

**IN THE HIGH COURT OF SOUTH AFRICA
(CAPE OF GOOD HOPE PROVINCIAL DIVISION)
Sitting with Admiralty Jurisdiction**

The MfV Yung Chun No 17

Case No. AC 30/97

REPORTABLE

In the matter between:

YUNG CHUN FISHERY COMPANY LIMITED

Plaintiff

And

TRANSNET LIMITED t/a PORTNET

Defendant

JUDGEMENT DELIVERED ON 1 SEPTEMBER 2000

DAVIS J

INTRODUCTION

On 24TH September 1995 Cape Town harbour was shrouded in fog when Captain Charles Pullen, a pilot employed by defendant to navigate the mfV "Yung Chun No.17" (the vessel) into the harbour set out on a pilot's boat to board the vessel at approximately 08.20. The fog held the entire harbour in its grey grip. While being so navigated by Pullen, the vessel collided with the A-berth spur in the harbour.

As a result of this collision plaintiff claimed damages in the amount of R1 693 730,80 from defendant. It

alleged that the collision was occasioned by the recklessness, alternatively gross negligence of the pilot

and the negligence of one or more employees of defendant other than the pilot acting within the course and scope of their employment. It further alleged that, arising out of the fact that the vessel was being piloted in a compulsory pilotage harbour, defendant owed the plaintiff statutory duty of care to ensure that the plaintiff's vessel did not suffer harm while being navigated by its employees.

The only issue for determination before this court concerns the legal merits of plaintiff's cause of action. Subject to a decision thereon, the question of quantum of damages stands over for later determination.

LIABILITY OF DEFENDANT

Section 10(7) of Schedule 1 to the Legal Succession to the South African Transport Services Act 9 of 1989 ('the Act') provides that the company and the pilot shall be exempt from liability for loss or damage caused by a negligent act or omission on the part of the pilot. Mr Mac William, who appeared on behalf of the plaintiff, submitted correctly that there did not appear to be any dispute between the parties that defendant would be liable were the court to find that Captain Pullen was grossly negligent or reckless. In support of this submission he was able to refer to certain concessions made by Mr Eia, who appeared on behalf of defendant, to which I shall make reference later.

Concessions aside, defendant pleaded, inter alia, that in the event of a finding that the pilot was reckless or grossly negligent and that such conduct contributed causally to the collision, neither defendant nor its pilot are by law liable for loss or damage caused by any negligent act or omission on the part of the pilot which exemption from liability includes all forms of civil negligence including gross negligence or recklessness (my emphasis)

Much of the argument which dealt with s 10(7) of the Act treated this provision as a form of exemption clause. In dealing with exemption clauses, the courts have traditionally attempted to confine the scope thereof within reasonable bounds by interpreting the wording narrowly. Christie, The Law of Contract in South Africa (3rd edition) at 209 writes as follows: "The method is particularly applicable to clauses which do not specifically set out the legal grounds for liability from which exemption is granted. In interpreting such clauses the court must first examine the nature of the contract in order to decide what legal grounds of liability would exist in the absence of the clause (for instance strict liability, negligence, or gross negligence), and the clause will then be given the minimum of effectiveness by being

interpreted to exempt the party concerned only from the ground of liability for which he would otherwise be liable which involves the least degree of blameworthiness."

This submission has been supported in a line of cases which can be sourced in the decision in **Essa v Divaris** 1947(1) SA 743 (A). (See Christie 146 at 209 for a list of subsequent cases). The employment of the phrase 'negligent act or omissions' in s 10(7) raises the question as to whether, narrowly construed, this exemption clause, albeit sourced in a statute, excludes reckless or grossly negligent conduct. See in **general S.A.R.H. v Lyle Shipping Company Ltd** 1958(3) SA 416(A) at 419.

Although the law of delict does not distinguish different forms or degrees of negligence, or culpa (**Cape Town Municipality v Payne** 1923 AD 207) the differences between negligence and gross negligence have been recognised in many areas of law. As Wessels J stated in **C.S.A.R. v Adlington & Co.** 1906 TS 964 at 973 "A person is guilty of gross negligence who gives no consideration whatever to the consequences of his act, as where a person who takes charge of property leaves it so exposed that thieves may carry it off. This is known as **culpa or negligentia lata, crassa, summa**. A person is guilty of ordinary negligence (**culpa levis**) who, though not grossly negligent, omits to take that care which ordinary people usually take in similar circumstances.... "

In **Government RSA (Department of Industry) v Fibre Spinners and Weavers (Pty) Ltd 1977 (2) 324(D & CLD)** at 335 E **Didcott J** stated "Gross negligence is not, of course, an exact concept lending itself to a neat and universally apt definition. The degree of negligence which is called gross for one purpose may not necessarily be thought for another." **Didcott J** followed the earlier dictum of **Murray J in Rosenthal v Marks** 1944 TPD 172 at 180 mainly that gross negligence denotes "recklessness, an entire failure to give consideration to the consequence of his actions, a total disregard of duty".

In a number of cases the courts have utilised the concept of gross negligence within the context of an exemption clause. See for example **Patterson v Aegis Insurance Co. Ltd** 1989 (3) SA 478 at 482-483; **Hotels Inns Resorts SA v Underwriters of Lloyds** 1998 (4) SA 466 (C) at 477-478.

The concept of recklessness is employed expressly in S 424 of the Companies Act 61 of 1993. The treatment of this concept, albeit contained in a different statutory context, can be of assistance in an examination of the scope of the word 'reckless'. In **Philotex (Pty) Ltd & Others v Snyman & Others** 1998(2) SA 138 (SCA), **Howie JA** referred with approval to a dictum that recklessness is "gross carelessness -the doing of something which in fact involves a risk, whether the doer realises it or not; and the risk being such, having regard to all the circumstances, that the taking of that risk would be described as "reckless" (at 143 D). Recklessness thus connotes the involvement of an element of risk. **Hovie JA** went on to follow the **dictum in S v Dhlamini** 1988(2) SA 302(A) at 308 that gross negligence includes an attitude or state of mind characterised by 'an entire failure to give consideration to the consequences of one's actions, in other words, an attitude of reckless disregard of such consequences'. (at 143 F).

The question arises whether section 10(7) should be interpreted to exempt defendant from liability for loss or damage caused by a grossly negligent or reckless act as accepted in one jurisprudence, or omission on the part of the pilot. In a somewhat different statutory context, the issue was canvassed in **Shell Tankers Ltd v SA Railways & Harbours** 1967 (2) SA 666(E). In that case the exemption provision in respect liability read as follows: "The East London harbour. ..and the Durban harbour are hereby declared to be compulsory pilotage harbours save and except in respect of such ships as may be exempted by statute or regulation; provided that the administration of the pilot who is a servant thereof shall be exempt from liability for any loss or damage that may arise or be caused through the act, omission or default of such pilot."

