

NOT FADE AWAY; THE RE-EMERGENCE OF COMMON LAW DEFENCES IN CANADIAN MARITIME LAW

Wylie Spicer* and William Laurence**
Halifax

In a trilogy of cases, beginning in 1986 with ITO—International Terminal Operators Ltd. v. Miida Electronics Inc., the Supreme Court of Canada articulated the principal characteristics of Canadian maritime law. One such characteristic is that Canadian maritime law is composed in part of non-statutory rules and principles adopted from the common law and applied in admiralty cases. The authors argue that included within this body of federal common law are the common law defences of contributory negligence, last clear chance, and no contribution between joint tortfeasors. Although abrogated by provincial legislatures, these common law defences remain undisplaced by federal statutes and have been, and must continue to be, applied by Canadian courts in the exercise of their jurisdiction over admiralty claims. The authors conclude that federal legislation inspired by existing provincial statutes which deal with contributory negligence and apportionment is necessary to remove such archaic and inequitable concepts from the law.

Dans une trilogie d'arrêtés, à commencer en 1986 par l'affaire ITO—International Terminal Operators Ltd. v. Miida Electronics Inc., la Cour suprême du Canada a défini les principales caractéristiques du droit maritime canadien. L'une d'entre elles est que le droit maritime canadien se compose en partie de règles et principes qui ne font pas l'objet de dispositions législatives, qui sont issus du droit de "common law" et sont appliqués en droit maritime. Selon les auteurs les défenses utilisées en "common law", telles que la faute contributive, la dernière chance et l'absence de contribution entre coauteurs d'un délit, font partie de ce corps de droit fédéral issu de la "common law". Quoique abrogées par les législatures provinciales, ces défenses n'ont pas été touchées par la législation fédérale. Elles ont été appliquées et doivent continuer de l'être par les tribunaux canadiens dans l'exercice de leur compétence dans des affaires de droit maritime. Les auteurs concluent de leur analyse qu'il est nécessaire de promulguer, au niveau fédéral, une législation inspirée des lois provinciales actuelles traitant de la faute contributive et du partage de la responsabilité, afin d'éliminer ces concepts archaïques et injustes.

* Wylie Spicer, of McInnes, Cooper & Robertson, Halifax, Nova Scotia.

** William Laurence, Graduate Student, Dalhousie Law School, Dalhousie University, Halifax, Nova Scotia.

Introduction

In 1976 and 1977 the Supreme Court of Canada delivered two judgments which have had a profound effect on Canadian maritime law and its practice, both in the federal and provincial superior courts. These decisions, *Quebec North Shore Paper Co. v. Canadian Pacific Ltd.*¹ and *McNamara Construction (Western) Ltd. v. The Queen*,² confined the jurisdiction of the Federal Court to the adjudication of matters involving the "laws of Canada".³

In *North Shore Paper* a claim was brought in the Federal Court rising out of an alleged breach of contract to build a railcar marine terminal at Baie Comeau in Quebec. Laskin C.J.C. concluded that for the Federal Court to have jurisdiction, the claim of the plaintiff had to be founded on existing federal law and not merely on federal legislative competence over the subject matter of the claim. This requirement of existing federal law, the court held, flowed from section 101 of the Constitution Act, 1867,⁴ pursuant to which the Federal Court, and its predecessor, the Exchequer Court, were constituted in accordance with the power contained in section 101 to establish courts "for the better administration of the laws of Canada".⁵

In *McNamara Construction*, the Federal Crown was proceeding in the Federal Court in connection with a dispute involving the construction of a young offenders' institution in Alberta. The Crown relied on section 17(4) of the Federal Court Act⁶ which provides, in part:

- (4) The Trial Division has concurrent original jurisdiction
- (a) in proceedings of a civil nature in which the Crown or the Attorney General of Canada claims relief; . . .

Laskin C.J.C. held that section 17(4) was not, in and of itself, sufficient to give the Federal Court jurisdiction. Referring to *North Shore Paper*, the Chief Justice commented:⁷

¹ [1977] 2 S.C.R. 1054, (1976), 71 D.L.R. (3d) 111. Sometimes referred to as *North Shore Paper*.

² [1977] 2 S.C.R. 654, (1977), 75 D.L.R. (3d) 273. Sometimes referred to as *McNamara Construction*.

³ This is in contradistinction to the general and inherent jurisdiction of the provincial superior courts. For instance, see, *Ontario (Attorney-General) v. Pembina Exploration Canada Ltd.*, [1989] 1 S.C.R. 206, at p. 217, (1989), 57 D.L.R. (4th) 710, at p. 718, per La Forest J.:

It is clear to me that the provincial power over the administration of justice in the province enables a province to invest its superior courts with jurisdiction over the full range of cases, whether the applicable law is federal, provincial or constitutional. . . .

⁴ Originally the British North America Act, 1867, 30 & 31 Victoria, c. 3 (U.K.). Its title was changed by the Constitution Act, 1982. The Constitution Act, 1867 is to be found in Appendix II to the Revised Statutes of Canada, 1985.

⁵ *Ibid.* (Emphasis added).

⁶ R.S.C. 1970, 2nd Supp. c. 10; see now R.S.C. 1985, c. F-7, s. 17(5).

⁷ *Supra*, footnote 2, at pp. 658 (S.C.R.), 277 (D.L.R.).

... this Court held that the quoted provisions of s. 101, make it a prerequisite to the exercise of jurisdiction by the Federal Court that there be existing and applicable federal law which can be invoked to support any proceedings before it. It is not enough that the Parliament of Canada have legislative jurisdiction in respect of some matter which is the subject of litigation in the Federal Court ... judicial jurisdiction contemplated by s. 101 is not co-extensive with federal legislative jurisdiction.

On the facts of the case it was concluded that there was no federal law in issue to support the grant of jurisdiction in section 17(4) and accordingly the Federal Court was not competent to hear the case.

The grant of jurisdiction to the Federal Court to hear maritime cases is contained in section 22 of the Federal Court Act:⁸

22.(1) The Trial Division has concurrent original jurisdiction, between subject and subject as well as otherwise, in all cases in which a claim for relief is made or a remedy is sought under or by virtue of Canadian maritime law or any other law in Canada relating to any matter coming within the class of subject of navigation and shipping, except to the extent that jurisdiction has been otherwise specially assigned.

(2) Without limiting the generality of subsection (1), it is hereby declared for greater certainty that the Trial Division has jurisdiction with respect to any one or more of the following: [19 heads of jurisdiction are enumerated in (a)-(s)]

Prior to *McNamara Construction* it had been assumed that as long as there was federal legislative competence, section 22 would be sufficient to give the Federal Court jurisdiction. In *Robert Simpson Montreal Ltd. v. Hamburg Amerika Linie Norddeutscher*,⁹ a 1973 decision of the Federal Court of Appeal, Jacket C.J. had held that section 22 did indeed confer jurisdiction:

... in an action or suit where a claim for relief is made or a remedy is sought under or by virtue of a law relating to a matter falling within the class of subject "Navigation and Shipping" that it would be "competent for the Parliament of Canada to enact, modify or amend" or in an action or suit in relation to some subject matter legislation in regard to which is within the legislative competence of the Canadian Parliament because that subject matter falls within the class "Navigation and Shipping".

It was clear that this analysis would not survive the reasoning in *McNamara Construction*. As a result, in virtually every maritime case in the Federal Court, applications were made seeking assurance that there was in fact actual maritime law to support the section 22 grant of jurisdiction.¹⁰

⁸ R.S.C. 1985, c. F-7.

⁹ [1973] F.C. 1356, at p. 1362.

