16th May, 1960

Judges:—

His Honour Prof. Sir Anthony J. Mamo, O.B.E., C.St.J., Q.C., B.A., LL.D., President;

The Hon. Mr. Justice, A.J. Montanaro Gauci, C.B.E., K.M., LL.D.;

The Hon. Mr. Justice W. Harding, C.B.E., K.M., B.Litt., LL.D.

Edward George Arrigo et ne.

versus

Paul Laferla

Collision at Sea — Damages — Contributory Negligence — Apportionment of Blame.

If two vessels come into collision through negligence on both sides, there is contributory negligence on the part of each vessel, and each vessel is consequently liable for a part of the damages ensuing out of the collision.

As regards the proportion in which each vessel is to share the damages, the question must be dealt with somewhat broadly and upon commonsense principles. If a clear line can be cut, undoubtedly the subsequent negligence is the only one to look at; but 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, while not held free from blame, might, on the other hand, invoke the prior negligence as being part of the cause of the collision so as to make it a case of contribution. And it is a sound rule that, when the case is such that the blame

cannot with any certainty be apportioned, the liability should be apportioned equally.

In principle, the decision of the Judge of First Instance in the matter of apportionment of the blame should not be lightly interfered with by the Appellate Court, apportionment involving an individual choice or discretion as to which there may be different opinions by different minds. Owing to which, the apportionment of liability made by the first Court should be interfered with only in very exceptional circumstances. In the present case, there was such interference by the Appellate Court; which varied the discretion of the First Court, which had apportioned the blame as regards one third on one side and as regards two thirds on the other side, by apportioning it in equal shares between the two vessels.

This is an appeal by the plaintiffs from a judgment of Her Majesty's Commercial Court of the 27th. of November, 1959;

The case arose out of a collision which occurred in the Grand Harbour of Valleta on the 26th. of February, 1955, at about 9 o'clock p.m., between the motor vessel "Star of Malta", owned by the defendant, and lighter no. 120 (at the time being towed by the tug "Melita XI"), owned by the plaintiffs. The plaintiffs claimed that the collision occurred through the negligence and fault of the master of the "Star of Malta" (for whose acts the defendant was responsible), and that consequently the defendant was liable for the damages suffered by the plaintiffs as a result of the collision;

The defendant pleaded that the collision was not due to any fault on the part of the master of the "Star of Malta." but, on the contrary, was caused by the negligence of the "Melita XI";

Her Majesty's Commercial Court came to the conclusion, and so declared and adjudged, that the defendant contributed to the collision in the degree of one third only,

and was, therefore, liable for only one third of the ensuing damages and for the payment of one third of the costs, the balance being borne by the plaintiffs themselves;

In the proceedings before it, the Commercial Court had appointed Lieutenant Commander Francis Warrington Strong as a referee to enquire and report with the assistance of Doctor of Laws Victor R. Sammut, whether the defendant had been responsible for the collision. This referee took the view that the "Star of Malta" was wholly to blame for the collision, owing to an effective look-out not having been kept, which prevented her from sighting the "Melita XI" in time to take the necessary avoiding action, that is to say altering course to starboard or stopping the vessel by going astern;

The defendant, feeling aggrieved by this finding, prayed for the appointment of additional referees in accordance with the provisions of section 674 of the Code of Organisation and Civil Procedure (Chap. 15). This request was granted, and the Court, thereupon, appointed Captain J. Talbot Harvey, Captain Oswald Tabone and Captain Philip Micallef, as such additional referees. These came unanimously to the conclusion that both vessels, i.e. both the "Star of Malta" and "Melita XI", were to blame for the collision, but not in equal degree. The negligence of the "Star of Malta" contributed only in the proportion of one third, whereas that of the "Melita XI" was responsible in the degree of two thirds. The additional referees, consequently advised that the responsibility for the damage should be apportioned as between the defendant and the plaintiffs, in that proportion;

In the view of the additional referees, both vessels had neglected to observe the "Harbour and Collision Regulations" and the ordinary practice of seamen, as stated hereunder:—

A. "Star of Malta" — 1. Failure to keep a proper look-out while proceeding from Marsa to the entrance of the Grand Harbour; 2. Failure to sound two short blasts

on her siren when altering course to port, in accordance with the ordinary practice of seamen, in view of the congestion in the harbour; 3. Failure to sound one short blast on altering course to starboard when in sight of the "Melita XI"; 4. Failure to sound three short blasts to show that her engine were moving full speed astern;

