

From *Ruabon Steamship* to *Lake Winnipeg*: In Partial Defence of McLachlin J.'s Apportionment Dissent

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I. INTRODUCTION

ON 14 DECEMBER 1899, THE HOUSE OF LORDS handed down its decision in the case of *Ruabon Steamship*.¹ The case laid down two principles on the seemingly minor issue of docking dues incurred by a ship in dry dock for repairs. While these principles may seem obscure, they help to explain and defend, in part, the seemingly unusual apportionment of costs found in the dissenting opinion of McLachlin J., as she then was, in the ship collision case of *Sunrise Co. v. Lake Winnipeg*,² decided by the Supreme Court of Canada in 1991. This paper defends that dissent, in part, based on the history of apportionment in ship collision cases, and on principles of the law of restitution derived from *Ruabon Steamship*. The paper concludes by arguing for a restoration of the “forgotten” second principle in *Ruabon Steamship*: where the owner of a ship damaged by another party puts into dry dock for repairs, and uses the opportunity to have *essential* repairs arising from his own responsibility done, the courts should apportion docking costs equally between the parties for the duration of repairs of the lesser accident.

Why bother to analyse a relatively obscure Supreme Court of Canada decision using a case from the nineteenth century? There are at least three reasons:

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¹ *The Ruabon Steamship Company Ltd. v. The London Assurance*, [1900] A.C. 6 (H.L.) [hereinafter *Ruabon Steamship*].

² *Sunrise Co. v. Lake Winnipeg (The)*, [1991] 1 S.C.R. 3 [hereinafter *Lake Winnipeg* (S.C.C.)].

the issues in the case will likely arise again, with practical, financial implications; *Lake Winnipeg* is literally a textbook case for first-year Canadian torts students;³ and McLachlin J.'s dissent, if not viewed within the correct historical context, can be seen as a mere mathematical curiosity, more concerned with fairness between parties than an applying of the extant law. Finally, the seemingly minor issue of ship repair due to multiple causes occupied the attention of two of the great jurists of the twentieth century: Lord Denning of England, and Judge Learned Hand of the United States.

In making its defence of McLachlin J.'s dissent in *Lake Winnipeg*, this paper focuses on a series of ship repair cases over a 105 year span (1886–1991). The common thread among these cases is that there are at least two causal elements involved in the work being done on the ship while it is in dry dock. These elements include tortious collisions, weather damage, harm resulting from the actions of a ship's operators, and optional work undertaken at the discretion of the ship owner. In all these repair cases, each party is responsible for the costs to repair any *physical* damage that it has caused. The issues that the courts have wrestled with are: which party is responsible for the lost profits arising from the ship's detention (also referred to as detention damages, or demurrage⁴), and whether dock dues (*i.e.* costs of using the dry dock for repairs) should be apportioned between the parties, or simply linked with the assignment of detention costs.

This paper first introduces the decisions in *Lake Winnipeg*. It then discusses: the history of the appointment doctrine; reasons for conceptualising detention (lost profits) and dock dues as separate types of damages; the benefit received by one party if dock dues are wholly assigned to another party; and the juristic reason for favouring apportionment.

II. *SUNRISE COMPANY V. LAKE WINNIPEG (THE)*

THE FACTS AND DECISIONS IN *LAKE WINNIPEG* MAY BE quickly summarised. In June 1980, the Kalliopi L. (owned by the Sunrise Co.) met the ship Lake Winnipeg on the St. Lawrence River. Owing to negligence by the Lake Winnipeg (as found by the courts at all three levels) the Kalliopi L. was forced to run aground, with damages from this tort requiring 27 days in dry dock to repair. On the following day, due to its own crew's fault, and for reasons unrelated to the first accident, the Kalliopi L. again went aground, necessitating 14 days worth of repair. Both accidents were sufficiently serious to render the Kalliopi L.

³ E.J. Weinrib, *Tort Law: Cases and Materials* (Toronto: Emond Montgomery, 1997) 206–209.