¹⁰ See, for instance, *R. v. Canadian Vickers Ltd.*, [1978] 2 F.C. 675, (1977), 77 D.L.R. (3d) 241 (F.T.D.), on appeal, [1980] 1 F.C. 366, (1979), 102 D.L.R. (3d) 240 (F.C.A.) (this case clarified whether there was Canadian maritime law to support the jurisdiction contemplated by s. 22 in respect of claims by ship owners against shipyards for breach of contract); *Triglav v. Terrasses Jewellers Inc.*, [1983] 1 S.C.R. 283 (this case concerned the constitutionality of s. 22(2)(r) concerning marine insurance. The Supreme Court of Canada concluded that the law of marine insurance was indeed a matter of maritime law. There is, however, no federal marine insurance legislation and, as a consequence of the decision

The result of all this attention has been not only to refine the law to be applied in the Federal Court but also to define the scope of the body of law known as Canadian maritime law.¹¹ A considerable amount of this attention came from the Supreme Court of Canada, and as a result it is now possible to outline the principal characteristics of this body of law:

- (1) Canadian maritime law is a body of federal law, uniform from coast to coast.
- (2) This federal law is composed of statutory and non-statutory elements, limited only by the scope of the federal power over navigation and shipping.¹²
- (3) Non-statutory maritime law is composed of the specialized rules and principles of admiralty and the rules and principles adopted from the common law and applied in admiralty cases.
- (4) This body of law is to be applied by any court of competent jurisdiction considering a maritime claim.
- (5) Provincial law can only be applied to a maritime claim where there is no applicable maritime law to dispose of the issue.¹³

It is beyond the scope of this article to consider in full all of the above characteristics. It is our purpose to consider in detail the consequences of

in *Terrasses*, a draft federal marine insurance statute is now in preparation); *Intermunicipal Realty & Development Corp. v. Gore Mutual Insce. Co.* [1978] 2 F.C. 691 (F.T.D.) (claims against marine insurance agents do not form part of the federal law concerning marine insurance); *Antares Shipping Corp. v. The Capricorn*, [1980] 1 S.C.R. 553, (1979), 111 D.L.R. (3d) 289 (the sale of ships forms part of maritime law); *Tropwood A.G. v. Sivaco Wire & Nail Co.*, [1979] 2 S.C.R. 157, (1979), 99 D.L.R. (3d) 235 (damage or loss to cargo is part of maritime law).

¹¹ Although the vast majority of maritime law is practised in the Federal Court, the courts of the provinces have a common law jurisdiction over admiralty matters and the nature of maritime law is important to these courts as well. On the admiralty jurisdiction of the provincial courts, see the discussion by La Forest J. in *Ontario (Attorney-General) v. Pembina Exploration Canada Ltd.*, *supra*, footnote 3, and the cases referred to therein. For an extensive discussion of the issue see *Bow Valley Husky (Bermuda) Ltd. v. St. John Shipbuilding Ltd.* (1992), 97 Nfld. et P.E.I.R. 217 (Nfld. C.A.).

¹² Some claims are obviously "maritime". Where the characterization as such is not apparent, the Supreme Court has indicated that in order for a matter to be maritime it must be "integrally connected to maritime matters"; McIntyre J. in *ITO—International Terminal Operators Ltd. v. Miida Electronics Inc.*, [1986] 1 S.C.R. 752, at p. 774, (1986), 28 D.L.R. (4th) 641, at p. 657. See also the comments of Iacobucci J. in *Monk Corp. v. Island Fertilizers Ltd.*, [1991] 1 S.C.R. 779, at pp. 800-801, (1991), 80 D.L.R. (4th) 58, at p. 95.

¹³ The point has recently been made by Huguessen J.A. of the Federal Court of Appeal that provincial statutes form no part of the Canadian maritime law: *Rhône (The) v. Peter A.B. Widener (The)*, [1990] 3 F.C. 185, at p. 223.

principle 3 which, in our view, has the potential to produce unintended and inequitable results.¹⁴

We argue that several common law defences, long ago statutorily abrogated by provincial legislation, are nevertheless still part of the federal common law. By way of example, it is our view that the common law defences of contributory negligence, last clear chance and the rule against contribution between tortfeasors form part of federal common law, not having been displaced by federal statutes. These common law rules have been applied by courts (including the Supreme Court of Canada) in the exercise of their jurisdiction over admiralty claims. Pursuant to principle 3, these common law defences form part of Canadian maritime law and, accordingly, a court considering a maritime case must apply these federal common law rules. In such circumstances, it is not open to a court to apply a provincial statute which would have the effect of displacing these federal rules.

I. *The Principles of Canadian Maritime Law*

The five principal characteristics of Canadian maritime law can be found in a trilogy of Supreme Court cases decided since 1986.

Canadian maritime law is federal law and must of necessity be the same wherever it is applied in Canada. This point was first made many years ago by Cartwright J. in a dissenting judgment in *National Gypsum Company Inc. v. Northern Sales Ltd.*¹⁵

¹⁴ It is not our purpose to discuss the specialized rules and principles of admiralty which also form part of Canadian maritime law by virtue of principle 3. One example, though, is that of interest. Based upon the civil law concept of *restitutio in integrum*, the admiralty principle is that interest may be awarded as part of damages, to run from the date of a plaintiff's loss. One rationale for the principle is that the person liable has retained an amount belonging to the plaintiff and has been able to benefit from the interest which this amount has generated: *The Kong Magnus*, [1891] P. 223, at p. 235 (P.D.A.); for other examples of the interest principle being applied, see *The Northumbria* (1869), L.R. 3A & E 6; *The Joannis Vatis (No. 2)*, [1922] P. 213 (P.D.A.). While the admiralty interest principle has mostly been applied in the context of collisions between ships, it has been employed in other maritime situations: see *The Gertrude and The Baron Aberdare* (1888), 13 P.D. 105 (C.A.), the facts of which are referred to in (1887), 12 P.D. 204; *Canadian Brine Limited v. The Scott Misener*, [1962] Ex. C.R. 441; *Bell Telephone Co. v. "Mar-Tireno"*, [1974] 1 F.C. 294.

A recent application of the interest principle was in *Tilbury Cement Ltd. v. Seaspan International Ltd.* (supplementary reasons for judgment, February 8, 1991, Trainor J., [1991] B.C.W.L.D. 630). Trainor J. held that Canadian maritime law was composed in part of traditional maritime principles, one of which was that interest may be included in damages, and that the provincial statute governing the calculation of interest was not applicable to a maritime case even when the claim was brought in the Provincial Supreme Court.

¹⁵ [1964] S.C.R. 144, at p. 153, (1963), 43 D.L.R. (2d) 235, at p. 238.

The substantive law applied by the Exchequer Court on its Admiralty side is, of course, the same throughout Canada and does not vary according to the Admiralty District in which the cause of action arises. . . .

This insight lay dormant for a number of years and it was not uncommon for the Supreme Court of Canada to apply provincial statutes to admiralty matters.¹⁶ *McNamara Construction (Western) Ltd. v. The Queen*¹⁷ changed all that and, as noted earlier, focused attention on the content of Canadian maritime law. As had been foreseen almost thirty years ago by Cartwright J. one of the cornerstones of the body of law that has emerged from this process of definition is its uniformity from coast to coast.