Cloete J said that he was inclined to the view that, "the section which operates entirely in favour of the defendant and which places the defendant in a special and favoured position in relation to the liability for damage caused in the circumstances contemplated, does create such a special defence. It creates a position where the defendant can avoid the normal incidence of common law liability for the actions of its servants and, that being so, it seems to me the onus of proving the defence properly rests upon the defendant the section in my view must be construed strictly. If this is done then the fact that it does

not explicitly exclude ;liability if the negligence of the defendant acting through its servants other than the pilot causes or contributes to the damage is significant". (at 672- 673).

Cloete J went on to say, "If therefore, a restricted interpretation is given to this section then in my view it does not extend to the case where damage is caused by concurrent wrongdoers one of whom was the pilot and one another a servant of the defendant. The defendant cannot therefore in such a case escape liability if the pilot's conduct merely played a part in causing the damage. In order to avoid liability it must be proved that the pilot's conduct was the sole and proximate cause of the damage." (at 673H).

In **Shell Tankers Ltd, Cloete J** held that as the information given by the port authority to the pilot and the vessel was three months out of date and hence incorrect, this factor together with the error of the pilot which caused the vessel to bottom on shallow ground within a turning circle demarcated by the port authority , justified the conclusion that the statutory exemption could not come to the aid of Portnet.

In essence Mr Mac William urged this court to adopt a similar **jurisprudential** approach to section 10(7), namely that the provision should be construed strictly, should only exempt defendant from negligent acts or omissions but should not be read to include within its protective scope either willful acts or those of a reckless nature.

The approach adopted by **Cloete J** in the **Shell Tanker** case lends support to the submission of Mr Mac William, that the interpretation of section 10(7) should be interpreted restrictively and that only the express wording of the section should provide an exemption from liability. As the express wording of the exemption provides that only negligent acts or omissions on the part of the pilot are exempt from liability it must follow from a restrictive approach to such clauses that willful, reckless or grossly negligent acts or omissions on the part of the pilot fall outside the exemption. Accordingly where the loss or damage is caused by such an act or omission, defendant would not be entitled to rely on the statutory exemption.

PLAINTIFF'S CASE:

The essence of plaintiff's case was that there was a Furuno radar aboard the vessel. It was situated on the bridge at all relevant times when the vessel was being navigated by Captain Pullen. He failed to use this equipment, the proper employment of which would have ensured that the vessel did not collide with the A berth spur. In its plea defendant, apart from raising the interpretative question relating to section 10(7) denied that the collision was caused by the fault of the pilot and went on to plead that the collision was caused by the fault of plaintiff and/or the master and crew of the vessel all of whom

acted at all material times within the course of the scope of the employment of plaintiff. Defendant pleaded that negligence was manifested in one or more of the following respects.

(i) the vessel was unseaworthy, particularly because its radar had no heading marker and one third of the screen from the center was burnt out;

(ii) the vessel entered into port limits (and beyond the breakwater) without informing defendant of its intention to do so;

(iii) the vessel remained at the entrance to the port and constituted a hazard to other vessels entering or leaving the port;

(iv) there was no English language speaking master or officer on the bridge of the vessel capable of properly communicating to the pilot the status of the bridge equipment and/or the vessel's characteristics.

(v) The master and/or crew failed to alert the pilot of the imminent danger to take the necessary avoidance action when the collision was imminent and to provide a qualified and competent helmsman which would have enabled the pilot to attend solely to the navigation of the vessel and to bring the vessel that was injured into a stern operation timeously or at all.

In short two competing versions were placed before the court. Plaintiff's version of events was that Captain Pullen had failed to make use of the Furuno radar which would have ensured, fog notwithstanding, that the vessel could be safely navigated into the harbour. Defendant's version was that no such radar was located on the bridge on the day in question. The only radar available to Captain Pullen was an older model of radar, JRC radar ('hooded radar') the condition of which was defective.

It is now appropriate to refer to certain concessions made by defendant's counsel Mr Eia, which have a material bearing on the manner in which this dispute should be considered. During the course of the trial Mr Eia, objected to certain questions put by Mr MacWilliam to the witness Captain Van Rossum. During an exchange with the Bench he said "Should your Lordship find, or be of the view that on a balance of probabilities that the Furuno radar was not where it was, well on that basis alone, plaintiff fails. It is not plaintiff's case that there was a JMA radar switched on there". He was then asked "Are you telling me that if I believe that the Furuno radar was there, your case is ended" He replied "I would accept that it would be so".

Mr Eia repeated this concession in argument. It was wisely made for all expert witnesses who testified about radar on board a vessel were unanimous about the high quality and performance of a functional Furuno radar and its applicability to the conditions faced by Capt. Pullen. Accordingly the key question for determination was whether plaintiff had shown that there was a Furuno radar on board the vessel positioned on the bridge on the day in question.

Five witnesses were called by Plaintiff in order to testify to this fact. The master of the vessel, Chen Wen I, testified that there were three radars on the bridge when the pilot boarded the vessel, namely the Furuno radar and two hooded radars (*JMA/525* radars). He testified that the hooded radars were in normal working order at the time when the vessel docked in Cape Town but had been switched off when the vessel came into port.

The master testified that Captain Pullen had examined the Furuno radar and thereafter communicated with the master as to the navigation of the vessel. He adjusted the radar setting from 0.5 nautical miles to 0.75 nautical miles. He then tested the helm 'by moving the helm from left to right'. Capt. Pullen then instructed him to use the throttle and move the vessel forward. He employed the Mandarin expression 'Chin Chin'. After this exchange, communication took place with hand signals. The vessel began to move forward.. Capt. Pullen required additional speed. Shortly thereafter, one of the crew stationed in front of the vessel, called out that "we're going to hit the harbour". The master testified that he went "full speed backwards". Immediately prior to the warning, the master testified that Capt. Pullen was steering with one hand and using the radio with the other hand. Shortly thereafter the vessel hit the quay.

Chen Wen I testified that the Furuno radar was his preferred radar of choice. At the time of the collision the total running time of the Furuno radar was less than 500 hours. He explained that prior to his having become the captain of the vessel, his predecessor had never used the Furuno radar because he preferred to make use of the hooded radars. In 1996 the Furuno radar was moved from the bridge into the master's cabin.

He insisted that the Furuno radar had been switched on, that Captain Pullen was able to view it from any angle at which he was standing on the bridge and that the radar was in proper working order. In answer to a question from Mr Eia "how on earth this collision took place if the radar was working properly", he answered "I know that from my side the radar has no problem prior entering into Cape Town I was fishing in Argentina and I was using the radar to enter and depart from the port so I trust the radar is in correct working order"

The chief engineer, Chan Kwo testified that he had followed Captain Pullen onto the bridge shortly after the former had boarded the vessel. He testified that the radar was located "in front, right inside of the helm ". The pilot had one hand on the helm, the other had a radio he was wearing dark glasses. He said further, "I was on the port side of the helm, there was a chair there, I was sitting down on the chair". He testified that the only radar which was operating at the time was the Furuno radar. He was unable to comment, being the chief engineer, as to why the Furuno radar reflected only 500 hours of running time. He did however say that it was used "most of the time we use it when we go through the Singapore State" During the three year period in which he had been the engineer on the vessel prior to the accident taking place, the Furuno radar had always been positioned on the bridge.