⁴ Demurrage: "An allowance made to a ship owner for detaining a ship in port after the agreed-upon sailing time" from D. Dukelow & B. Nuse, *Dictionary of Canadian Law* (Scarborough: Carswell, 1995).

unseaworthy. Repairs arising from the first accident were carried out over a 27 day period, with work on the second set of damages being done concurrently for 14 of these days. The owners of the Kalliopi L. requested reimbursement from the owners of the Lake Winnipeg for 27 days lost profits and docking dues. The owners of the Lake Winnipeg rejected any liability for the accident.

In the Federal Court Trial Division, Cullen J. awarded 27 days of detention (lost profit) damages to the owners of the Kalliopi L.⁵ Cullen J. held that the second collision did not increase the time spent in dry dock, and was merely coincidental to the main damage. As a result, the owners of Lake Winnipeg were responsible for reimbursing lost profits for the full period of repairs. Cullen J. dealt briefly with the dock dues issue, assigning the costs for all 27 days' docking against the owners of the Lake Winnipeg. He reasoned, "[t]here is no question of apportionment in respect of dry docking expenses. A defendant is liable in full or not liable at all."⁶ The damages were calculated at \$424 161 arising from the first grounding, with another \$257 107 arising from the second grounding. Of this second amount about \$157 000 represented detention damage, and the remaining \$100 000 covered dock dues and related expenses.⁷

The owners of the Lake Winnipeg launched an appeal, arguing that the operators of their ship had not acted negligently, and alternatively that the allocation of damages was not appropriate. The Federal Court of Appeal ("FCA"), with Hugessen J. writing for the court, held that the owners of the Lake Winnipeg were responsible only for lost profits arising from 13 days repair, as the Kalliopi L. would have been out of service due to its own actions (the second grounding) for the additional 14 days. The Federal Court held that the correct approach in the case was to ask, "... whether during the fourteen days that repairs due to the second grounding were being carried out, the plaintiffs suffered any damage resulting from detention due to the first grounding." The court held that "[t]he answer is no since, even without the first grounding, she could not have earned any profit during that period."⁸ No mention is made of dock dues in the decision.

Both parties filed appeals in the Supreme Court of Canada, with the owners of the Lake Winnipeg still disputing their responsibility for the accident, and the owners of the Kalliopi L. objecting to the FCA's reallocation of damages.

⁵ *Sunrise Co. v Lake Winnipeg (The)* (1987), 12 F.T.R. 57 (F.C.T.D.) [hereinafter *Lake Winnipeg* (F.C.T.D.)].

⁶ *Ibid.* at 67.

⁷ The first set of figures is from *Lake Winnipeg* (F.C.T.D.), *supra* note 5. The breakdown of lost profits and dock dues resulting from the second accident is from *Lake Winnipeg* (F.C.A.), *infra* note 8.

⁸ *Sunrise Co. v. Lake Winnipeg (The)* (1988), 96 N.R. 310 and 316 (F.C.A.) [hereinafter *Lake Winnipeg* (F.C.A.)].

Perhaps because the dock dues represented a small amount of the total damages involved, neither side made an alternative argument pertaining to apportionment of the docking costs in its factum.⁹

The Supreme Court of Canada split in its decision. A five-person majority concurred in the opinion of L'Heureux-Dubé J., upholding the original award of the Federal Court (Trial Division). L'Heureux-Dubé J. assigned all detention (lost profit) costs against the owners of the Lake Winnipeg, as the tortious collision was the first cause that rendered the Kalliopi L. unseaworthy, and therefore a "non-profit earning machine." Charges for dock dues were assigned against the Lake Winnipeg along with the responsibility for lost profits.

A. The McLachlin J. Apportionment Dissent

In dissent, McLachlin J. (with Gonthier J. concurring) held that where the operator of a damaged ship uses the time in dry dock to make non-essential repairs for his own benefit the tortious ship is solely responsible for detention costs. In these cases the owner is simply gaining an incidental advantage, as explained in *Ruabon Steamship*.¹⁰ She also argued, however, that this assignment of costs should not govern where both sets of repairs are necessary, and the operator of the damaged ship was not simply making discretionary improvements.

