court of Canada, in which that Court held, by a majority, that the manufacturer of a dangerously defective article is not in general liable in tort to an ultimate consumer or user of that article for the cost of repairing defects in the article itself or for economic loss sustained as a result of the need to effect repairs, although he was liable in that case

because the economic loss could have been avoided if he had given warning of the defect. Neither the majority decision, nor the dissenting judgment of Laskin J. deal with the question which arises in the instant appeal.

With regard to the judgment of Stephen J. (as he then was) in *Caltex* it appears to their Lordships, with all due deference to the authors of the headnote in 136 C.L.R., that he rested his decision on much wider grounds than those relied on by Gibbs and Mason JJ. At page 574 his Honour recognised the need for some "control mechanism based upon notions of proximity between tortious act and resultant detriment" to take the place of foreseeability as the only test. At page 575 he said:-

> "But in the general realm of negligent conduct it may be that no more specific proposition can be formulated than a need for insistence upon sufficient proximity between tortious act and compensable detriment. The articulation, through the cases, of circumstances which denote sufficient proximity will provide a body of precedent productive of the necessary certainty ..."

At pages 576 and 577 his Honour gave a list of five features which in his view demonstrated "a close degree of proximity between the defendant's conduct in severing the pipelines and the economic loss which [the owner of the terminal] suffered when its chosen means of supplying its terminal with products was interrupted by the injury to the pipelines". Thus it was the combination of the five listed factors, and not merely, or even primarily, the fact that the probable victim of negligence was a particular known person, which led his Honour to his conclusion.

Jacobs J. accepted the general rule laid down in *Cattle*'s case. At page 599 he said:-

> "If it [sc. economic loss] arises in a way which can only be characterized as the loss of the benefit of a contract with a third party it will not be recoverable. However, if it arises out of a physical effect on the person or property of the plaintiff, it will not be irrecoverable simply because it is economic loss."

He immediately proceeded to cite the case of *Cattle supra*. At page 604 his Honour, after repeating that the defendants owed no duty of care to the owner of the terminal simply because of the risk that they might suffer economic loss through interruption of their contract with the owner of the refinery, said this:-

> "However that is not the end of the matter. There was a duty of care owed by the defendants to [the owners of the terminal]. The duty of care was that owed to a person whose property was in such *physical propinquity* to the place where the acts or omissions of the dredge ... had their physical effect that a physical effect on the property of that person was foreseeable as the result of such acts or omissions." (Emphasis added).

The fifth member of the court, Murphy J., reached the conclusion (at page 605) that "there is no satisfactory general principle governing recovery of economic loss caused by negligence".

Their Lordships have carefully considered these reasons for the decision in the case of *Caltex*. With regard to the reasons given by Gibbs and Mason JJ., their Lordships have difficulty in seeing how to distinguish between a plaintiff as an individual and a plaintiff as a member of an unascertained class. The test can hardly be whether the plaintiff is known by name to the wrongdoer. Nor does it seem logical for the test to depend upon the plaintiff being a single individual. Further, why should there be a distinction for this purpose between a case where the wrongdoer knows (or has the means of knowing) that the persons likely to be affected by his negligence consist of a definite number of persons whom he can identify either by name or in some other way (for example as being the owners of particular factories or hotels) and who may therefore be regarded as an ascertained class, and a case where the wrongdoer knows only that there are several persons, the exact number being to him unknown, and some or all of whom he could not identify by name or otherwise, and who may therefore be regarded as an unascertained class? Moreover much of the argument in favour of an ascertained class seems to depend upon the view that the class would normally consist of only a few individuals. But would it be different if the class, though ascertained, was large? Suppose for instance that the class consisted of all the pupils in a particular school. If it was a kindergarten school with only six pupils they might be regarded as constituting an ascertained class, even if their names were unknown to the wrongdoer. If the school was a large one with over a thousand pupils it might be suggested that they were not an ascertained class. But it is not easy to see a distinction in principle merely because the number of possible claimants is larger in one case than in the other. Apart from cases of negligent mis-statement, with which their Lordships are not here concerned, they do not consider that it is practicable by reference to an ascertained class to find a satisfactory control mechanism which could be applied in such a way as to give reasonable certainty in its results.

Similarly they are, with the utmost respect to Stephen J., not able to find in his speech a statement of principle which appears to them to offer a satisfactory and reasonably certain guide. The opinion of Jacobs J. does appear to their Lordships to provide a reasonably certain test, namely the traditional test of physical propinquity. But that gives no support to the argument presented by Mr. Gleeson.

In these circumstances their Lordships have concluded that they are entitled, and indeed bound, to reach their own decision without the assistance of any single *ratio decidendi* to be found in *Caltex*.