The third witness called by plaintiff was Mr Clifford Hall, a service engineer on marine equipment, navigation equipment communications and all other electronic equipment on board a vessel. Mr Hall confirmed in evidence that on 4 October 1995 he inspected the radar on board the vessel. At that time he was employed by Radio-Holland who had been instructed by the ships agent (at that time), Ellerman and Bucknall.

His report on the performance of the Furuno radar on board the vessel read as follows:

- "A) Check receiver sensitivity and transmission on 0.5-48 N.M. range. Found results satisfactory with good picture presentation.
 - B) Check and compare with chart. Electronic bearing line and variable range maker on all ranges, found operation satisfactory and accurate.
 - C) Check Gyro Compass information, information input to radar, found correct with radar stablization normal.
 - D) Check all other controls associated with radar operation. Picture brilliance, gain control, sea clutter control, rain clutter control, range rings and pulse length. Found all to be in good operational condition.
 - E) Compare radar bearing and range measurements of harbour with same on charts, found all to be correct and accurate.
- Over all performance and operation of radar satisfactory within specifications. Total running time of radar less than 500 hours."

As to the role which the radar could play in assisting the navigation into the harbour, the following exchange from the record reflects Mr Hall's understanding: "So if you are at a particular point and you want to get -if you are waiting to get through the entrance, more specifically the Duncan Dock, and you look at the radar when you are say 800 metres away, it will give you a certain picture of the position as it is there, and as you pass Duncan Dock, it will keep updating your information on the radar screen, is that correct;. ..yes it will. So if, the fact you set a particular line or particular bearing, that doesn't take you to the entrance to the dock that will become apparent on the radar screen as you move towards the entrance; yes it would."

Mr Hall was not able to inform the court as to the precise location of the radar on the bridge when he inspected it on the vessel on 4 October.

However he found the radar to be located on the bridge and it was from the bridge that he conducted his inspection. Significantly defendant did not contest this piece of Mr Hall's evidence. He explained that if the Funino radar had been moved from the captain's cabin to the bridge it would have required the removal of wiring from the radar, the dismantling of the display, the placing of the radar in another position and the rerouting of the wiring. This move could involve some expertise specifically regarding the power lines and the 'interface' between the radar and the gyro-compass and other navigational equipment. Once the radar had been so moved Mr Hall testified that, "One again has to be sure that nothing has been disturbed during the transition of movement, otherwise yes certainly one will have to recalibrate in a sense".

Under cross-examination Mr Hall conceded that his finding that the total running time displayed on the radar did not exceed 500 hours would be surprising if the radar had been employed consistently by the master as his "preferred radar of choice". However Mr Hall went on to say that "I don't know when he switched the radar on to use it for navigation or whatever purpose". He also testified that there was no need to keep the Furuno radar operating continuously in order to keep it dry and avoid "any back contact due to moisture."

Joseph Lee was the ship's agent, at the time employed by Ellerman and Bucknall who were at the relevant time plaintiff's Cape Town agents. On 24 September 1995 Mr Lee was present in the harbour in order to complete the formalities for the berthing of two vessels including the Yung Chun No.17 .After clearing the other vessel, the Yung Y 66, Mr Lee drove to M Berth in the harbour where the brother of the owner of the vessel Mr Kwo Han Chun, together with the master and the chief engineer's wives were waiting for the vessel to dock. Mr Lee testified that shortly after his arrival the master "just started to scream over the radio, they called me by my Chinese name, that 'the vessel hit the quay, the vessel hit the quay". I told the owner's brother that the -well, he spoke in Chinese and he heard, he said what's going on, what's going on. So the captain says I must meet them on the quay when they come alongside because the ship hit the quay and of course hearing that, we went around to OH Berth immediately to wait for the ship to come alongside."

When the ship came alongside, Mr Lee saw that its bow had been buckled on the port side. He boarded the vessel upon which Captain Pullen informed him that the bottom half of the radar screen was not in working order. Mr Lee confirmed that he saw a Furuno radar on the bridge, that he looked at the radar but did not consider himself qualified to opine to its state of repair. He was unsure as to the meaning of Captain Pullen's statement that the screen was not working properly because when he examined the Furuno radar "there was a full screen there, so I thought maybe it's some other technical term and I didn't know how to translate it to the master". He informed the master however of Captain Pullen's allegation that the radar had not functioned properly. According to him the master "went berserk and starting turning all the knobs there and he says, "how can it not be working properly?" He was busy pulling the dash bringing the ranges in and out. ". Captain Pullen was looking on, at that stage a very shaken man.

In dealing with his recollection of his observation of the Furuno radar Mr Lee testified that he had seen the radar after climbing the stairs onto the bridge whereupon he looked and saw the radar "lit up" on the opposite side of the staircase, namely the starboard side.

Mr Lee testified that the owner's brother had phoned the owner and informed him that they intended to sue Portnet. At this point Mr Lee contacted the attorney who represented the ships agents Mr Arthur James. Mr James arrived shortly thereafter, some time before 12 p.m. Mr Lee explained that he first showed Mr James the damage to the bow and thereafter Mr James went on board the vessel.

Mr Lee also testified that Port Control was aware of the arrival of the vessel and that it had instructed the vessel "to proceed to the breakwater. He was subjected to intensive cross examination by Mr Eia as to the sequence of events leading up to the vessel requiring the assistance of a pilot. As this aspect of the trial is not directly relevant to the location of the Furuno radar, it is not necessary to deal with this evidence. To the extent that it has a bearing on credibility, I deal with it below.

Captain Edward McAllistair gave expert testimony on behalf of plaintiff. To the extent that it is relevant to this aspect of the dispute, Captain McAllistair's evidence requires

some analysis. He testified that had Capt. Pullen been concerned about a misalignment of the radar, he could have turned the vessel seaward, or he could have taken more time. Based on defendant's records he also rejected the argument contained in the expert notice of defendant's witness, Mr Needham that when Captain Pullen boarded the vessel constituted an embarrassment to other vessels in the area. Captain McAllistair conceded that had the pilot satisfied himself of the accuracy of the radar, he would not have been at fault had he proceeded into the harbour.

Mr James was the final witness called on behalf of the plaintiff. He confirmed Mr Lee's testimony that soon after the vessel had berthed he had received a telephone call from Mr Lee. Some 30-45 minutes later he arrived at the harbour.