As two different elements caused the detention, there should be some diminution in the liability of the party causing the first damage. McLachlin J. held:

... the question is not merely whether the detention was caused by the defendants' act, but whether damage (loss of use of the ship a profit-making machine) has been established to be caused by the act. ... Damages are to be full and complete, but at the same time, the plaintiff is not entitled to compensation in excess of the actual loss which he has established to have been caused by the tort.¹¹

She perceived the Federal Court of Appeal's approach to reducing the first tortfeasor's liability as ignoring the *concurrent* impact of the two sets of repairs (*i.e.* two different causes for the detention for the 14 day period of joint repairs). The more equitable way of dividing responsibility, she felt, would be to apportion equally the costs related to the second grounding (14 days repairs caused by the operators of the Kalliopi L.) between the parties. Unlike earlier cases, which merely apportioned charges for dock dues, McLachlin J. held that *both* deten-

⁹ Factums provided to author by legal counsel to both parties in January 2001.

¹⁰ McLachlin J. states in *Lake Winnipeg* (S.C.C.), *supra* note 2 at 33–34:

... where a ship is damaged by a tortfeasor and the owner takes advantage of the time the ship is incapacitated to effect these repairs to have other optional work done, that need not be brought into account. ... The cases typically refer to the owner's work as not having been "necessary."

¹¹ *Ibid.* at 26–27.

tion charges and dock dues related to the lesser accident should be split between the parties. Her rationale can be summarised as,

... the authorities (largely English), in so far as they bear on the particular question before us, are impossible to reconcile entirely when viewed in terms of their results. ... [W]e must return to the general principles which govern the award of damages and attempt to fashion an approach which is consistent with them and which is just in all the circumstances.¹²

The *ratio* of the Supreme Court majority on lost profits reflected the common law developed in English cases on multiple cause ship repairs.¹³ However, the nature of this decision meant that the owners of the *Kalliopi L.* received an advantage from its collision with the *Lake Winnipeg*. Not only did they avoid any loss of profits arising from their own grounding, they also avoided paying any dock dues related to this set of repairs. This paper argues that this latter benefit, the non-payment of any dock dues, constituted an unjust enrichment of the owners of the damaged ship.

The seminal Canadian case for defining the law of restitution, or unjust enrichment, is the Supreme Court of Canada's decision in *Pettkus v. Becker*.¹⁴ In that case Dickson J., as he then was, laid out a three pronged test for finding an unjust enrichment: an enrichment; a corresponding deprivation; and absence of any juristic reason for the enrichment. He also cited *Ruabon Steamship*¹⁵ to illustrate the idea of an incidental advantage—a benefit that would not result in an obligation for restitution.

In *Lake Winnipeg* one can clearly see a benefit to one party, in that the owners of the *Kalliopi L.* did not have to pay lost profits and dock dues, despite being responsible for the second grounding. The corresponding deprivation was that the owners of the *Lake Winnipeg* were responsible for all such lost profits and dock dues. However, was this the sort of benefit that should be part of an unjust enrichment analysis, or was it merely an incidental advantage? Moreover, was there juristic reason for allowing one of the parties to avoid all payment of lost profits and dock dues? These two questions animate the discussion presented below of the various ship collision cases that have considered these issues.

This paper argues, using the law of restitution, the McLachlin J.'s dissent should be adopted in so far as it apportions dock dues between the parties. Where two sets of repairs are being undertaken, and both sets of repairs are essential for the seaworthiness of the vessel, the party causing lesser damages (in this case the *Kalliopi L.*) should not only pay for the physical repairs it has

¹² *Ibid.* at 26.

¹³ See discussion of *The Chekiang* and *The Carslogie* in the text of this paper.

¹⁴ (1980), 117 D.L.R. (3d) 257 (S.C.C.).

¹⁵ *Ibid.* at 274.

caused, but also for one-half of the dock dues during the period of joint repairs (*i.e.* 1/2 of 14 days in the case of the *Lake Winnipeg*). This idea would return the law to the doctrine laid out in *Ruabon Steamship*—that there is a difference between an incidental advantage and an obligation to contribute. To hold otherwise is to grant a benefit without juristic reason to the party causing the lesser set of damages.