This requirement of uniformity has been considered recently on a number of occasions by the Supreme Court of Canada, frequently in the context of considering whether provincial law can be applied to a maritime dispute. In *ITO—International Terminal Operators Ltd. v. Miida Electronics Inc.*,¹⁸ the Supreme Court dealt with the question whether the Federal Court had jurisdiction over a claim for damages in negligence against a terminal operator in the Port of Montreal. It had been argued that the court could apply the Quebec Civil Code. In rejecting this submission, McIntyre J. described the nature of Canadian maritime law:¹⁹

It is my view, as set out above, that Canadian maritime law is a body of federal law encompassing the common law principles of tort, contract and bailment. I am also of the opinion that Canadian maritime law is uniform throughout Canada, a view also expressed by Le Dain, J. in the Court of Appeal who applied the common law principles of bailment to resolve Miida's claim against ITO. Canadian maritime law is that body of law defined in s. 2 of the *Federal Court Act*. That law was the maritime law of England as it has been incorporated into Canadian law and it is not the law of any Province of Canada.

Also in *ITO*, McIntyre J. commented on the substantive content of Canadian maritime law:²⁰

Canadian maritime law, as a body of substantive law, encompasses the principles of English maritime law as they were developed and applied in the Admiralty Court of England (*The Queen v. Canadian Vickers Ltd.*, *supra*), and authorities cited therein, pp. 683-684. In 1934 when, as has been noted, a body of admiralty law from England was incorporated into Canadian law, the Admiralty side of the High Court of Justice

¹⁶ *St. Lawrence Metal & Marine Works Inc. v. Canadian Fairbanks-Morse Co. Ltd.*, [1956] S.C.R. 717; *Resolute Shipping Ltd. v. Jasmin Construction Inc.*, [1978] 1 S.C.R. 907, (1977), 79 D.L.R. (3d) 402; *Hendricks v. The Queen*, [1970] S.C.R. 237, (1969), 9 D.L.R. (3d) 454.

¹⁷ *Supra*, footnote 2.

¹⁸ *Supra*, footnote 12.

¹⁹ *Ibid.*, at pp. 779 (S.C.R.), 660 (D.L.R.). The court made it clear in *Quebec North Shore Paper Co. v. Canadian Pacific Ltd.*, *supra*, footnote 1, at pp. 1064-1065 (S.C.R.), 119-120 (D.L.R.), that the Quebec Civil Code, even if arguably applicable to a matter within federal legislative jurisdiction, was not federal law unless made so by adoption or enactment.

²⁰ *Ibid.*, at pp. 776 (S.C.R.), 658 (D.L.R.).

had jurisdiction in cases of contract and tort which were considered to be admiralty matters. In dealing with such cases, the court applied the necessary common law principles of tort and contract in order to resolve the issues. Common law rules of negligence, for example, were applied in collision cases ("*Cuba*" (*The*) v. *McMillan* (1896), 26 S.C.R. 651, at pp. 661-62, and E. Mayers, *Admiralty law and Practice in Canada* (1916) at p. 146). Bailment principles were applied in loss of cargo cases ("*Winkfield*" (*The*), [1902] P. 42 (C.A.)). Thus, the body of admiralty law, which was adopted from England as Canadian maritime law, encompassed both specialized rules and principles of admiralty and the rules and principles adopted from the common law and applied in admiralty cases as these rules and principles have been, and continue to be, modified and expanded in Canadian jurisprudence. (See, for example, the judgment of this Court in *Wirerope Industries of Canada (1966) Ltd. v. B.C. Marine Shipbuilders Ltd.*, [1981] 1 S.C.R. 363, in which common law principles of negligence and contract law were employed to resolve the appeal.)

McIntyre J. also recognized the possibility that provincial law may be incidentally applied to the resolution of a maritime case (principle 5).²¹

In *Q.N.S. Paper Co. v. Chartwell Shipping Ltd.*,²² a case from the Quebec courts, the issue was whether an agent of an unnamed or undisclosed principal could be personally responsible under a contract entered into with a third party, even though the agent had expressly indicated that he was acting only as an agent. Once again, the argument was made that the Quebec Civil Code could be applied to a maritime matter. For the majority, La Forest J. referred to *ITO—International Terminal Operators Ltd. v. Miida Electronics Inc.*²³ and went on to indicate that while certain provincial courts may exercise concurrent jurisdiction in maritime matters,²⁴ the law to be applied by the provincial court was the same law as that applied to maritime cases by the Federal Court:²⁵

Thus McIntyre J.'s statement [in *ITO*] that Canadian maritime law is a body of federal law encompassing certain common law principles and that this law is uniform throughout Canada applies whatever court may exercise jurisdiction in a particular case.

The Supreme Court of Canada was presented with a further opportunity to discuss Canadian maritime law in *Whitbread v. Walley*,²⁶ a case from the British Columbia courts. It arose in the context of deciding whether the statutory right to limitation of liability contained in the Canada Shipping Act²⁷ would be constitutional if applied to an action for damages arising from a pleasure craft accident on inland waters in British Columbia.

²¹ *Ibid.*, at pp. 781-782 (S.C.R.), 662 (D.L.R.). This can only occur where there is no federal law available. Principle 5 is set out *supra*, at p. 703.

²² [1989] 2 S.C.R. 683, (1989), 62 D.L.R. (4th) 36.

²³ *Supra*, footnote 12.

²⁴ A point later elaborated upon by La Forest J. in *Ontario (Attorney-General v. Pembina Exploration Canada Ltd.*, *supra*, footnote 3.

²⁵ *Supra*, footnote 22, at pp. 698 (S.C.R.), 42 (D.L.R.).

²⁶ [1990] 3 S.C.R. 1273, (1990), 77 D.L.R. (4th) 25.

²⁷ See now R.S.C. 1985, c. S-9, ss. 574, 575.

La Forest J., writing for the court, referred to *ITO—International Terminal Operators Ltd. v. Miida Electronics Inc.*²⁸ and *Q.N.S. Paper Co. v. Chartwell Shipping Ltd.*²⁹ as decisions which had “outlined the contours of a uniform body of federal maritime law . . .”³⁰ He also noted that:³¹

... tortious liability which arises in a maritime context is governed by a body of maritime law within the exclusive legislative jurisdiction of Parliament.

He went on:³²

Quite apart from judicial authority, the very nature of the activities of navigation and shipping, at least as they are practised in this country, makes a uniform maritime law which encompasses navigable inland waterways a practical necessity. . . . In this country, inland navigable waterways and the seas that were traditionally recognized as the province of maritime law are a part of the same navigational network, one which should, in my view, be subject to a uniform legal regime.

The direction from the Supreme Court of Canada is unambiguous. Maritime cases are to be determined by reference to a body of federal law which is to be applied in any court in Canada having jurisdiction over maritime matters. That body of law includes common law defences that have been applied by courts in the resolution of maritime cases. It is these defences to which we now turn.

II. The Common Law Defences

A. Contributory Negligence and Last Clear Chance

At common law, any act or omission on the part of a plaintiff which contributed to the loss sustained in connection with another person's tort constituted a complete bar to recovery. The common law contemplated only one cause of an injury, either the fault of the plaintiff or the defendant.³³ The first recorded application of this rule is *Butterfield v. Forrester*.³⁴ In that case, a property owner had placed barricades across a public highway. The plaintiff, tearing along on a horse, ran into the barricades and was injured. The barricades were visible for 100 yards. The claim of the plaintiff was dismissed because of his failure to exercise adequate care.

This common law rule was sometimes described as precluding recovery where the plaintiff contributed to a tort. Lord Esher M.R., in *The Bernina*³⁵ stated that “if the plaintiff had been personally guilty of negligence which

²⁸ *Supra*, footnote 12.

²⁹ *Supra*, footnote 22.

³⁰ *Supra*, footnote 26, at pp. 1288 (S.C.R.), 35 (D.L.R.).

³¹ *Ibid.*, at pp. 1289 (S.C.R.), 35 (D.L.R.).

³² *Ibid.*, at pp. 1294-1295 (S.C.R.), 39-40 (D.L.R.).

