

**B. GAGGIN v. MOSS AND GATES**

*An appeal from the decision of McPherson J. to the Full Court of the Supreme Court of Queensland, 28 November 1983.*

This case arises out of a collision between the yacht "Selathia" and the fishing vessel "Madonna".

In this matter the Full Court of the Supreme Court of Queensland declined to allow an appeal from a decision of McPherson J. who had directed entry of judgment at first instance for the plaintiff, Mr Gaggin. The central issue in the appeal was whether or not there had been actual fault or privity by the owner. The trial judge had not been persuaded that the casualty had occurred without the actual fault or privity of the appellant. Considerable discussion took place concerning the effect of the pleadings and whether the right to limit liability was a right set up by way of defence in the action, as the appellant, Mr Gates, contended or a right which arose as an independent limitation action. Connolly J. was not troubled by this issue and did not consider it to be of great significance. He did not regard the right to limit as a defence proper and expressed the view that "the existence of the right depends upon the proof of facts which go beyond proof of default in the navigation or management of the ship."<sup>1</sup>

At the trial of the action there was an admission of liability made by the defendants on the basis of one or more faults in navigation as pleaded in the statement of claim. However, no evidence was called by the defendants as to what had in fact occurred and there was, therefore, no evidence before the learned trial judge as to the immediate cause of the collision. Counsel for the appellant sought to argue that all the trial judge was entitled to consider, in ascertaining whether there had been actual fault or privity, was the issue as limited by the pleadings, the admissions and the preliminary acts which had been filed. Connolly J. rejected that submission since "[i]f the inquiry into actual fault or privity were confined to the evidence admissible on the issues joined on the collision aspect, actual fault or privity would in most cases never have been found."<sup>2</sup> He, therefore, found that the enquiry as to actual fault or privity necessarily ranged much wider than the issue concerning the cause of the casualty and that the owners had failed to meet the burden of proof establishing that the casualty had occurred without its fault or privity.

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<sup>1</sup> Transcript of the judgment of Connolly J. at p. 4.

<sup>2</sup> *Id.* 7.