III. PERSONAL INJURY CASES

THE INTERRELATION OF THE SHIP COLLISION CASES with cases related to personal injury and successive causation is beyond the scope of this paper. The Supreme Court majority in *Lake Winnipeg* dealt with the personal injury theme in a cursory manner, L'Heureux-Dubé J. stating:

... I will briefly comment on the comparison of loss of profit cases in the shipping area with personal injury cases. ... Inherent differences in the nature of the injuries sustained militate against any meaningful comparisons between the two areas.¹⁶

The failure of the Court to address this issue has been the main focus of critical comment on the Supreme Court decision in *Lake Winnipeg*.¹⁷

A. The History of the Apportionment Doctrine

1. *Marine Insurance Co. v. China Transpacific Steamship Co. ("The Vancouver")*¹⁸

The *Vancouver* had sustained damage to its sternpost during a voyage at sea, though this damage was not readily apparent. Subsequently, the ship put into dry dock in order to have its hull cleaned, scraped and painted, as

¹⁶ *Lake Winnipeg* (S.C.C.), *supra* note 2 at 17.

¹⁷ M. McInnes, "Causation in Tort Law: Back to Basics at the Supreme Court of Canada" (1997) 35:4 *Alta. L. Rev.* 1013 at 1023, contrasts the *Lake Winnipeg* decision with a personal injury decision that is seemingly incompatible and then abandons the field, stating "[a]s the focus of the present discussion is on *Athey v. Leonati* specifically, and personal injury cases generally, the issue of property damage will not be addressed further." It has also been stated that "[i]t is surprising and regrettable that both L'Heureux-Dubé J. and McLachlin J. made little reference to the various personal injury cases that have dealt with successive causes In fact there seems to be no obvious reason why an analogy should not be drawn with the personal injury cases." in N. Rafferty, "Developments in Contract and Tort Law: The 1990–1991 Term" (1992) (2d) *Supreme Court L.R.* 73 at 104–105; Prof. J. Cassels observes that the majority decision in *Lake Winnipeg* "... creates a disjunction between property cases and the personal injury cases," in that personal injury cases take into account a second, not-tortious causal event, in J. Cassels, *Remedies: The Law Of Damages* (Toronto: Irwin Law, 2000) 310.

¹⁸ *Marine Insurance Co. v. China Transpacific Steamship Co. ("The Vancouver")*, [1886] 6 *Asp. Mar. Law Cas.* 68 [hereinafter *The Vancouver*].

... the vessel had a very foul bottom, which so much affected her speed that no prudent owner would have sent her to sea again without having her first scraped and cleaned.¹⁹

Once in dry dock for the cleaning and the scraping the earlier damage was discovered. Repairs took place concurrently, with the sternpost repairs requiring eight days, and the cleaning and scraping taking three days. The ship owners and their insurers disputed responsibility for costs related to the three days of cleaning and scraping, the sternpost repairs having been covered by the insurers. The court's decision dealt only with the issue of docking dues, and not with responsibility for lost profits.

Upholding the Court of Appeal decision, the House of Lords held that the dock dues for the three days—the period of the cleaning and scraping—should be split between the parties. Lord Blackburn stated in his reasons that

The whole, both what concerns the ship owners and what concerns the underwriters, has to be repaired. It is best and most cheaply done by doing them both together ... Neither is entitled to take the whole benefit of the reduction of cost and apply it to his own work exclusively.²⁰

This principle of apportionment of dock dues where there are two sets of essential repairs would be upheld by the English courts in a series of subsequent cases.

2. Ruabon Steamship

In *Ruabon Steamship*, the Ruabon sustained damage from running aground, and put into dry dock on 4 January 1896 to have repairs undertaken, with its insurers admitting liability for the cost of these repairs. However, while in dry dock the ship owner took advantage of the opportunity to have a Lloyd's surveyor renew the Ruabon's No. 1 classification at Lloyd's. If not undertaken at that point the survey would have required docking and surveying in November, 1896. The insurers argued that a small portion of the dock dues should be absorbed by the ship owners because of this survey. The issue of lost profits, or demurrage, was not mentioned by the court.

In *Ruabon Steamship*, the House of Lords distinguished *The Vancouver*, because the insurance survey was not essential, unlike the cleaning and scraping of the hull required in *The Vancouver*. The owners of the Ruabon were merely gaining an incidental advantage by having this work done while in dry dock. The *ratio* from *Ruabon* was captured by Lord Halsbury's statement:

¹⁹ *Ibid.* at 69.