³³ K.C. McGuffie (ed.), *Marsden on the Law of Collisions at Sea* (10th ed., 1953), p. 24; J.G. Fleming, *The Law of Torts* (7th ed., 1987), p. 243.

³⁴ (1809), 11 East 60, 103 E.R. 926 (K.B.).

³⁵ (1887), 12 P. 58, at p. 61 (C.A.).

has partly directly caused the accident, he cannot maintain an action against any one". Unless one assumes that the accident and the damages resulting from it are synonymous, such a definition of the common law rule is not entirely accurate. A cause of action arises not from a tort *per se*, but from the consequences of the tort.³⁶ There is no cause of action unless a plaintiff sustains an injury compensable at law. This distinction was discussed by Brett L.J. in *The Margaret*.³⁷

Therefore, even in a case in which there is no contributory negligence charged against the plaintiffs, it is not sufficient for the Court to find that there was a collision in point of fact, and that the collision was caused by the negligence of the defendant. There is no cause of action established by that, although in 999 cases out of 1000 that is sufficient, because there has been some damage done. But in order to establish a cause of action, the Court must find not only that there was a collision, and that it was the result of the negligence of the defendants, but that some damage was done, these being found the liability is made out and the cause of action is established. But if it be asserted that the plaintiff was guilty of contributory negligence: Then the question is, what is contributory negligence? To my mind, strictly stated, it is whether the plaintiff has by negligence of his own contributed to that which is the cause of action, and not merely to the collision.

Looked at from this wider perspective, the scope of contributory negligence is very broad, encompassing those persons who, while not actually responsible for an accident, may contribute to its injurious effects through an act or omission which occurred sometime before the actual accident. If it were applied in a maritime context, this could cause hardship in a number of situations. A plaintiff dock-owner whose facilities were damaged by a ship's negligent docking manoeuvres, yet who had failed to notice that his structures were unsound and not capable of withstanding even the force of a properly docking vessel, could run afoul of this rule, as could a shipowner who failed to inspect properly a negligently manufactured piece of ship's equipment which subsequently became a fire hazard.

Not surprisingly, a doctrine emerged to mitigate the harshness of this rule. This doctrine, variously described as last clear chance, last opportunity, and ultimate negligence³⁸ was born out of *Davies v. Mann*.³⁹ That celebrated

³⁶ See, for instance, the comments of Dickson J. in the Supreme Court of Canada in *Moran v. Pyle*, [1985] 1 S.C.R. 393, at p. 404, (1973), 43 D.L.R. (3d) 239, at p. 247, in the context of products liability:

For myself, I have great difficulty in believing that a careless act of manufacture is anything more than a careless act of manufacture. A plaintiff does not sue because somebody has manufactured something carelessly. He sues because he has been hurt.

³⁷ (1881), 6 P.D. 76, at p. 79 (C.A.). See also *Boy Andrew (Owners) v. St. Rogvald (Owners)*, [1948] A.C. 140, at p. 148 (H.L.), where Viscount Simon stated: "Negligence, whether on land or at sea, does not constitute a good cause of action unless it is a cause of the damage that occurs as the result of it."

³⁸ Allen M. Linden, *Canadian Tort Law* (4th ed., 1988), p. 431.

³⁹ (1842), 10 M & W 546, 152 E.R. 588 (Ex.).

decision involved a claim for damages arising from the death of a donkey. The plaintiff owner of the donkey had left it fettered by the forefeet, in a public road. The animal was killed when it was run over by the defendant's wagon. The plaintiff's contributory negligence did not bar his recovery, it being held that the defendant with proper care might have avoided the accident. The defendant's negligence by contrast was deemed the immediate cause of the injury. This case formed the basis for the doctrine that the contributory negligence bar would not be applied where the defendant had a clear opportunity to avoid an accident and failed to do so.⁴⁰

The leading expression of the last clear chance doctrine is by Lord Penzance in *Radley v. London & North Western Railway Co.*:⁴¹

... though the Plaintiff may have been guilty of negligence, and although that negligence may, in fact, have contributed to the accident, yet if the Defendant could in the result, by the exercise of ordinary care and diligence, have avoided the mistake which happened, the Plaintiff's negligence will not excuse him.

The doctrine was extended in *British Columbia Electric Railway Co. v. Loach*,⁴² where the Judicial Committee of the Privy Council determined that a defendant who would have been able to avoid an accident, but for some negligence on his part which incapacitated him from later exercising the proper degree of care, would still be held liable for causing the accident, despite some intervening negligent act by the plaintiffs.

For the last clear chance doctrine to be invoked, a defendant must have been presented with what would have been a reasonable opportunity under the circumstances to avoid the consequences of the plaintiff's negligence. A mere moment in which to react should not qualify as a true "chance". If the negligent acts of the plaintiff and defendant are contemporaneous or nearly so, one may not be able to determine whether a defendant could have reasonably avoided the consequences of the plaintiff's negligence. One cannot talk of last clear chance if at the time of the accident a plaintiff had no present ability to avoid it, or the same ability as did the defendant.⁴³

Beginning with Ontario in 1924,⁴⁴ all of the common law provinces eliminated the common law defence of contributory negli-

⁴⁰ For a recent study on the continuing relevance of last clear chance in Canadian law, see D.G. Casswell, *Avoiding Last Clear Chance* (1990), 69 *Can. Bar Rev.* 129.

⁴¹ (1876), 1 App. Cas. 754, at p. 759 (H.L.).

⁴² [1916] 1 A.C. 719 (P.C.).

⁴³ See *Swadling v. Cooper*, [1931] A.C. 1 (H.L.), which arose from a fatal collision between a car and a motorcycle. Both the motorist and motorcyclist were found to have been negligent. The plaintiff, widow of the motorcyclist, was denied her claim. At the time of the accident, the motorist and the motorcyclist had the same opportunity to avoid a collision, which, under the circumstances, did not involve adequate time to do anything.

⁴⁴ Contributory Negligence Act, S.O. 1924, c. 32.

gence⁴⁵ by legislation that apportions damages according to the degree of fault or negligence found against each party. In Quebec, article 1053 of the Civil Code provides for apportionment.⁴⁶

B. No Contribution Between Joint Tortfeasors

Another common law principle which may form part of Canadian maritime law and thus be applicable in maritime cases is the rule that unless there is an express or implicit indemnity agreement, there is no contribution between joint tortfeasors.⁴⁷ This rule is derived from *Merryweather v. Nixan*,⁴⁸ in which one of the defendants found jointly liable for conversion was held not entitled to recover against the other a moiety of the amount which he had been required to pay to the plaintiff.