B. "Melita XI" and Tow — 1. Failure to keep to the middle of the fairway from the time of leaving the "S.S. Argentina" to the time of sighting the "Star of Malta"; 2. Failure to alter her course to starboard in order to place herself and her tow on the correct side of the channel, in view of the fact that the outgoing signal was being shown on the Palace and St. Angelo Towers; 3. Failure to sound signals on the two occasions, when she altered her course, or at the time during her passage up the Grand Harbour when in sight of the "Star of Malta"; 4. Failure to tow on a bridle, especially in view of the fact that the first lighter on the tow was square ended; 5. Failure to attract the attention of the "Star of Malta" by sounding five short blats on her siren in view of the fact that the "Star of Malta" was in sight from the time she weighed anchor at Marsa; 6. Failure to make use of No. 6 Admiralty Berth in order to clear the channel for the outgoing vessel;

The judgment of Her Majesty's Commercial Court approved and adopted the findings of the additional experts and, as already stated, decided and adjudged accordingly;

By their petition of appeal the plaintiffs have prayed that the judgment be reversed and their claims allowed with full costs against the defendant. Without prejudice to this, the plaintiffs have however also submitted that, should it be held that both vessels were in some measure to blame for the collision, the assessment of the respective liability made by the Court below is not a fair and realistic one. The contributory negligence of the "Melita XI" could not amount, at worst, to more than one fourth;

The main contention of the appellants is that, but for

the negligence of the "Star of Malta" in failing to keep a proper look-out, and (in consequence of such omission) in failing to take appropriate avoiding action in time, the collision would not have occurred. Such negligence was, therefore, the "causa proxima" of the collision, and it is this that has to be regarded;

Now, on the question of the look-out on the part of the "Star of Malta", the additional referees gave further evidence before this Court. They said that "the remarks in their report (filed before the First Court) concerning the failure of keeping a proper look-out were never intended". In any event, they now withdraw their remarks and say that considering the practice of the sea and the size of the vessel, they are firmly of the opinion that the look-out kept by the "Star of Malta" was fully adequate and proper. In the light of this conclusion they would now be inclined to say — having carefully reconsidered all the circumstances of the case — that the blame for the collision rested completely and entirely on the "Melita XI". In fact, the other faults previously attributed by them to the "Star of Malta" stemmed from the conclusion of lack of proper look-out. Once that conclusion is withdrawn, those other faults do not arise;

Of course, on the appeal of the plaintiffs — there being no principal or cross-appeal by the defendant — the measure of the responsibility of the plaintiffs as assessed in the judgment appealed from, cannot be increased. Learned counsel for the respondent properly conceded this without any hesitation. The respondent has acquiesced in the judgment of the First Court, which, indeed, in his reply, at fol. 269 of the record, he describes as fair and just and deserving of being affirmed;

The question, therefore, is whether the finding of the First Court, whereby the responsibility for the collision was allotted at any rate, as to two thirds to the "Melita XI", can be sustained;

The Court finds very great difficulty in accepting the

opinion now expressed by the additional referees that the look-out kept by the "Star of Malta" was adequate and proper. It may well be that, in terms of number and type of officer, the look-out was adequate and in accordance with the usual practice of merchant ships monaeuvering in harbour. But the question is whether the officers keeping that look-out were sufficiently vigilant and careful in carrying out their duties. It is conceded by the respondent that there was no special look-out, i.e. no officer specifically detailed for that work and no other. The duties of look-out were being performed by the master and by the pilot. The first officer, though he was standing on the forecastle head, was engaged on other duties, that is, as he said in evidence, preparing to adjust the port anchor for heaving in the hause pipe (fol. 124). Again, at fol. 126, the chief officer said:— "I was adjusting the anchor of the Star of Malta which had come out the wrong way round when I looked up and spotted the lights of the tug";

Spiteri, the wireless operator, was not acting as look-out at all. Suffice it to say that, according to his own evidence, before the collision he was looking at the cruiser (presumably the "Jamaica") — fol. 128. He heard the Captain's order to stop when the "Star of Malta" was close to the cruiser "which I was watching" (fol. 128). This witness further said that "no one was posted as a look-out on the bridge of the Star of Malta, but the Captain and the pilot on the starboard wing would both act as look-outs' (fol. 46);

Now, as regards the pilot, he never saw the tug on the tow at all, except after the Captain had given the order "stop, full astern". This witness said:— "I cannot explain why I did not see the tug's lights earlier before the collision". It may be that this was because of the Aircraft Carrier in the background" (fol. 136);

The Captain sighted the lights of the tug when it was too late to prevent the collision completely. He said:— "If the tug's lights were on before I actually saw them, the only reason for their not having been seen before would be

the glare from lights in the background, i.e. on Senglea Point' (fol. 118);