²⁰ *Ibid.* at 71.

I cannot understand how it can be asserted that it is part of the common law that where one person gets some advantage from the act of another a right to contribution towards the expense from that act arises on behalf of the person who has done it.²¹

Similar sentiments were found in speech of Lord Macnaghten, "... there is no principle of law which requires that a person should contribute to an outlay merely because he has derived a material benefit from it."²² This concept of "incidental advantage" was one of the two principles from *Ruabon Steamship* that would be cited in subsequent cases, but it was the only one to have survived to the present day.

The second main principle from *Ruabon Steamship* is found in the speech of Lord Brampton, and it is this *ratio* which has fallen into disuse by the Courts.²³ While concurring in the decision (*i.e.* no apportionment of dock dues), Lord Brampton stated,

... where two operations are essentially necessary to be performed upon the hull of the ship in order to render her in a condition to justify a prudent owner in sending her again to sea ... and neither of such operations could be performed unless the ship were dry-docked ... in such cases the cost of docking and all dock dues during the period the vessel is in dock must be shared in proportion, having regard to the period of joint or separate actual use of it.²⁴

Clearly, for the court in these early cases, there would be a duty to share in the cost of dock dues if both operations on the ship were essential—a result that would not be adopted by the Supreme Court majority in *Lake Winnipeg*.

²¹ *Ruabon Steamship*, *supra* note 1 at 10. Cited in *Elpidoforos Shipping Corp. v. Furness Withy (Australia) Pty. Ltd. (The "Oinoussian Friendship")*, [1987] 1 Lloyd's Rep. 258 [hereinafter *Oinoussian Friendship*]; and *Lake Winnipeg* (S.C.C.), *supra* note 2. Lord Halsbury's comments would be echoed two years later by the Admiralty Court in *The Acanthus*, [1902] 9 Asp. Mar. Law Cas. 276, a decision that applied the *Ruabon Steamship* principle to deny any liability for a ship owner who gained an incidental advantage from a dry-docking. Sir Francis Jeune in his reasons stated:

... a person is not obliged to contribute unless there is some legal obligation on him to do so. The mere fact that he gets an advantage from the opportunity ... although it may give rise in some person's mind to a general idea of general justice or good sense, or one of those vague propositions ... is not sufficient to impose a legal obligation.

²² *Ruabon Steamship*, *ibid.* at 15. Cited in *Oinoussian Friendship*, *ibid.*; and *Commissioners for Executing Office of Lord High Admiral of United Kingdom v. Owners of the Steamship Chekiang*, [1926] A.C. 637 [hereinafter *Chekiang*].

²³ *Ruabon Steamship*, *ibid.* Cited in *The Haversham Grange*, [1905] 10 Asp. Mar. Law Cas. 156 [hereinafter *Haversham Grange*] and *The Hawk* (1928), 30 Ll. L. Rep. 32 [hereinafter *The Hawk*].

²⁴ *Ruabon Steamship*, *ibid.* at 16–17.

Both *The Vancouver* and *Ruabon Steamship* would be cited with favour in a 1904 decision from the United States, *The Bratsberg*. Judge McPherson of the Pennsylvania District Court held that dock dues should be divided in a case involving repair of collision damage and a second set of unrelated repairs, stating, "... the English rule which divides the charges under such circumstances seems to be fair and equitable"²⁵ However, the apportionment doctrine does not seem to have progressed beyond this case in the United States,²⁶ and later fell out of use.

The idea that where two sets of repairs are both "essentially necessary" the dock dues²⁷ should be apportioned would be applied with consistency in the British courts until the 1950's, when it was over-ruled by the House of Lords in *Carslogie*.²⁸ As stated above, it is the thesis of this paper that the abandonment of this idea can be challenged by applying principles of restitution and unjust enrichment.

3. The Haversham Grange

In *The Haversham Grange* the English Court of Appeal dealt with the issue of whether to apportion demurrage and dock dues in a case concerning a ship (the Maureen) involved in two separate collisions with tortious ships, the Caravellas (on 25 December 1904) and the Haversham Grange (on 26 December). The repairs attributed to the Caravellas required 22 days, with concurrent repairs for damage caused by the Haversham Grange lasting only six of these days. As the operators of the Maureen were found 50% liable for the first accident, they took action against the owners of the Haversham Grange, claiming demurrage (lost profits) for six days during which the repairs caused by the Haversham Grange were being repaired, as well as half of the cost of dock dues for those six days. The owners of the Haversham Grange rejected the claim for demurrage and dock dues, and argued that their liability was limited to paying the actual physical repair costs necessitated by their wrongdoing.