His testimony concerning the location of the Furuno radar is captured in the forthcoming passage from the record: "It is five years ago, I am trying to remember the details as best I can but I went down shortly afterwards, this must have been about mid-morningish, I went down to Duncan Dock where I found Mr Lee. The vessel was alongside I can't remember whether she was double-banked or not. I went on board the vessel, where Mr Lee introduced me to various people. There were a lot of people milling around, quayside and on the vessel and I was introduced to the master of the vessel. I was told by Mr Lee, again I can't remember exactly how the discussion went, but assumed that the vessel had been involved in a collision in thick fog at one of the breakwaters. It had been under pilotage at the time. The pilot had been using the radar and the owner required me to assist them in recovering the vessel's damages. The master then, I think, showed me the radar. It was a radar on the bridge, a TV type radar -I can't remember whether it was on or whether it was switched for my benefit, I think it was actually on, he starting adjusting it, ranges etc. It displayed a picture of the port. I am no expert, my response to Mr Lee was it looks wonderful but, please get an expert in to come and check it and make sure that it is indeed operating correctly."

Under cross-examination Mr James conceded that he was unable to testify some five years after the event exactly where the Furuno radar was located on the bridge. He suggested it might have been located somewhere below the windows but "I can't - whether it is portside, starboard side, please, I can't remember."

Under cross-examination, Mr James was also asked a series of questions as to the nature of the photographs which were taken pursuant to the inspection of the vessel on 22 December 1999. This inspection had been necessitated as a result of the somewhat inadequate set of photographs taken of the bridge and which had been entered into evidence earlier in the trial. During the court vacation an inspection had been arranged to which representatives of both parties attended. Mr James testified that a plinth had been placed on the bridge at the time when the vessel was in Taiwan. The placement of the plinth was intended to do no more than to represent where the radar stood when it had been located on the bridge. Mr Eia demanded an explanation of Mr James as to why no representative of defendant had been informed that the plinth had been retrospectively fitted. To this Mr James replied "I don't, it's not a matter I specifically applied my mind to, I think it was only discussed and raised with me subsequent to the inspection."

Mr James explained that it had not been his intention to represent to Mr Matt Ash, defendant's attorney, that the plinth had always been "there" but rather that the original plinth upon which the radar had been located had been found and had been placed in a position to assist in the taking of the photographs designed to illustrate the exact positioning of the radar at the time of the accident.

I have mentioned the dispute about the plinth in some detail because this issue became the subject of an intense dispute which prompted an application for plaintiffs witnesses Mr Lee and Mr James to be recalled to testify under cross-examination.

APPLICATION TO RECALL WITNESSES.

In terms of an affidavit deposed to by Mr Ash, after the conclusion of proceedings on Friday 17 March 2000 and after everyone had left the court, save for the attorneys and Mr Lee a discussion took place on an informal basis between Messrs Lee and James and Mr Ash. According to Mr Ash, Mr James reasserted his position that the question of the plinth was "a red herring". At this point Mr Lee stated that he was unhappy about the criticism apparently directed towards him concerning the retro-fitting of the plinth because Mr James had so instructed him. Mr James did not deny this assertion or take issue with Mr Lee. Mr Ash stated that, given the dispute as to the siting of the

Furuno radar on the vessel and Mr James' testimony pursuant thereto, defendant was left with no alternative but to apply for both Mr Lee and Mr James to be subjected to cross-examination.

In his submissions in support of the application Mr Fitzgerald, who argued this aspect of the case together with Mr Eia, referred in detail to the evidence of Mr James namely ""Were you aware at the time of inspection, that the plinth had been put there between the time of our trial commencing and the vessel coming into Cape Town harbour, can you recall or not? I don't -it is not a matter I specifically applied my mind to, I think it was only discussed when it was raised with me subsequent to the inspection."

Mr Fitzgerald submitted that, having regard to the instructions given to Mr Lee by Mr James, it was reasonable to infer that Mr James had deliberately chosen to conceal from the court the fact that the plinth had been re-fitted upon his instruction. Accordingly the cross-examination of both Messrs James and Lee would impact upon their credibility. The evidence given by the two witnesses related to a material issue in the matter, namely whether the Furuno radar was on the bridge at the time of the accident.

In support of this submission Mr Fitzgerald referred to the decision in **Hladhla v President Insurance Co Ltd**. 1965(1)SA 614 (A) at 621 B in **in fine** in which **Van Blerk JA** having considered the power of a trial court to allow a witness to be recalled even after the defendant had closed its case said: "I see no reason why even at this stage of the proceedings at trial Court should not on application have the power to allow in its discretion a witness to be recalled especially where, as in this case, it is clear that plaintiffs counsel inadvertently omitted to establish the identity of the vehicle which was involved in the accident. The defendant put the identity of the vehicle in issue, merely because it had no knowledge of the allegation that the insured vehicle was involved in an accident.. The nature of the evidence which plaintiff now seeks to place before the Court by recalling the witness is purely supplementary and almost of a formal nature. It is, on the view I take, to correct an error which may be described as a slip of the pen."

In response to the approach adopted by **Leon J in Barclays Western Bank v Gunas and Another** 1981(3) SA 91(D & CLD) at 93, that an application of this nature should not succeed when the evidence to be heard amounts simply to evidence rebutting an earlier denial by another witness and hence is relevant only to the question of credibility, Mr Fitzgerald submitted that the evidence sought to be adduced by way of cross-examination was not designed to rebut a denial by an earlier witness but was relevant to a fundamental and material issue in the case, the position of the plinth.

In opposing the application Mr Mac William also relied upon the **Hladhla** decision. He submitted that the application was intended to do far more than "correct an error which may be described as a slip of the pen". It was designed to obtain a further opportunity for the defendant to attempt to discredit the evidence of Mr James by way of further cross-examination of both Mr Lee and Mr James. As that had been the basis by which the application to lead further evidence in the **Gunas** case had been abandoned, Mr Mac William submitted that there was no basis for the application.

Unquestionably the court has the power, which it may exercise in its discretion, to allow a party, which has closed its case, to reopen it. See **Hladhla** at 621-622; **Claude Neon Lights (SA) Ltd v Daniel** 1976(4) 403(A) at 413 DE. It is also trite that the discretion should be exercised circumspectly. **Hoffman & Zeffert The South African Law of Evidence (4th ed)** at 477 provide a most useful summary of the approach to be adopted in such matters. "...leave will be more readily granted after only one party has closed its case and after both have done so, and it will be still more difficult for a party to obtain leave after the weaknesses in his case have been exposed in argument or judgment has been reserved and the other witnesses have gone home. It is best to analyse the matter. ...according to the stage at which the application is made; this will have the effect, ...of leading to the conclusion "that the court at each successive stage will be less ready to accede to an application for leave to reopen a case for the purpose of leading fresh evidence and will require a strong case to be made out before granting that privilege where argument has already been concluded'.

In this case argument had already been concluded and accordingly a strong case is required before a court should exercise its discretion in favour of the applicant.

As noted, Mr Eia had conceded during the trial and again during argument that, were the court to find that a Furuno radar was located on the bridge on the morning which Captain Pullen boarded the vessel, defendant would in effect have no case against plaintiff. For this reason all of the evidence relating to the location of the radar on the day of the accident became critical to the resolution of the dispute. Mr James, an attorney of this court, was obviously a witness of critical importance to plaintiff's case. The suggestion that his evidence may well have been inaccurate or worse still, dishonest in part, is one that, within the context of the case, could not be lightly dismissed. It would certainly not have been in the interest of justice to ignore the allegations made on affidavit by Mr Ash without affording defendant the opportunity of properly testing the evidence and establishing its relevance to the location of the Furuno radar.