Finally their Lordships must refer to the recent decision of the House of Lords in an appeal from Scotland *Junior Books Ltd v. Veitchi Co. Ltd* [1983] 1 A.C. 520, (1982) S.L.T. 492. That case may be regarded as having extended the scope of duty somewhat, but any extension was not in the direction of recognising a title to sue in a party who suffered economic loss because his contract with the victim of the wrong was rendered less profitable or unprofitable. It is therefore not in point here.

Their Lordships consider that some limit or control mechanism has to be imposed upon the liability of a wrongdoer towards those who have suffered economic damage in consequence of his negligence. The need for such a limit has been repeatedly asserted in the cases, from *Cattle*'s case to *Caltex*, and their Lordships are not aware that a view to the contrary has ever been judicially expressed. The policy of imposing such a limit is consistent with the policy of limiting the liability of ships and aircraft in maritime and aviation law by statute and by international agreement. The common law limitation which has been generally accepted is that stated by Scrutton LJ. in *Elliott Steam Tug Co.*, *supra*, which has been already mentioned. Not only has that rule been generally accepted in many countries including the United Kingdom, Canada, the United States of America and until now Australia, but it has the merit of drawing a definite and readily ascertainable line. It should enable legal practitioners to advise their clients as to their rights with reasonable certainty, and their Lordships are not aware of any widespread dissatisfaction with the rule. These considerations operate to limit the scope of the duty owed by a wrongdoer, and they do so at the second stage mentioned by Lord Wilberforce in the passage cited above from his speech in *Anns v. Merton L.B.C.*, *supra*.

Almost any rule will have some exceptions, and the decision in *Caltex* may perhaps be regarded as one of the "exceptional cases" referred to by Gibbs J. in

the passage already quoted from his judgment. The exceptional circumstances may be those referred to by Stephen J. at pages 576 to 577 already mentioned. Certainly the decision in *Caltex* does not appear to have been based upon a rejection of the general rule stated in *Cattle*'s case. For these reasons their Lordships are of the opinion that Yeldham J. erred in holding that the time charterer was entitled to recover damages from the appellants in this case.

The second issue - Were the 32.79 days lost because of the "black ban" rightly included in quantifying the damages due to the charterers?

On this issue their Lordships are respectfully in complete agreement with the opinion of Yeldham J. His Honour relied on the decision of Sir Samuel Evans P. in *H.M.S. London* [1914] P. 72 to the effect that, where the owners of a vessel damaged by collision were entitled to recover the cost of repairs from the owners of another ship, an item for loss of use of their vessel during a strike while she was in dock for repairs was properly allowed. The learned Registrar said at page 75:-

> "If workmen have to cease work on account of bad weather, or breakdown of machinery, so that the operation of repair is prolonged, the plaintiffs are clearly entitled to recover in respect of such lengthened time. The prolongation of the work caused by a strike seems to me analogous to the above instances. The loss of time was in fact directly connected with the collision. If the case be regarded from the point of view as to what events were within the contemplation of the parties, it is impossible to doubt that in respect of repairs the possibility of delay by strikes would certainly be in the minds of the defendants."

Counsel for the appellants sought to distinguish that case on the ground that the strike was for industrial reasons, whereas the strike in the present case was essentially political in nature. Counsel accepted that, if the delay to the Ibaraki Maru had been caused by a strike for higher wages or on some other purely industrial issue, it would have been rightly included as one of the items in quantifying the damages owed to the charterers, because it would have been foreseeable as a possible consequence of the appellants' negligence. But he submitted that the strike in this case, being political in nature, was not foreseeable and was not the "very kind of thing" likely to happen as a result of their negligence - see *Home Office v. Dorset Yacht Club* [1970] A.C. 1005, 1030 EC.

Their Lordships do not regard the distinction between industrial and political strikes as

realistic. It is well known that strikes during this century have often been motivated to a greater or less extent by what may broadly speaking be called political reasons. Many strikes have both "industrial" and "political" objects, and it would not be practicable to draw a sharp line between the two kinds of strike. Their Lordships accordingly are of the opinion that the decision in *H.M.S. London*, *supra*, cannot be distinguished on that ground, and that it is applicable here. The learned judge rightly included the delay caused by the black ban when quantifying the damage.

Conclusion

Their Lordships will humbly advise Her Majesty that the appeal should be allowed so far as it relates to the first issue, and that it should be dismissed so far as it relates to the second issue. The judge's order with regard to costs should not be disturbed. The greater part of the time at the hearing before the Board was occupied by discussing the first issue. The appellants must pay the second respondent's costs of the appeal and the first respondent must pay three-quarters of the appellants' costs of the appeal.