²⁵ *The Bratsberg*, 127 F. 1005 at 1007 (1904).

²⁶ The Second Circuit Court of Appeals in *Clyde SS. Co. v. New York (City of)*, 20 F. (2d) 381 (1927) [hereinafter *Clyde*] declined comment on the apportionment of dock dues found in *The Vancouver* and *Ruabon Steamship*, and refused to rule on an application for apportionment due to technical reasons in *The Russell (No. 3)*, 99 F.(2d) 826 (1938).

²⁷ The Court of Appeal in *Ruabon Steamship* had disallowed claims for docking the ship (e.g. pilotage), while allowing apportionment of dock dues. The House of Lords did not address this issue in dismissing the whole claim. In *Haversham Grange*, *supra* note 23 at 161, the Court of Appeal felt that the expenses of "going into and coming out of the dock" should be treated as one with the dock dues. In later cases, the court's view on this issue was not always spelled out, as in some cases the issue was simply referred to as dock dues and incidental fees.

²⁸ *Carslogie Steamship Co. v. Royal Norwegian Government*, [1951] 2 Lloyd's Rep. 441 (H.L.) [hereinafter *Carslogie Steamship* (H.L.)].

Both the Registrar and the lower court rejected the claims by the owners of the *Maureen*. At the Court of Appeal, the report on the hearing indicates the length of time repaired to dispose of the demurrage issues: "Maurice Hill, for the respondents, the owners of the *Haversham Grange*: 'First with regard to the demurrage' Collins M.R.: 'You need not argue the demurrage point; you may confine yourself to the dock dues'"²⁹ In its decision, the Court dismissed that appeal on demurrage in three sentences, stating the second tortfeasor (the *Haversham Grange*) had not detained the *Maureen* "an hour longer," since the ship had been detained for the full time due to the actions of the *Caravellas*. Perhaps because of the Court's brevity, later decisions would take the *ratio* of this decision to be that the second tortfeasor in any sequential causation scenario was only responsible for damages to the extent that they exceeded the costs incurred by the first tortfeasor.³⁰ It would take another 50 years before the House of Lords, in *The Carsolgie*, would revisit this issue, and hold that the key is not sequence, but rather which causation first rendered the vessel unseaworthy.

The Court of Appeal spent far more time on the treatment of dock dues, ordering the owners of the *Haversham Grange* to pay three days dock dues (*i.e.* their portion of the dues for the six days of repair caused by their actions). Collins M.R. held that the principle from *The Vancouver* should be applied:

... so far as there was a common factor in the case, and to the extent of the time occupied in the common process of repairing the mischief done by each of them, that that must be apportioned between the two ships ...³¹

While not explicitly contrasting dock dues with the idea of lost profits, Collins M.R. clearly believed that the dock charges were common to the repairs necessitated by both parties, in contrast to the more indirect nature of lost profits. He concluded,

... the proper way of looking at the repairs, which is the ordinary way of ascertaining the damage to be recovered from the wrong-doer, ... [is that] the common items ... should be divided.³²

Romer L.J. agreed with Collins M.R. in brief reasons dealing only with dock dues.

As in *The Vancouver* and *Ruabon Steamship*, the court in *The Haversham Grange* focused on the common nature of the docking expenses where both sets of repairs are immediately necessary. However, the principle of dividing the advantage gained from common repairs clearly did not extend to apportionment

²⁹ *Haversham Grange*, *supra* note 23 at 159.

³⁰ See for example, *The Hawk*, *supra* note 23 at 36.

³¹ *Haversham Grange*, *supra* note 23 at 160.