To a large extent, the effect of the application was to test the credibility of Mr James and, to a lesser extent, that of Mr Lee. Hence a decision in favour of the application would appear to run contrary to the approach set out in **Gunas'** case, *supra*. However the application did serve a purpose which went beyond credibility. The positioning of the plinth upon which the radar was allegedly situated on the bridge was itself of importance. For these reasons I ruled that defendant would be entitled to cross-examine both Mr Lee and Mr James in respect of the positioning of the plinth which appeared in the photographs taken on 22 December 1999.

When recalled as a witness, Mr Lee testified that during his overseas trip to the Far East in November 1999 he visited the vessel in order to take further photographs. During this inspection he telephoned Mr James in Cape Town to inform him that the Chief Engineer had found the original plinth on board the vessel. Mr James instructed him to replace the plinth where it was understood that the radar had been located on the day of the accident. He further testified that he had not informed defendant's representatives that the plinth had been refitted when the further inspection took place on 22 December 1999 because he did not consider this fact to be important.

Mr James was carefully cross-examined by Mr Fitzgerald as to the answers which he had provided to the court during his evidence as well as to his omission in failing to inform Mr Ash or any other representative of defendant as to the retrofitting of the plinth. He suggested that it was only when he had seen the report of Mr Godfrey Needham, an expert testifying on behalf of defendant, that he had realised that there had been some confusion in respect of the fitting of the plinth. Accordingly he corrected this misunderstanding expeditiously by a communication with defendant's attorney.

Mr James suggested that he had not provided a dishonest answer to Mr Eia's question to whether he could recall that the plinth had been "put there in between the time of our trial commencing and the vessel coming to Cape Town Harbour". When he answered, "it is not a matter I specifically applied my mind to, I think it was only discussed when it was raised with me subsequent to the inspection", he suggested that what he intended to convey was that the retrofitting of the plinth itself was not of major importance and he had only considered the issue as being pertinent when it was raised after the inspection.

SUMMARY OF PLAINTIFF'S CASE.

The essence of plaintiff's case was that five witnesses confirmed the central theme of the case namely, that at all material times a fully functional Furuno radar was located on the bridge of the vessel. Had Captain Pullen used this radar as he should have in the circumstances, particular regard being had to the lack of visibility, he would have obtained a sufficiently clear picture to have enabled him to have successfully piloted the vessel into the harbour .

DEFENDANT'S CASE.

In his affidavit in support of the application that Messrs Lee and James should be recalled to testify under cross-examination, Mr Ash provided an excellent summary of defendant's version as presented to the court. He stated thus, "It has always been Defendant's version that Defendant's servant, Pilot Pullen did not have reference to a Furuno radar whilst conning the vessel, that no such radar was brought to his attention, that such radar was certainly not switched on, nor was such radar in a position where plaintiff alleges the radar to have been sited". Thus defendant relied upon the evidence of Captain Pullen, Captain Staverees an employee of defendant, Captain Van Zyl, an employee of defendant and two expert witnesses, Captain Van Rossum and Mr Needham. In addition defendant also called Mr Arend De Boer a specialist in electronic navigation systems.

Much of this evidence focussed not only upon the denial of the existence of the Furuno radar on board the bridge of the vessel (direct evidence from Captain Pullen and inferential reasoning from Mr Needham) but was directed to the further argument that the master of the vessel had breached port regulations in "creeping in" passed the breakwater before Captain Pullen boarded and that Captain Pullen had not been given every assistance from the master and chief engineer Defendant's case also attempted to provide a better explanation for the accident, an explanation which was to be located in the malfunctioning of the JRC radar, the misalignment of which caused Captain Pullen to navigate in a direction which resulted in the vessel colliding with the A berth spur.

Captain Pullen testified that when he came onto the bridge of the vessel he looked into the hooded JRC radar on the starboard side of the helm. He stated that after he had orientated himself with the vessel with particular reference to the radar, the breakwater and the top of port control "the radar seemed to be alright as far as I could judge". After he had manoeuvred the vessel in an S-shape direction approaching the entrance to Duncan Dock and with reference to the radar he testified that he had kept the A berth spur on his starboard bow. At that stage he suggested that the vessel was travelling between 2-3 knots. He then testified "It is because I just kept on opening up and opening up away from the A berth spur because at the same time because I was handling the wheel, checking the two compasses one against the other. Just making sure that as far as I could tell, that the Geiger Compass wasn't 10° higher or lower it was over here in the turn, keeping the A berth spur just on the starboard bow, at all times, about four points on the starboard bow at least. ...because I was checking the radar from time to time, checking the compasses, keeping it on a steady heading, and at one stage I was either looking into the radar or about to look into the radar when there was a shout"

In answer to the question: " are you able to recall what your reaction was to the shout?", he replied "because I looked up immediately from my position at the wheel and above the fog I could see the green light of the lighthouse in the A berth spur which in those days was at least twice the height of the present one. Especially as there no time for that then I put the wheel hard to starboard, immediately I said to the captain I said pull astern, please I said you know absolutely pull astern. Because he looked at me he seemed to look out the window and he seemed to take some time to react, I had to repeat this three or four times."

When asked as to how the collision could have taken place when he had earlier considered that the A berth spur was on the starboard bow, he testified "It was quite obvious that the ship was heading in one direction and the radar was heading in another direction, meaning that there was a gross misalignment to the radar, just which I never was aware of at that point in time and I couldn't have been aware of it either". The radar picture had indicated clearly that the vessel would pass the A berth spur on its starboard side. It never indicated that the vessel was heading directly towards the A berth spur or that it was likely to collide. He further testified that he had not been informed that there was anything wrong with the radar and "I accepted in good faith that all the systems were working properly which is quite normal because masters of the ships inform pilot when compasses are in error, and high or low, if anything is wrong with the radar. The radar might have sent an error or anything here".

When questioned about the positioning of the Furuno radar he confirmed that it was the better radar to have employed under the conditions which existed on the day. As he said " one should rather use the daylight screen radar, being a sort of rear radar as well." He testified that no such radar had been available to him. He had thus been compelled to use the hooded model. As to the condition of the hooded radar which he was constrained to employ, Captain Pullen said the centre appeared to be heavily scarred, "because I took it to be a sign of excessive use of brilliance or gain over a period repeated over a long

Mr Needham also testified as to the nature of the inspection on the 22 December as well as the location of the plinth. He testified that the plinth had "been simply secured by two nails, just hammered through the after parts". He further testified that there was no evidence to

suggest that the radar had been permanently fitted on to the plinth at the point where the plinth had been located when the photographs had been taken. There were no screw holes in the plinth which would have suggested that it had been employed to permanently locate a radar thereon. Furthermore the size of the plinth was such that Mr Needham did not consider that the Furuno radar had in fact been placed on that plinth.