The additional referees, giving evidence before this Court, said that "in spite of the adequate look-out it was possible not to see the lights on the tug and tow, because there were at the time a number of warships in the background and other lights in the harbour, plus the lights on Senglea Point, which in fact could have obstructed the view of the look-out of the Star of Malta to observe the low-power light on the tow" (fol. 277);

The Court does not think this to be a sufficiently good explanation of the failure of the "Star of Malta" in sighting the tug and tow earlier. It may be that the glare of the lights on the background contributed in some measure to that failure; but as the first referee pointed out, "one should be constantly on the alert, not only to sight and identify fixed lights, but to detect any light which are exhibiting a change in position relative to the background. This is the only alerting factor which indicates the lights of a vessel under way" (fol. 209);

It is the view of the Court that, if the master and the pilot had kept a truly efficient and vigilant look-out, they would have seen the on-coming lights of the tug. Although the night was dark, it was clear, and visibility was good. The evidence shows that the "Melita XI" was carrying the normal navigation lights, which were of normal brilliance, saving what is said hereafter as regards the light on the tow. Now, the Court attaches great importance to the following evidence given by the first officer of the "Star of Malta", Frank Camilleri. This witness sighted the lights of the tug practically at the same time as they were sighted by the master; but — said the witness — "had I been looking out all the time, I would have distinguished them earlier, but not much earlier"; and further, "had I been on the bridge and navigating, I would have been able to spot the tug's lights much earlier with the help of binoculars. Even without glasses I would have been able to spot them earlier, being in a higher position on the bridge" (fol.

128). It does not appear from the evidence that the pilot made use at any time of binoculars, although there was a pair on the bridge for his use (fol. 117). The master said that he did use his binoculars between the time of leaving his berth and of sighting the tug's towing lights by eye (ibid). But the Court finds great difficulty in believing that, if he had really done so, and, in general, if he and the pilot had in fact been vigilant and kept a serious look-out, they could possibly have failed to spot the lights of the tug sooner;

Moreover, we have it that "the conditions as regards glare and traffic on the night of the collision were normal when men-of-war were lying at buoys" (fol. 126). If this glare is usually likely to create confusion and difficulty in distinguishing lights of on-coming vessels, the master had the duty of taking additional precautions to counter this difficulty, as, for instance, by detailing a special look-out to report only any vessels or small craft approaching from ahead. It is no excuse to urge that, if there had been such special look-out, the same disability would have arisen for him from the glare of other lights as arose for the master and the pilot, for in proportion to the greatness of the necessity the greater ought to be the care and vigilance employed;

To this extent, therefore, the "Star of Malta" was negligent in failing to descry the tug earlier on. But the Court agrees with the contents of paragraph 14(c) of the report of the additional referees (fol. 241), that "if a hurricane lamp was placed on the centre of the taffrail of the last lighter, it is very likely that it was hidden from forward by the cargo on the lighters in front; consequently, although the look-out on the "Star of Malta" should have known that the "Melita XI" was towing, they had no means of knowing the length and position of the tow";

Now, appellant's contention is that the negligent failure of the "Star of Malta" to see the tug and tow earlier (which failure, as the Court accepts, was due to a faulty look-out) was the sole cause of the collision, and that con-

sequently the respondent is responsible for the whole of the damage. With this contention the Court does not agree. It holds that there was contributory negligence on the part of the "Melita XI";

The question of contributory negligence, it was said by Lord Berkinhead L.C. in the "Volute" (1922) 1, A.C. 129, "must be dealt with somewhat broadly and upon commonsense 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, while not held free from blame... might, on the other hand, invoke the prior negligence as being part of the cause of the collision so as to make it a case of contribution";

The Court accepts the opinion of the additional referees that initially, that is after leaving the "Argentina", the tug and tow placed themselves in a wrong position in relation to the centre of the fairway. Instead of righting their course immediately, the tug and tow continued on a course well to port of the centre almost to the spot where the collision occurred. At the moment of impact, notwithstanding that the tug had altered course to starboard, the tow was stroddling the fairway to such an extent that, although the master of the "Star of Malta" gave orders "Stop" and "Full Astern", which were promptly executed, part of barge no. 1300 (the one that was hit) and the whole of barge no. 159 were still to port of the "Star of Malta". The tug, which was in a position to observe the movements of the "Star of Malta" from the moment the latter left her berth at Marsa should have altered course much earlier so as to place herself and her tow in a safe position. As an encumbered vessel, "Melita XI" was in duty bound to take the greatest precaution to steer clear. As it was, while the tug, by changing her course to starboard, when she did, placed herself in a safe position, the tow was still astride of the central line of the channel;

