

4. COMMENTARIES AND CASE NOTES

A. KOHLHASE v. NATIONAL INSURANCE COMPANY OF NEW ZEALAND LIMITED AND RUTHERFORD; COMMON v. NATIONAL INSURANCE COMPANY OF NEW ZEALAND LIMITED AND RUTHERFORD

A decision of Holland J. of the High Court of New Zealand, 21 October 1983. The judgment of Mr Justice Holland was given orally in these two actions which were heard together.

This case involved a claim in respect of the fishing vessel "Proton II" and the subsequent insurance claim against the National Insurance Company of New Zealand Limited. The actions were defended on the basis of unseaworthiness and section 40(5) of the Marine Insurance Act 1908 (N.Z.) was relied upon. That provision is in identical terms to section 45(5) of the Marine Insurance Act 1909 (Cth).¹ The unseaworthiness relied upon related to the master who was not properly certificated and did not have either the experience or the ability to be placed in that position. The finding can be understood readily when it is realised that the grounding occurred, so it was found by his Honour, as a result of the master plotting the wrong course. His Honour accepted the evidence that the master had plotted a course based on the true bearing on the chart without making the appropriate deduction of something just over 20 degrees for the difference because of the magnetic compass. That error had resulted in the vessel, in the words of Mr Justice Holland, "finishing off the mouth of the Hokitika River instead of the Grey River which was planned".²

An attempt to fix a marine surveyor with liability for decisions made during salvage operations was also unsuccessful. It was alleged that decisions made by the marine surveyor had resulted in further damage to the vessel. Mr Justice Holland, however, did not accept that the decisions made by the marine surveyor at the time constituted negligence in law. Although apparently accepting that in hindsight it may have been possible to say that to have refloated the vessel would have been the best course, his Honour did not accept that the decision made to take the vessel further up the beach was sufficient to establish that there had been a failure of the duty of care required by the marine surveyor.

¹ The Australian and Western Australian equivalents are discussed in an earlier edition of the Journal: September 1983, Vol. 1 No. 3, pp. 16-17.

² At p. 6 of the transcript of the judgment.