³² *Ibid.* at 161.

of lost profits. McLachlin J.'s treatment of *The Haversham Grange* in her opinion in *Lake Winnipeg* is therefore problematic. After a brief discussion of the Court of Appeal's *ratio*, McLachlin J. stated:

[T]hus it is clear that in principle the Court of Appeal in *The Haversham Grange* accepted the proposition that two tortfeasors who cause consecutive injuries to a ship which are repaired concurrently must share the resultant detention costs. However the actual disposition of the case reflected this only in part.³³

As the Court of Appeal dismissed the detention (lost profits) concept in a few sentences, and did not even require counsel to argue the issue, it is hard to see what part of the case reflected the idea that detention costs should be apportioned.

4. The Chekiang

The next major case to cover both detention and dock dues was *The Chekiang*, in which the steamship Chekiang negligently collided with the Cairo, a British naval cruiser. The Chekiang caused damage that required 20 days of repair. Here, the Admiralty took advantage of the necessary time in dry dock to perform the Cairo's annual refit, which had not been due for another three months. This refit took eight weeks, with damage caused by the Chekiang being repaired concurrently for 20 days of this period. The Chekiang's owner agreed to pay for repairs, but refused the Admiralty's demand for 20 days worth of detention, and dock dues.

Overturning the Court of Appeal, the House of Lords held that the Admiralty's refit did not constitute an essential repair, and that the owners of the Chekiang should therefore pay detention costs, as well as dock dues, for 20 days. The court applied the *ratio* from *Ruabon Steamship*, the case being cited in all three speeches,³⁴ and held that the Admiralty was simply getting an incidental advantage from the Cairo's time in dry dock. Viscount Dunedin cautioned, "If the act of the owner was of necessity it would be otherwise," while Lord Phillimore dealt with the dock dues in a cursory manner, and observed that in *The Haversham Grange*:

... the Court distinguished this [dock dues] charge from the charge of detention on a ground which is not very easy to appreciate that the charge for the dry dock must be considered as part of the charge for repairs.³⁵

In *Lake Winnipeg*, L'Heureux-Dubé J. ignored Viscount Dunedin's statement about necessity in her discussion of *The Chekiang*, focussing instead on the re-

³³ *Lake Winnipeg* (S.C.C.), *supra* note 2 at 31.

³⁴ *Chekiang*, *supra* note 22 at 641, 645, and 652.

³⁵ *Ibid.* at 653.

marks of Lord Phillimore in an effort to discredit the apportionment doctrine,³⁶ just as the House of Lords had done in their treatment of the case in *The Car-sologie*.

5. *The Hawk*

In 1927, the Court of Session decided the case of *The Hawk*, with the Lord Constable as the sole presiding judge. On 28 June 1925 the *Hawk* collided with the *Cameronia*, an accident for which the *Hawk* was held 2/3 responsible and the *Cameronia* 1/3. Repairs were not immediately necessary, and the *Cameronia* carried on business until 8 January 1926 when it was forced to enter dry dock due to "its rudder having worked loose" during an Atlantic crossing. Damage caused by the collision took about ten days to repair, while work on the rudder (carried on concurrently with the other repairs) required 22 days. The owners of the *Cameronia* submitted a bill to the owners of the *Hawk* for detention and three days of apportioned dry dock expenses,³⁷ both of which were rejected by the *Hawk*'s owners.

In his speech, Lord Constable denied the claim for detention while allowing the claim against the *Hawk* for apportionment of dock dues. He contrasted the "rule" established in *The Vancouver* and *The Haversham Grange* (i.e. dock dues to be apportioned where both sets of repairs are essentially necessary) with the "exception" found in *Ruabon Steamship* and *The Chekiang* (i.e. ship owners who are merely taking advantage of the situation to derive a benefit are not liable to share in common costs). He applied the "rule" in this case, holding that while the collision repairs may not have been essentially and immediately necessary, they were not a "purely voluntary and discretionary act." As both sets of repairs were non-discretionary, the owners of the *Hawk* were responsible for paying their portion of the dock dues for the duration of common repairs.

This case offered an important example (along with *The Haversham Grange*) of courts separating responsibility for lost profits from responsibility for dock dues. In both cases the tortfeasor causing the less serious damage was not obliged to pay detention damages, but was required to contribute to the dock dues incurred during the duration of repairs of the lesser damage. Unfortunately, the decision to apportion dock dues in *The Hawk* has been ignored by subsequent courts—L'Heureux-Dubé J., for example, cited the decision on detention in *The Hawk* two sentences after she made a critical comment on the idea of apportioning dock dues.³⁸

³⁶ *Lake Winnipeg*, *supra* note 2 at 13.