He testified that the view of the radar screen from behind the helm would be inconvenient and inappropriate. The position of the Furuno radar as alleged by plaintiff would "seriously compromise the convenience and the really fine machine that the Furuno radar represents by putting it into that position. There was a lot of space, it could have been suspended from deck heads, mounted on bulk head brackets or any other work surface, and as I say again on the starboard side where the traditional Spanish, South African or any other shipping boats -that I have experience on, where you would find the conning position on the starboard of the wheel house is surrounded by navigational aids, including fish finders, echo finders, direction finders and radar. I can only say that I know that the Furuno radar in that position seems to be totally incongruous, I cannot understand the positioning of the radar in that position."

Under cross-examination Mr Needham conceded that there was a power supply on the bridge which was still in place and which was appropriate for the powering of the Furuno radar. While the power supply on the bridge did not power the Furuno radar in its existing position in the captain's cabin, it indeed appeared to operate "nothing, nothing was connected to it". He conceded that it was the kind of power that one could employ for a Furuno radar or any other electronic equipment. He also conceded that there was "a wire curled up and lying behind the existing fish-finding equipment" which appeared to serve no purpose and which could have been an indication that something had previously been connected to that power supply.

Captain Gerald Staverees is a senior pilot employed by defendant. On 24 September he was on duty in Port Control. He noticed the vessel had slowly made its way towards the breakwater and had entered the approach channel. He contacted Captain Pullen on the radio to request that he 'consider bringing it in'. Pullen was reluctant to agree to the request. He repeated the request before Pullen reluctantly agreed. Indeed he suggested that Pullen thought he had made the request on three occasions.

He agreed with Mr Mac William that if Captain Pullen had access to an operational Furuno radar and he piloted the vessel so that it struck the A berth spur 'that would have serious consequences for him'.

According to Captain Staverees the vessel had rounded the breakwater and proceeded towards Victoria Basin. It constituted a threat to other vessels and needed to be moved.

When confronted with defendant's records of vessel movement on the day which indicated that this presented an inaccurate picture in that the vessel was inside the breakwater when Captain Pullen was dispatched. Captain Van Zyl who was in charge of the pilot boat on the 24 September, supported the version of Captain Staverees. Mr Mac William made much of the initial claim of Captain Staverees that the records were accurate within a few minutes. Only when confronted with the application of the records to the case did Captain Staverees claim otherwise, that the records represented approximations.

EVALUATION

Although much of defendant's case was directed to supporting the hypothesis of Mr Needham, namely that the misalignment of the hooded radar had caused Captain Pullen to take the wrong line and thus cause the vessel to collide with the A berth spur, it was common cause that the existence of the Furuno radar on the bridge of the vessel would constitute sufficient evidence to justify conclusion of recklessness on the part of Captain Pullen. Support for this conclusion is to be derived in testimony from defendant's experts.

Mention has already been made of the relevant evidence of Captain Staverees. The following exchange is to be found in the record as part of the evidence given by Captain Van Rossum. Under cross-examination, the following was put to him: "If there was a radar picture and there was a Furuno radar there, then obviously Captain Pullen could not have been watching it, isn't that right? He couldn't have been watching it? Yes, if there was a Furuno radar there it wasn't misaligned and it had no problems with it, Captain Pullen could not have been looking and paying attention to that radar, isn't that correct?"

No, obviously not because if you have that radar there you don't have any need to be away from the helm you can have the helm and the radar at the same time."

Mr Needham conceded, albeit reluctantly, that there would have been negligence on the part of Captain Pullen if the radar had shown the A berth spur and that it was working correctly. Pushed by Mr Mac William he said "if there was a target across your heading flash depicting a big pile of concrete structure in front of you, it can't be missed, its pure negligence". He also conceded, even more reluctantly that Captain

Pullen would have been entitled to insist that the other radar (other hooded radar) should have been switched on if he had been satisfied with the operation of the hooded radar which had been switched on.

According to Captain MacAllistair, a radar in the condition described by Captain Pullen would provoke some concern and could prompt the use of the other radar. To power up the second hooded radar would have taken no more than 5-6 minutes.

As mentioned, Mr Eia, wisely within the context of this evidence, conceded that had a Furuno radar been on the bridge at the time, Captain Pullen's conduct would render defendant liable.

For this reason the key issue relates to the existence of a Furuno radar on the bridge. Plaintiff produced evidence of the master and the chief engineer to the effect that a Furuno radar was located on the bridge at the time of the accident and that it was available for use by Captain Pullen. This evidence is supported by Mr Lee and Mr James who state that within a couple of hours of the accident, they observed a Furuno radar on the bridge. Mr Hall's evidence that he inspected a Furuno radar on the bridge some days later is uncontested. Defendant relies on a denial by Captain Pullen of the existence of a Furuno radar, an attack on the credibility of the four witnesses, a reconstruction of events by Mr Needham supported to an extent by the evidence of Captain Van Rossum that the misalignment of the hooded radar provided a cogent explanation for the accident and further evidence related to the improbability of a Furuno radar being located on the bridge, given the other electronic equipment positioned close to the alleged location of the Furuno radar.

The credibility of the master and the chief engineer is difficult to assess in these circumstances because they gave their evidence in Mandarin Chinese which was interpreted. It is often a problem to capture the nuances of evidence in translation and one can never be entirely certain that the subtlety of questions phrased in English were perfectly understood by either of the two witnesses.

Mr Eia submitted there were many contradictions in the evidence given by the master in particular, much of which had to do with his explanation as to where the vessel was lying at the time it was boarded by Captain Pullen. Perhaps of greater relevance to this particular issue was that, when confronted with the fact that the total running time of the Furuno radar was less than 500 hours, the master did provide a number of explanations including that the radar had not been installed "very long ago", that although it was his radar of choice he only employ it "for important events for example, entering or departing from a port".

Mr Eia made much of Mr Lee's failure to bring the relevant port regulations to the attention of the vessel's master and to certain embellishments in his evidence when he recounted the conversation between himself and Captain Pullen. In particular he focussed upon Mr Lee's testimony that Captain Pullen had informed him that the bottom half of the radar screen had been burnt, an observation which could not have been accurate as such a defect was not technically possible with a Furuno radar.

Mr Fitzgerald sought to attack the credibility of Mr James' evidence for the reasons which have been set out above in dealing with the application to recall both Mr Lee and Mr James. In short he suggested that Mr James had not been entirely candid in his explanation as to how the plinth had been fitted prior to the photographs being taken at the inspection on the 22 December 1999.

I accept that defendant justified in pointing to the defects in the evidence of plaintiff's witnesses. However for the court to conclude that the version of these four witnesses should be disregarded would in effect be to necessitate a conclusion that these witnesses were lying to the court, that their memories had failed them or that while Mr Lee and Mr James had told the truth, the master and/or the engineer (or other members of the crew) had relocated the Furuno radar from the Captain's cabin to the bridge during the period from the time that the accident occurred to the time that Mr Lee and later Mr James boarded the vessel.