As with the contributory negligence rule, the common law provinces have eliminated through statute the exclusion of contribution between joint tortfeasors.⁴⁹ In Quebec, article 1118 of the Civil Code provides for contribution between those jointly liable for a delict.⁵⁰

⁴⁵ Contributory Negligence Act, R.S.A. 1980, c. C-23; Negligence Act, R.S.B.C. 1979, c. 298; Tortfeasors and Contributory Negligence Act, R.S.M. 1970, c. T-90; Contributory Negligence Act, R.S.N.B. 1973, c. C-19; R.S. Nfld. 1970, c. 61; R.S.N.S. 1989, c. 95; Negligence Act, R.S.O. 1990, c. N.1; Contributory Negligence Act, R.S.P.E.I. 1988, c. C-21; R.S.S. 1978, c. C-31; R.S.N.W.T. 1988, c. C-18; R.S.Y. 1986, c. 32. Attention has been paid to last clear chance in seven of these provincial statutes. The British Columbia and Prince Edward Island statutes expressly abrogate last clear chance. It continues to be provided for, though, in the Alberta, Newfoundland, Northwest Territories, Saskatchewan, and Yukon statutes. The fate of last clear chance in the other common law provinces rests with the courts and may be subject to conflicting authority. See, for example, *Gaudet v. Doucet* (1991), 101 N.S.R. (2d) 309 (S.C.T.D.). Interestingly, the example of Newfoundland shows that the position of last clear chance may still be uncertain despite a provincial statute which specifically retains the principle: *Healey's Estate v. Brown* (1977), 18 Nfld. & P.E.I.R. 492 (Nfld. T.D.); *Gibbons v. Power and O'Reilly* (1983), 40 Nfld. & P.E.I.R. 352 (Nfld. Dist. Ct.); *Blundon v. Osmond* (1986), 58 Nfld. & P.E.I.R. 295 (Nfld. Dist. Ct.); *Penney's Transport Ltd. v. O'Brien* (1988), 72 Nfld. & P.E.I.R. 80 (Nfld. T.D.); *White v. Sweetland* (1978), 29 Nfld. & P.E.I.R. 58 (Nfld. Dist. Ct.).

⁴⁶ See J.-L. Baudouin, *La responsabilité civile délictuelle* (3d ed., 1990), p. 206; *Price v. Roy* (1899), 29 S.C.R. 494.

⁴⁷ R.W.M. Dias (ed.), *Clerk and Lindsell on Torts* (16th ed., 1989), para. 2-57. The rule was later extended to several, concurrent tortfeasors, whose separate acts of negligence contributed to the same damage: see Glanville Williams, *Joint Torts and Contributory Negligence* (1951), p. 81.

⁴⁸ (1799), 8 T.R. 186, 101 E.R. 1337 (K.B.).

⁴⁹ Tortfeasors Act, R.S.A. 1980, c. T-6; Negligence Act, R.S.B.C. 1979, c. 298; Tortfeasors and Contributory Negligence Act, R.S.M. 1970, c. T-90; Tortfeasors Act, R.S.N.B. 1973, c. T-8; Contributory Negligence Act, R.S. Nfld. 1970, c. 61; Tortfeasors Act, R.S.N.S. 1989, c. 471; Negligence Act, R.S.O. 1990, c. N.1; Contributory Negligence Act, R.S.N.W.T. 1988, c. C-18; R.S.P.E.I. 1988, c. C-21; R.S.S. 1978, c. C-31; R.S.Y. 1986, c. 32.

⁵⁰ Baudouin, *op. cit.*, footnote 46, p. 208.

III. *The Common Law Defences and Maritime Law*

Historically, Admiralty Courts have consistently found that the principles of the common law are applicable to admiralty claims. Existing admiralty rules would always be applied, but if these rules did not address a particular situation, the gap would be filled by reference to the common law. In *The Harriett*,⁵¹ Dr. Lushington, reputed for defending the distinctiveness of admiralty jurisdiction, had the following to say about the applicable law in a case involving the liability of a surety to provide bail for a ship:

Under this state of facts, I have now to determine upon the law to be applied to the circumstances of this case; and the first enquiry must be, what is the principle of law which I must take as my guide? The answer is,—the same principle which applies in case of principal and surety; and in applying this principle to the present case, I must be governed by the same rules which prevail in the Courts of law and equity; for I know of no general principles of maritime law which differ from the rules of other Courts.

Similarly, in *The Devonshire*,⁵² the House of Lords in a case involving responsibilities between a tug and tow made the following comments concerning the interrelation between common law and the law of admiralty. Viscount Haldane said:⁵³

The questions thus raised to some extent involve consideration of the principles which govern the relations of the Admiralty Court jurisdiction to that of the common law. For by the common law, if the respondents were entitled to succeed, they would plainly be entitled to recover the whole of the damages, and this right can be cut down only by shewing that there exists an admiralty rule which displaces it.

Lord Atkinson concurred:⁵⁴

In my view the appellants have wholly failed to shew that there ever was any general principle of law administered in the Court of Admiralty, according to which the owners of the vessels in default were, in such circumstances, not treated in the same way as joint tortfeasors are treated at common law, and each made liable for all the damage he helps to inflict.

As set out below, this general principle has been applied by courts exercising admiralty jurisdiction to both the defence of contributory negligence and the rule against contribution between joint tortfeasors.

A. *Contributory Negligence and Last Clear Chance*

Unlike the common law courts, the Admiralty courts developed a rule that in cases involving collisions between two vessels, losses would be apportioned 50/50. This rule was applied only in cases involving collisions

⁵¹ (1841), 1 W. Rob. 182, at pp. 191-192, 166 E.R. 541, at p. 545 (H.C. Adm.).

⁵² [1912] A.C. 634.

⁵³ *Ibid.*, at p. 642.

⁵⁴ *Ibid.*, at p. 657.

between vessels and did not extend to other instances of maritime negligence.⁵⁵

This 50/50 rule was recognized as being contrary to the common law defence of contributory negligence. Marsden⁵⁶ commented on this point:

The rule that where both ships are in fault for a collision each shall recover half his loss from the other contradicts the old rule of the common law that a plaintiff who is guilty of contributory negligence can recover nothing. This conflict between the common law and the law of the Admiralty was put an end to in 1873 by the Judicature Act of that year, which (s. 25, sub-s.9) provides that 'if both ships shall be found to have been in fault' the Admiralty rule shall prevail.

Similarly, in Marsden's *Collisions at Sea*⁵⁷ it is stated:

Before the passing of the Judicature Act, 1873, the rule as to division of loss had no application except in the Court of Admiralty. Elsewhere the rule that a person could not recover damages for loss caused wholly or in part by his own negligence was applied in collision as in all other cases. The Judicature Act, 1873, s. 25(9), now repealed by the Maritime Conventions Act, 1911, s. 9(3), enacted that the rules in force in the Court of Admiralty should be applied in all cases arising out of a collision between two ships, if both ships were found to blame, and the law as to the incidence of loss became the same in all the courts.

At present, the rule for division of loss in collision cases is contained in sections 565-567 of the Canada Shipping Act⁵⁸ which, in property damage cases, renders liability to make good the damage or loss proportionate to the degree in which each vessel is at fault. In personal injury, the liability of the colliding vessels is joint and several, with a right to claim contribution. These sections apply only in collision cases.

That the common law defence of contributory negligence was applicable in maritime cases was recognized long ago by the Supreme Court of Canada. In a series of cases, the court ruled that only the Crown could be permitted to take advantage of provincial apportionment statutes in admiralty matters not arising out of a collision between two vessels.⁵⁹ In

⁵⁵ *The Zeta*, [1893] A.C. 468, at pp. 487 and 491 (H.L.).

⁵⁶ R.G. Marsden, *Two Points of Admiralty Law* (1886), 2 Law Q. Rev. 357, at p. 357.

⁵⁷ McGuffie, *op. cit.*, footnote 33, pp. 155-156.

⁵⁸ *Supra*, footnote 27.

⁵⁹ At common law, the Crown, including its agents and servants, is not bound by a statute except by express words or by clear implication. A leading articulation of this principle was by the Judicial Committee of the Privy Council in *Province of Bombay v. Municipal Corporation of Bombay*, [1947] A.C. 58, at p. 61:

The general principle to be applied in considering whether or not the Crown is bound by general words in a statute is not in doubt. The maxim of the law in early times was that no statute bound the Crown unless the Crown was expressly named therein. . . . But the rule so laid down is subject to at least one exception. The Crown may be bound, as has often been said, "by necessary implication". If, that is to say, it is manifest from the very terms of the statute, that it was the intention of the legislature that the Crown should be bound, then the result is the same as if the Crown had been expressly named. It must then be inferred that the Crown, by assenting to the law, agreed to be bound by its provisions.

so deciding, the court explicitly recognized that the common law defence of contributory negligence was otherwise available.