If there was negligence on the part of the "Star of Malta", in failing to see the tug at a greater distance, a failure due to her look-out not being sufficiently alert and efficient, the improper position of the tow made the avoiding action, taken in the agony of the collision, more difficult, and contributed materially to its incomplete success. If the incident had occurred by day, and those in charge of the "Star of Malta" had known that the tow was athwart the fairway in ample time to avoid it without difficulty, the fact that it was an improper place for the tow to be in would clearly not have made the negligence of "Melita XI" one of the contributory causes of the collision (cfr. Marsden on Collisions at Sea, 10th. edition, pp. 29-30). But the collision took place at night, and it may well be that the lights in the back-ground made visibility more difficult. The speed of the "Star of Malta" at the time was (as the Court understands from the evidence given before it by the additional referees) the lowest possible. The position of the tow was a continuing source of embarassment to the "Star of Malta" up to the moment of impact, and, therefore, a contributory factor. There was a breach of good seamanship on the part of the "Melita XI" in not correcting the position of herself and her tow earlier, the effect of which could not be remedied when risk of collision had actually arisen (ibid, p. 31);

Moreover, it is common ground that the "Melita XI" did not make any sound signals. Her coxswain had been watching the progress of the "Star of Malta" for quite a considerable time before the collision. As the additional referees remarks in para. 20 of their report (fol. 214), "on coming abreast of H.M.S. Jamaica he could still see the other vessel's port and starboard lights, and, therefore, it was obvious that her bearing had not appreciably changed since she was first sighted. Consequently, he should have known that a risk of collision existed, and was therefore bound to follow the Regulations, which include not only an obligation to observe the Rule of the Road, but also that of making sound signals as laid down by article 28". It is a most point whether such sound signals, if made, would definitely have averted the collision. But it is at least

arguable that a sound signal or sound signals could have served as an alert. The first referee, giving his evidence after he had filed his report, admitted that "the action of a look-out reporting, or the hearing of a sound signal (both in sufficient time), would have had an alerting effect, and this would have very probably served to avert the collision in either case" (fol. 215). And the additional referees, in their evidence before this Court said:— "If the tug had... kept to the port side in the channel and given an indication that she was doing so, it would have alerted the "Star of Malta" and the collision would most probably have been averted" (fol. 279);

For these and the other reasons given by the additional referees, the Court considers that the "Melita XI" was negligent, and that her negligence was a contributory cause of the collision. The negligence of both vessels continued up to the moment of the collision, and in this sense was contemporaneous;

There remains the question of the degree of responsibility of the one vessel and the other. The First Court assessed this in the degree of one third on the part of the "Star of Malta" and two thirds on the part of the "Melita XI". In doing so, the First Court acted on the advice of the additional referees, using the discretion conferred by section 1094 of the Civil Code;

Now, in principle the decision of the Judge of first instance in such matter should not be lightly interfered with by an Appellate Court. Apportionment, as was said by the House of Lords in the Macgregor (1943) A.C. 197, involves an individual choice or discretion as to which there may well be differences of opinion by different minds. For this reason it should be interfered with only in very exceptional cases. In the present case, however, this Court feels that, having regard to all the circumstances, the apportionment of liability made by the First Court is not altogether fair. Of course, assessing the degree of blame of each side is not a matter "of adding up sins and assessing culpability by a kind of arithmetical process". In spite

of the greater number of faults imputable to the "Melita XI", the Court thinks that her share of the blame for the collision was not greater than that of the "Star of Malta". It is a sound rule that, when the case is such that the blame cannot with any certainty be apportioned, the liability should be apportioned equally; and this rule the Court feels right to apply in the present case. In coming to this conclusion the Court has taken account both of section 1094 of our Civil Code, afore quoted, as well as of Admiralty practice (Her Majesty's Commercial Court in Malta is, of course, also vested with Admiralty jurisdiction — Chap. 41 Rev. Edition);

Wherefor, the Court disposes of the appeal as follows;

It affirms the judgment of first instance in so far as it held that the plaintiffs have by the negligence of their own vessel contributed to the collision; but varies it in so far as it apportioned the blame of the defendant in the degree of one third and held him liable for one third only of the ensuing damages and costs; ordering, instead, that the blame for the collision should be apportioned equally between the two parties, and that the defendant should consequently be liable for one half of the damages and one half of the costs of first instance;

The costs of appeal shall be borne as to one sixth by the respondent, and five sixths by the appellant.