It is prudent to treat the evidence of the master, the chief engineer and indeed that of Captain Pullen with a measure of caution. All three had a vested interest in the veracity of their version. For this reason the evidence of Mr Lee and more so that of Mr James an attorney, becomes even more important. While accepting that Mr James had been vague with regard to his answers as to the retrofitting of the plinth, not even Mr Fitzgerald was prepared to go so far as to conclude that Mr James' evidence relating to his visit to the vessel on the day of the accident should be totally disregarded. He suggested rather that it should be treated with a measure of caution. Mr James' evidence concerning his inability to recall the nature of the refitting was somewhat unfortunately phrased. Account should also be taken of the fact that he had sought to correct quickly any misunderstanding when he had read the report of Mr Needham and further that Mr Needham's own observation of the plinth could only have lead him to the conclusion that it had been placed there for the purpose of obtaining a clear photograph of the alleged location of the radar.

The need for additional photographs resulted from a view from the bench that the initial photographs were not satisfactory and that additional photographs should be taken. Consequently there would have been an understandable desire on the part of Mr James to depict the location of the radar more accurately than initially had been done.

Viewed in its totality, the manner in which Mr James conducted himself and the context of the evidence which he gave does not lead to a conclusion of dishonesty. I am satisfied that Mr James testified accurately and honestly as to his observations of the radar being on the bridge on the 24 of September 1995. He did not seek to exaggerate his knowledge. He carefully stated that he had seen a radar. He could not comment as to whether it was working properly or had been switched on for his benefit.

In short he took the court into his confidence as to the extent of his knowledge about events which had taken place some four years earlier. I find that Mr James' testimony regarding his observations of the bridge of the vessel on 24 September 1995 should be accepted as reliable evidence. This version is supported by the evidence of Mr Lee who, although subject to criticism by Mr Eia, testified in a candid manner, as was exemplified in his testimony upon recall under cross-examination.

Once the evidence of Messrs Lee and James is accepted in respect of their observation that a Furuno radar was located on the bridge of the vessel on 24 September 1995, only one of two possibilities ~ seriously be entertained in favour of defendant. The first is that the captain together with the chief engineer and/or other members of the crew moved the radar from the captain's cabin to the bridge some time after the vessel collided with the A berth spur and prior to Mr Lee and Mr James boarding the vessel. Not only would such an act have revealed an astonishing knowledge of South African law in general and the implications of section 10(7) of the Act in particular but this manoeuvre would presumably have taken place while Captain Pullen was still on board the vessel!

The other possibility is that the Furuno radar was located on the bridge but was not operating when Captain Pullen boarded the vessel and was under some covering such that he did not notice its existence, nor was it pointed out to him.

Such an omission would be highly surprising for an experienced pilot, with knowledge of such equipment on the bridge of a vessel. This omission becomes all the more surprising when Captain Pullen's evidence is examined in context. Captain Pullen testified that when he took the wheel position he was uncertain as to whether both the hooded radars had been switched on. When asked what he was able to observe when he examined the one radar which had been switched on, he answered thus "When I looked at the PPI (plan position indicator). ...I was immediately struck that there was an absence of a heading marker, because it is quite illegal, one can depress the heading marker for twenty seconds only, sort offspring-load the switch the centre of the radar appeared to heavily scarred because I took it to be a sign of excessive use of brilliance or gain over a period, repeated over quite a long time". Accordingly "I wasn't happy at all with the presentation of the radar ...so I turned to the captain, the chief engineer and said there is something wrong with this radar what is wrong with it, they both shrugged their shoulders and smiled at me. So at least I thought well, notwithstanding, the things that were absent, it should be alright. Because they plainly understood what they had to say there, there was no way that they mistook what I said ...I immediately asked the captain, I said captain, can I please have this radar on to which his reply was almost exactly the same; shrugged his shoulders and smiled at me. He did understand, he knows exactly what I meant, I mean of that I have got no doubt".

As a result of his uncertainty regarding the operation of the radar, he stepped outside the bridge in order to ascertain his bearings and perform a number of checks which would allow him to test the accuracy of the radar as best he could under the circumstances. His testimony was to the effect that something was amiss with the hooded radar. He had serious anxiety about the operation thereof. On his own version one would have expected more than a tentative request in English to a captain who only speaks Mandarin Chinese regarding the operation of the alternative radar. Yet, it would appear that he proceeded to navigate a vessel in extremely poor visibility which had been positioned beyond the breakwater with a radar of which, at best, he must have been deeply suspicious. Not to have considered the use of an alternative radar, either the Furuno which, on plaintiff's version was on the bridge, or the other hooded radar reflects detrimentally upon the veracity of Captain Pullen's version. Not to have insisted that the other radar should be switched on before piloting the vessel or examining the bridge a little more carefully in order to ascertain the location of the Furuno radar was to hazard a 'chance. At no time did Captain Pullen or any other witness who testified on behalf of defendant suggest that the pilot could not have waited 5 -6 minutes to power up the other hooded radar before moving the vessel.

Captain Pullen's own version under cross-examination is hedged in qualification. In answer to the question as to whether he wanted to comment on the existence of the Furuno radar being on the bridge as alleged by Mr Lee Captain Pullen said "It is because I never saw such a radar, because I never navigated with one, and if it was on the bridge, it was never switched on, and was never ever brought to my notice". In short Captain Pullen's version raises a range of possible explanations as to why he had not navigated with the Furuno radar. It was either not there, not switched on or not brought to his attention. This must be contrasted to the clear, understandable versions of both Mr James and Mr Lee, namely that they saw a Furuno radar located on the bridge, albeit that neither felt qualified to testify as to its working order, supported by the master and chief engineer and further the uncontested evidence of Mr Hall that he conducted his examination of a Furuno radar on the bridge, albeit some 10 days after the accident. This latter evidence, uncontested during the trial, puts paid to Mr Needham's speculation that the Furuno radar could never have been located on the bridge.

Mr Eia made much of the fact that the Furuno radar reflected an overall operating time of 500 hours. He suggested that this was incongruous with a version of the master that the Furuno radar was his radar of choice. Since the evidence of Mr Hall confirmed the existence of a Furuno radar on board the vessel when he examined it, even were the evidence of Mr Lee and Mr James to be disregarded, it would be difficult if not impossible to conclude that a Furuno radar was not on board the vessel at the time that the accident occurred. Its limited use can therefore not be used to determine its location. Whether it was in the captain's cabin or on the bridge, the captain claimed it was his preferred radar of choice, namely he employed it when navigating in and out of harbours or locations such as the Singapore Straights. That he may have used it sparingly is one thing but that it could have employed it in the captain's cabin or on the bridge, is another Issue.

The evidence of Mr Needham was employed at considerable length by Mr Eia in an attempt to show that the probabilities did not favour plaintiff's version. Although Mr Needham testified that the Furuno radar could not have been located exactly in the position where the plinth had been placed at the time the photographs had been taken in December 1999, he did establish that the Furuno radar may well have been located on the bridge in that he had found a power point on the bridge which was at that time unused but which could well have been employed to power a Furuno radar on the bridge.