In *Gartland Steamship Co. v. The Queen*,⁶⁰ a ship collided with a Crown-owned bridge when the bridge did not rise because of a mechanical failure. The bridge operator was two-thirds responsible, for having failed

(See also Halsbury's Laws of England (4th ed.), Vol. 44, para. 930; P. W. Hogg, *Liability of the Crown* (1989), p. 201; P.-A. Côté, *The Interpretation of Legislation in Canada* (1984), pp. 154-161).

While the Crown at common law was only bound by statutes if this was made clear by express language or implication, this did not prevent the Crown from taking advantage of those statutes which would otherwise be inapplicable to it. Unless it was clear, whether expressly or impliedly, that the Crown could not resort to a statute, the Crown could thus take advantage of any statute. In *R. v. Fraser* (1877), 11 N.S.R. 431, at p. 438 (S.C.A.D.), the principle was accepted as follows:

It was contended by Mr. McDonald at the argument, that the Crown could not bring Replevin, as it was an action resting on and derived from our Provincial Statute. I think it is competent for the Crown to avail itself of the statute. *Chitty on Prerog.*, p. 382, lays down the well known principle thus: "The general rule clearly is, that though the King may avail himself of the provisions of any Act of Parliament, he is not bound by such as do not particularly and expressly mention him."

(See also Hogg, *ibid.*, pp. 214-219; Halsbury's, *ibid.*, para. 931; Côté, *ibid.*, p. 159).

It is clear, however, that should the Crown choose to take advantage of a benefit in a statute which would otherwise not be applicable to it, it must also accept any burdens which arise from application of the statute. In *Sparling v. Québec (Caisse de Dépôt et Placement du Québec)*, [1988] 2 S.C.R. 1015, at p. 1021, (1988), 55 D.L.R. (4th) 63, at p. 67, La Forest J., delivering the judgment for the entire Supreme Court, held that a Crown agent could not enjoy the benefit of a statute without also subjecting itself to the burdens of the statute:

I am in agreement with Tyndale J.A. that the benefit/burden exception to Crown immunity exists and that it applies in this case to render the insider reporting provisions of the *Canada Business Corporations Act* applicable to the Caisse.

There can be no disputing the existence of the benefit/burden exception (sometimes referred to as the "waiver" exception) to Crown immunity. It is of ancient vintage; see *Crooke's Case* (1691), 1 Show. K.B. 208, at pp. 210-211, 89 E.R. 540, at p. 542 (K.B.), where it is said:

If they have any right, the King can only have it by this Act of Parliament and then they must have it as this Act of Parliament gives it.

La Forest J. went on to indicate, in *Sparling v. Québec (Caisse de Dépôt et Placement du Québec)*, at pp. 1027 (S.C.R.); 71-72 (D.L.R.), that:

Just as in *Murray [The Queen v. Murray]*, [1978] 1 S.C.R. 61] the Crown was not bound by the prejudicial provisions of the law until it chose to take advantage of its beneficial aspects, here no right or prerogative of the Crown is affected by the *Canada Business Corporations Act* standing alone. It was only by seeking the benefits of the statute by purchasing shares that the Caisse chose to bring itself within the purview of the law relating to shareholders. In the words of Professor Hogg, *op. cit.* [*Liability of the Crown in Australia* (1971)] at p. 183, "when the Crown claims a statutory right the Crown must take it as a statute gives it, that is, subject to any restrictions upon it." Otherwise, the Crown would receive a "larger right than the statute actually conferred" (p. 183).

⁶⁰ [1960] S.C.R. 315, (1960), 22 D.L.R. (2d) 385.

to give a timely warning that the bridge could not be raised. The ship's master was found one-third responsible, for having not stopped the ship short of the bridge.

Despite the contributory negligence of the Crown (the bridge operator), Judson J. allowed the Crown to take advantage of the Ontario Negligence Act:⁶¹

Apart from statute this action would be dismissed. With a plea of contributory negligence established as in this case, the plaintiff fails because he does not prove that the defendant caused the damage: *TCC v. The King* [[1949] S.C.R. 510]. The *Canada Shipping Act*, incorporating the *Maritime Conventions Act 1911*, has no application to a collision between a ship and a structure on land. The choice is between no recovery at all and a recovery under the Ontario *Negligence Act*. This is a common law action for damages within s. 29(d) of the *Exchequer Court Act*, R.S.C. 1952, c. 98, and in my opinion the Crown, as plaintiff, is entitled to the advantage of the Ontario Act: *TTC v. The King, supra*.

In reaching this decision, Judson J. relied upon the result in *Toronto Transportation Commission v. The King*.⁶² That decision concerned an action by the Crown for damages to an airplane that occurred when a street car collided with a truck and trailer being used to transport the airplane. Servants of the Crown were found fifty per cent responsible for the accident. Although contributory negligence would have been a complete bar to the Crown's claim at common law, the Crown was permitted to take advantage of the Ontario Negligence Act:⁶³

On this basis the result in the case at bar, in view of the finding of negligence on the part of servants of the respondent would be that the Crown's claim would be dismissed. It is well settled, however, that the Crown may take the benefit of a statute and, applying the provisions of the Ontario *Negligence Act*, the Crown should recover one moiety of its claim.

In *Algoma Central & Hudson Bay Ry. Co. v. Manitoba Pool Elevators Ltd.*,⁶⁴ a ship berthed for the purpose of taking on a cargo of wheat was damaged by a boulder which lay at the bottom of the harbour. The harbour commission, a Crown agent, and the grain elevator company were sued. The ship's master and first mate were found to be negligent for having failed to ascertain the depth alongside the loading berth. Rather than using the Canadian Hydrographic Survey chart for the harbour, they had relied upon the harbour commission booklet, which was found to be merely a rough guide to the depth there. While this was the "real direct and proximate" cause of the damage, it was also accepted that a foreman who worked for the defendant elevator company had indicated to the master that the depth at the berth was sufficient.

⁶¹ *Ibid.*, at pp. 326-327 (S.C.R.), 408-409 (D.L.R.).

⁶² [1949] S.C.R. 510, [1949] 3 D.L.R. 161.

⁶³ *Ibid.*, at pp. 521 (S.C.R.), 171 (D.L.R.).

⁶⁴ [1964] Ex. C.R. 505.

Wells D.J.A. held that the harbour commission was able to take advantage of section 11 of the Ontario Public Authorities Protection Act,⁶⁵ to bar an action where the writ was issued more than six months after the happening of a negligent act. Referring to both *Toronto Transport Commission v. The King*⁶⁶ and *Garland Steamship Co. v. The Queen*,⁶⁷ Wells D.J.A. found that the Ontario contributory negligence statute could not be used to save the ship's claim from the contributory negligence bar:⁶⁸

If the provisions of the *Ontario Negligence Act* were applicable it might enable me to apportion damage in accordance with responsibility of the Manitoba Pool on one hand and the ship's officers on the other. Under the authorities, however, it would seem to me quite clear I am not entitled as between the ship, the owners of the *Algoway* and the elevator company to apportion negligence. The *Ontario Negligence Act* has no application to such a situation. The matter was discussed in the Supreme Court of Canada in the case of *Sparrows Point v. Greater Vancouver Water District et al.* [1951] S.C.R. 306. At p. 411 Rand J. said in respect of another aspect of the *Contributory Negligence Act* of British Columbia:

It seems to have been assumed by counsel that the provincial *Contributory Negligence Act* applied as between the respondents, but I am unable to agree that it does. There is here a special situation. By the *National Harbours Act* the Commission is declared for all purposes of its administration of this harbour to be the agent of the Crown. Although that *Act* creates a duty on the Commission, by its commitment, in such a case, to the Admiralty Court, the law of that Court becomes applicable; and from the judgment of the House of Lords in *The Devonshire* [1912] A.C. 634 the maritime law, in this respect, is seen to be the same as the common law. It follows that there can be no contribution between the defendants.