The balance of Mr Needham's evidence was to provide a hypothetical reconstruction of events in order to support conclusion that "a serious misalignment of the vessel's radar appeared to be the only logical explanation for the vessel adopting a course that resulted in a collision with the A berth spur." While hypothetical reasoning is often required to determine the cause of an accident, it must to a considerable extent be based on the facts provided by way of evidence. As Mr Macwilliam submitted Mr Needham was unable to allude to any facts to support his conclusion that the radar was misaligned. He relied on his use of logic and a version of Captain Pullen's evidence. Although Mr MacWilliam may have been somewhat harsh to describe Mr Needham as having acted as a "sleuth" he did appear to have performed a dual

role as an expert witness and a determined advocate for defendant's case. In other words much of his evidence appeared to represent an interpretation of facts milked to the maximum advantage for defendant.

On the basis of the conclusion to which I have come, it is not necessary to examine the details of Mr Needham's hypothetical explanation and engage in a detailed comparison with the competing version given by plaintiff's expert, Captain MacAlistair. A plausible hypothetical explanation cannot be employed to rebut evidence credibly given as to the existence of a Furuno radar on board the vessel. As **Eksteen J** said in **Motor Vehicle Insurance Fund v Kenny** 1984 (4) SA 432 (E) at 4361-437B "Direct or credible evidence of what happened in a collision, must, to my mind, generally carry greater weight than the opinion of an expert, however experienced he may be, seeking to reconstruct the events from his experience and scientific training. An expert's view of what might probably have occurred in a collision must, in my view, give way to the assertions of the direct and credible evidence of an eyewitness. It is only where such direct evidence is so improbable that its very credibility is impugned, that an expert's opinion as to what may or may not have occurred can persuade the court to his view".

Mr Mac William sought to strengthen his attack on the use of the hypothetical explanation provided by Mr Needham: by submitting that at no stage had it ever been pleaded by the defendant that the radar was misaligned and indeed neither in cross-examination of the master nor of Mr Hall was it suggested that there was any direct evidence that the radar was misaligned. It appeared to be a "logical conclusion" of the experts that one of the JMA radars was misaligned. Had Captain Pullen ignored the Furuno radar and chosen to employ the hooded radar as a result of which misalignment the accident occurred, such a decision would not exonerate him from reckless conduct in that on his own evidence the hooded radar appeared to be defective. The expert witnesses on both sides testified that the Furuno radar was the far preferable equipment to employ in the conditions. By deciding to proceed in heavy fog, with a radar that was in a most suspect condition (for example he claimed the centre area of the radar was burnt out), and without making any attempt to employ another radar available, Captain Pullen acted reckless as to the consequences. No satisfactory explanation was available as to how Captain Pullen could have been satisfied with the accuracy of a radar which on his own version was in a condition of a kind hardly ever encountered.

On the basis of the factual findings to which I have come, Captain Pullen's decision to control the vessel under the prevailing conditions without making use of the available radar constituted an act of gross carelessness, the 'doing of something which in fact involves a significant risk.' For these reasons, S 10(7) affords no legal defence to defendant.

APPORTIONMENT

In order to succeed in a claim for contributory negligence, there must be a proven connection between the defendant's conduct and the loss and the plaintiff's conduct and the loss. In addition to the requirement of factual causation the negligent conduct of plaintiff can only be considered as legal cause if policy considerations based on principles of reasonableness, fairness and justice dictated that the consequences be imputed to the plaintiff- (see **J C van der Walt's Law of South Africa** vol. 8 para. 118). Defendant raised the following issues with regard to plaintiff's fault in relation to the loss:

1. The vessel's radar had no heading marker and one-third of the screen from the centre was burnt out.
2. The vessel entered into port limits (and beyond the breakwater) without informing defendant of its intention to do so.
3. The vessel remained at the entrance to the port and constituted a hazard to other vessels entering or leaving the port.
4. There was no English language speaking master or officer on board the bridge.
5. The master of the crew failed to take avoiding action.

The absence of the heading marker and the burnt screen relates to the hooded radar. The basis of this evidence flows from that of Captain Pullen. Even if defendant had laid a basis to establish these facts (which Mr MacWilliam with some justification strongly contested), on its own this would not be sufficient to establish an adequate causal connection to the accident. Even on defendant's version another radar was available for use.

There was a considerable dispute regarding the location of the vessel when Captain Pullen boarded. In brief the evidence of the master supported by the records of defendant relating to vessels entering the harbour must be contrasted with the evidence of Captain Pullen, Captain Staverees and Captain Van Zyl. The records indicate that the vessel passed the breakwater after the pilot had boarded.

Nonetheless Captain Pullen had satisfied himself that the vessel could be safely navigated and pursuant to this decision, the vessel sailed towards the A berth spur. Mr Mac William correctly submitted there was no evidence that the vessel had remained at the entrance of the port for any appreciable time or that it constituted a hazard to any other vessels. Such a claim appeared to be a case of **expost facto** justification on the part of defendant's witnesses.

The absence of an English language speaking master or officer on the bridge manifestly represents a difficulty in such conditions. Captain Pullen asserted that the master and engineer understood his requests perfectly when he suggested to them that he preferred to employ another radar. Captain Pullen was unable to speak Mandarin Chinese. However he testified that the reaction of both the master and the engineer was to shrug and smile. From a person unable to communicate, it is difficult to conclude decisively from such testimony that the master or the engineer understood Pullen, or had simply ignored Pullen or had not attempted to be cooperative. Furthermore it appeared from the implications of evidence given by a number of witnesses on behalf of defendant that it is not an unusual situation for vessels, which have no person who is able to speak English, being allowed to enter the port. Unless defendant is able to make provision for some interpreter to accompany the pilot (which would unquestionably be a costly and difficult exercise) it in essence assumes the risk.

From the evidence it appears that it was the crew on the bow of the vessel which first alerted the master and Captain Pullen to the presence of the A berth spur. On the basis of the conclusion to which I have come, it has already been established there was a fully functional Furuno radar on the bridge. That Captain Pullen took the helm and the master went to the throttle was not presented in evidence as

anything other than fairly common practice. Support for this can be found in the evidence of Captain Van Rossum, defendant's witness. Although Mr Eia cross-examined the master as to why no assistance had been given to the pilot in respect of the monitoring of the radar, on Captain Pullen's evidence he had satisfied himself about the functionality of the radar. Further there was no need for any other crew member who did not understand "anything about radar" to be employed on the bridge. On the master's testimony he put the vessel into hard astern as soon as he could and there was no suggestion made that he could have done anything further to avoid the collision.

CONCLUSION

For the reasons given it is ordered that -

1. The defendant is liable for the damages occasioned as a result of the Yung Chun 17 colliding with the A berth spur in Cape Town harbour on 24 September 1995.
 2. The defendant pay the costs of suit. The master, the chief engineer and Mr Hall are declared to be necessary witnesses.
-