And it seems equally clear to me that apart from statute there is no relief from the results of contributory negligence.

In *Sparrows Point v. Greater Vancouver Water District*,⁶⁹ to which Wells D.J.A. referred, underwater pipes were damaged by a ship which had been instructed, by the agent of the harbour commission, to stop at a particular location. The ship and the harbour commission, a Crown agent, were both sued. As noted by Wells D.J.A.,⁷⁰ Rand J., making no mention of a Crown capacity to take the benefit of any statute, held that the provincial *Contributory Negligence Act* did not apply to permit contribution between the tortfeasors.

In *Fraser River Harbour Commission v. The "Hiro Maru"*⁷¹ a ship broke away from its moorings at a berth, causing damage to the ship, to facilities owned by a harbour commission, and to a loading facility owned by a private company. Actions were taken by the harbour commission, which was a

⁶⁵ R.S.O. 1960, c. 318.

⁶⁶ *Supra*, footnote 62.

⁶⁷ *Supra*, footnote 60.

⁶⁸ *Supra*, footnote 64, at pp. 518-519.

⁶⁹ [1951] S.C.R. 396.

⁷⁰ *Supra*, footnote 64, at pp. 411-412.

⁷¹ [1974] 1 F.C. 490 (T.D.).

Crown agent, and by the company, against the ship. These actions were consolidated. The basic cause of the damage was a failure to fix the ship to shore breast lines. There was also negligence on the part of the harbour commission for failing to maintain the dock.

Following *Algoma Central & Hudson Bay Ry. Co. v. Manitoba Pool Elevators Ltd.*,⁷² Urie J. allowed the Crown agent to take advantage of the provincial Contributory Negligence Act, and thus to recover damages, but denied a claim to the other plaintiff:⁷³

It thus appears clear that the plaintiff Commission is entitled under section 2 of the British Columbia *Contributory Negligence Act* to recover damages on the basis of the apportionment to which I shall hereinafter make reference. However, in my opinion, the claim for damages of the plaintiff Johnston Terminals Limited must fail by reason of the negligence of the servants of the plaintiff Commission, which is imputed to Johnston Terminals Limited. This is so because it cannot take advantage of the provincial statute to which the plaintiff Commission is entitled to claim benefit, as I have already found.

Gartland Steamship Co. v. The Queen,⁷⁴ *Algoma Central & Hudson Bay Ry. Co. v. Manitoba Pool Elevators Ltd.*,⁷⁵ *Sparrows Point v. Greater Vancouver Water District*,⁷⁶ and *Fraser River Harbour Commission v. The "Hiro Maru"*,⁷⁷ all concerned admiralty causes of action which occurred on water within the body of a province. In the decisions where the provincial contributory negligence statute was applied it was only done so for the benefit of the Crown. Those cases, namely *Gartland* and *The "Hiro Maru"*, follow or refer to *Toronto Transportation Commission v. The King*,⁷⁸ which was based upon the principle that the Crown could take the benefit of any statute.

Two points should be noted. In all four cases, in admiralty actions which arose in provincial waters, no non-Crown plaintiff who had contributed to his loss was able to take advantage of the provincial contributory negligence statute. Secondly, in all four decisions, it was accepted, whether expressly or implicitly, that admiralty law followed the common law in denying recovery to a plaintiff partly responsible for his loss, where there was no applicable statute to abrogate the rigours of the common law rule.

The above line of cases refused consistently to apply a provincial apportionment statute to a maritime claim other than where the Crown was seeking to take advantage. The 1975 decision of the Supreme Court of Canada in *Stein Estate v. The Kathy K*⁷⁹ seems out of step with this

⁷² *Supra*, footnote 64.

⁷³ *Supra*, footnote 71, at pp. 512-513.

⁷⁴ *Supra*, footnote 60.

⁷⁵ *Supra*, footnote 64.

⁷⁶ *Supra*, footnote 69.

⁷⁷ *Supra*, footnote 71.

⁷⁸ *Supra*, footnote 62.

⁷⁹ [1976] 2 S.C.R. 802, (1975), 62 D.L.R. (3d) 1.

line of authority. Here, the court did indeed apply a provincial contributory negligence statute to a collision situation.

In *Stein Estate v. Kathy K*, a collision had occurred in internal provincial waters in British Columbia between a sailboat and an unmanned barge being towed by a tug. The owner of the sailboat was killed and an action was brought by the owner's widow and executors. The Supreme Court of Canada upheld an apportionment of liability between the tug and the crew of the sailboat. Ritchie J., for the court, concluded that the apportionment sections of the Canada Shipping Act⁸⁰ concerning collisions were not applicable.⁸¹ He also found, however, that since this was a collision case the common law contributory negligence bar could not be applied. As a consequence of this reasoning there did not seem to be any maritime law by which fault could be apportioned, nor could the contributory negligence bar be invoked. The solution adopted by Ritchie J. was to apply the Contributory Negligence Act of British Columbia.⁸²

The old common law defence of contributory negligence has never been recognized in collision cases in admiralty law, and the rule as to equal division adopted in the Admiralty Court appears to have applied only to damage to a vessel or its cargo. Furthermore, the collision occurred at the mouth of False Creek in English Bay, British Columbia, at a point within the inland waters of that Province and I can see no reason why a claim under s. 22(2)(d) of the *Federal Court Act* should not be governed in that Court by the substantive law of the Province concerning division of fault. I am accordingly of opinion that the provisions of the *Contributory Negligence Act* of British Columbia, R.S.B.C. 1960, c. 74, s. 2, apply to this collision and that the liability to make good the damage sustained by reason of the death of Charles Stein should be in proportion to the degree in which vessel was at fault.

Ritchie J.'s conclusion that one may simply apply the substantive law of a province to a claim arising in the Federal Court would not withstand the subsequent jurisprudence of the Supreme Court of Canada.⁸³ What is interesting about the judgment, however, is the assertion that the contributory

⁸⁰ Ss. 638 and 639 of R.S.C. 1970, c. S-9, now ss. 566 and 567 of R.S.C. 1985, c. S-9.

⁸¹ He found that the sections did not apply to the situation of an innocent person on board a ship at fault where that person was not in some fashion identified with the ship.

⁸² *Supra*, footnote 79, at pp. 823 (S.C.R.), 16-17 (D.L.R.).

⁸³ This is so, we believe, notwithstanding the comments of McLachlin J. in *Sunrise Co. Ltd. v. Ship "Lake Winnipeg"*, [1991] 1 S.C.R. 3, (1991), 77 D.L.R. (4th) 701. In dissent, McLachlin J. commented, at pp. 37 (S.C.R.), 724 (D.L.R.), on the effect of *Stein Estate v. The Kathy K*, *supra*, footnote 79:

... this Court held that provincial contributory negligence legislation applied to marine collisions within the territory of the province.

With respect, this comment fails to address the issue of uniformity of Canadian maritime law at all. It is however consistent with the interpretation given to *The Kathy K* by courts in Ontario and Nova Scotia: *Bentley's Estate v. MacDonald* (1978), 27 N.S.R. (2d) 152 (N.S.T.D.); *Curtis v. Jacques* (1978), 88 D.L.R. (3d) 112, 20 O.R. 552 (Ont. H.C.).

negligence bar had been recognized in admiralty cases, except in ones involving collisions.

It can in fact be argued that the judgment of Ritchie J. is nothing more than the application of provincial law to a maritime case where no applicable federal law can be found to resolve the claim.⁸⁴ In order to deal completely with the issue of liability, it was necessary to apply the provincial statute, the court having concluded that there was no federal law available, whether statute or otherwise, to dispose of the issue of apportionment.

The last clear chance doctrine has been referred to in a maritime context by Viscount Birkenhead L.C. in *Admiralty Commissioners v. S.S. Volute*.⁸⁵

Upon the whole I think that the question of contributory negligence must be dealt with somewhat broadly and upon common sense principles as a jury would probably deal with it. And while no doubt, where a clear line can be drawn, the subsequent negligence is the only one to look to, there are cases in which the two acts come so closely together, and the second act of negligence is so much mixed up with the state of things brought about by the first act, that the party secondly negligent . . . might . . . invoke the prior collision as being part of the cause of the collision. . . .

The last clear chance approach has been used in collision situations by English and Canadian Admiralty courts. The doctrine was not employed to save the action of a contributorily negligent plaintiff from the harsh result of the common law contributory negligence rule, but to determine fault for a collision. With the 50/50 division of loss rule,⁸⁶ and later, statutes which apportioned liability for collision damages according to fault, Admiralty law never denied a plaintiff's claim in a collision situation simply because he had contributed to his loss.

*The Albert Edward*⁸⁷ may be seen as a maritime equivalent of "the donkey case". An action was taken to recover damages suffered by a dredge which had been struck by a steamer. At the time of the collision, the dredge, at anchor, was improperly positioned and lacked adequate lights. These facts did not serve to bar the claim of the dredge. Rather, the Exchequer Court found that the steamer could have avoided the accident through the exercise of reasonable care and skill, and thus was fully liable for the damages sustained by the dredge.

B. No Contribution Between Joint Tortfeasors

The case most often referred to for defining a joint tort is *The Koursk*.⁸⁸ A collision occurred between two ships, with both of them being at fault.

⁸⁴ This is consistent with principle 5 of Canadian maritime law, as set out *supra*, p. 703.

⁸⁵ [1922] 1 A.C. 129, at p. 144 (H.L.).

⁸⁶ See *supra*, at p. 711.

⁸⁷ (1908), 12 Ex. C.R. 178. See also *Cayzer v. Carron Co. ("The Margaret")* (1884), 9 App. Cas. 873 (H.L.).

⁸⁸ [1924] P. 140 (C.A.).

One of these ships in turn collided with an innocent third vessel, which sank. At issue was whether the judgment received by the innocent third vessel against one of the negligent vessels barred an action against the other negligent ship. In allowing the plaintiff to proceed, the Court of Appeal held that independent wrongful acts which result in one *damnum* are not enough to produce a joint tort. Rather, some common design or intention which unites the negligent acts will be required.⁸⁹

I am of opinion that the definition in Clerk and Lindsell on Torts, 7th ed., p. 59, is much nearer the correct view: "Persons are said to be joint tortfeasors when their respective shares in the commission of the tort are done in furtherance of a common design". . . . "but mere similarity of design on the part of independent actors, causing independent damage, is not enough; there must be concerted action to a common end." Still more so when there is not even similarity of design, but independent negligences accidentally resulting in one damage.

In a number of admiralty decisions prior to *The Koursk*, seemingly independent acts which had contributed to the same damage were deemed to be joint torts.⁹⁰ In *The Koursk*, the inaccuracy of such an approach was pointed out.⁹¹ There was no doubt, however, that the rule that there was to be no contribution between joint tortfeasors was as equally applicable to admiralty claims as it was to claims at common law.

The applicability of the common law rule concerning contribution to admiralty causes of action was specifically adverted to in the Supreme Court of Canada by Rand J. referring to *The Devonshire*⁹² in *Sparrows Point v. Greater Vancouver Water District*.⁹³

. . . the maritime law, in this respect, is seen to be the same as the common law. It follows that there can be no contribution between the defendants.

It is clear from the foregoing discussion that Canadian courts have applied the common law rules related to contributory negligence, last clear chance and contribution between joint tortfeasors to the resolution of maritime cases. Accordingly, these principles fall squarely within the terms of principle 3 of Canadian maritime law, that is, they are "rules and principles adopted from the common law and applied in admiralty cases".⁹⁴ They are thus an integral part of the body of federal law available for the adjudication of maritime claims in Canadian courts. We now turn to the consequences of this state of affairs.

⁸⁹ *Ibid.*, at p. 156.

⁹⁰ As in *The Devonshire*, *supra*, footnote 52.

⁹¹ Bankes L.J., *supra*, footnote 88, at p. 150: "... the use of the expression [joint tortfeasors] under such circumstances is inaccurate and misleading." See also the comments of Scrutton L.J., *ibid.*, at p. 158, to similar effect.

⁹² *Supra*, footnote 52.

⁹³ *Supra*, footnote 69, at p. 412.

⁹⁴ *Supra*, at p. 703.

Conclusions

The existence of a body of federal common law composed of archaic and inequitable principles requires legislative attention by the federal government. It makes no sense for a contributorily negligent plaintiff in a maritime case to have his claim dismissed simply because, for instance, the stairs he fell down after having had a few too many drinks were a ship's gangway. The same drunken plaintiff falling down the stairs of his apartment building would not suffer the same fate; he would be able to rely on a provincial statute to grant him relief to the degree that the accident was not his fault. Similarly it makes no sense for a joint tortfeasor in a maritime case to bear the entire burden of a judgment for damages while a joint tortfeasor governed by provincial law is able to seek recourse against others responsible for the tort.

The consequence of *McNamara Construction (Western) Ltd. v. The Queen*,⁹⁵ at least in the maritime field, has been to point out the existence of a substantial federal jurisdiction over torts.⁹⁶ Other than with respect to collisions there is no federal apportionment legislation. The federal government has not taken any steps to legislate and, as a result, defences such as those discussed here are now being actively pursued by litigants involved in maritime claims. The situation has become so serious that the Canadian Maritime Law Association recently constituted a committee to study the whole question of contributory negligence in maritime cases with a view to making recommendations for legislation to the federal government.

McNamara Const. (Western Ltd. v. The Queen was decided in 1977. As discussed earlier, the refinement of the nature of Canadian maritime law really started with the 1986 decision of the Supreme Court in *ITO—International Terminal Operators Ltd. v. Miida Electronics Ltd.*⁹⁷ and was completed with *Whitbread v. Walley*⁹⁸ in 1990. We are now certain that there are some very outdated concepts of the common law that must be applied by Canadian courts in the resolution of maritime cases. This problem can be solved very simply by federal legislation which mirrors the existing provincial statutes dealing with contributory negligence and apportionment.⁹⁹ In our view this legislation should be enacted promptly to remove these anachronistic concepts from the law.

⁹⁵ *Supra*, footnote 2.

⁹⁶ As pointed out by La Forest J. in *Whitbread v. Walley* in the passage from his judgment set out in the text, *supra*, at footnote 31.

⁹⁷ *Supra*, footnote 12.

⁹⁸ *Supra*, footnote 26.

⁹⁹ Such a statute will not however deal with other common law defences which may have been eliminated by provincial statute, but remain nevertheless applicable to a claim governed by Canadian maritime law. The common employment doctrine comes to mind. In addition a wrongful death claim brought by a common law spouse in a maritime case is not contemplated by The Canada Shipping Act, *supra*, footnote 27, and accordingly would be barred by the common law. See *Shulman v. McCallum*, [1991] 6 W.W.R. 470 (B.C.S.C.).