³⁷ The *Cameronia*'s owners asked for only three days dry dock expenses based on an inspection of its hull, rather than dues for the ten days of collision repairs, as it was admitted that the repairs were largely above the water line, and thus would not have required dry docking.

³⁸ *Lake Winnipeg* (S.C.C.), *supra* note 2 at 15.

6. The Carslogie

The case that eliminated the separation of dock dues and detention was *The Carslogie*. There were four separate hearings in *The Carslogie* (Admiralty Registrar; Wilmer J. sitting as the Admiralty Division; Court of Appeal; and the House of Lords) each of the final three overturning the judgment at the previous level. The *Carslogie* tortiously collided with the *Heimgar* in November 1941 causing damage to the latter. However, the *Heimgar* “remained a sea-worthy vessel,” and the Admiralty decided to have the repairs done in New York due to the lack of facilities in war-time England. During its crossing, the *Heimgar* sustained heavy weather damages that rendered it unseaworthy, and required 30 days repairs once at dry dock in New York. The repairs arising from the collision with the *Carslogie* were performed at the same time, and occupied ten days of this 30 day period. Repair costs for the collision damage were paid for by the owners of the *Carslogie*, while the parties voluntarily agreed to split the dock dues.³⁹ As a result, only the claim by the *Heimgar*'s owners for ten days detention damages from the *Carslogie* issue remained in dispute.

The House of Lords unanimously rejected the Court of Appeal's finding in *The Carslogie*,⁴⁰ agreeing with the trial judge that the real issue was whether the *Heimgar* was a “profit-earning machine” at the time of detention. In the instant case the tortfeasor bore no responsibility for either detention or dock dues because it was the second set of damages (*i.e.* weather damages) that rendered the *Heimgar* unseaworthy. Viscount Jowitt concluded:

... it is not enough to consider whether the ship was detained by the wrongful act of the defendants. It is essential to consider whether damages were caused to the plaintiffs by reason of such detention. ... [The] rule ... treats that first wrongdoer who renders the vessel unseaworthy as responsible for the consequent delay ...⁴¹

³⁹ *Carslogie Steamship* (H.L.), *supra* note 28 at 450. “My Lords, in this appeal the liability for dock dues in not in issue. We were told that they had been apportioned, and there was no appeal against that.”

⁴⁰ *The Carslogie* (1950), 84 Ll. L. Rep. 399 (C.A.). The Court of Appeal awarded ten days detention against the owners of the *Carslogie*. Lord Denning held, at 407, that in a case of this sort,

... two causes co-operate to produce the detention and each ship is responsible for the detention of which it is a cause. ... [T]he ship responsible for the second collision ... would be liable for the loss of time while the damage due to the second collision was being repaired.

The Court of Appeal decision in *The Carslogie* offers a direct parallel to the decision of the Federal Court of Appeal in *Lake Winnipeg*. Both courts eschewed the “all costs to the major causation” approach, and instead awarded detention costs for part of the period of repairs against the ship that had been the lesser cause of detention. In both cases, these decisions would be overturned on appeal.

⁴¹ *Carslogie Steamship* (H.L.), *supra* note 28 at 445 and 447.

Viscount Jowitt cited *The Hawk* in support of this position on assignment of detention damages, while not mentioning the apportionment of dock dues found in that case. He then proceeded, in one paragraph, to dismiss the 50 year old tradition of apportionment of dock dues. This paragraph contained an interpretive statement so broad that it raises the issue of whether the Lords were simply looking to eliminate the dock dues issue, and invented the precedential bases for that decision. After stating his disagreement with the appointment of dock dues found in *The Haversham Grange*, Viscount Jowitt went on to claim:

The *Ruabon Steamship sup*, was a case which was concerned solely with dock expenses. No question as to damages for delay arose in that case. The *Chekiang, sup*, was a case which was concerned solely with damages for delay. No questions as to dock expenses arose in that case. Yet Viscount Dunedin in the latter case...regards the decision of the House in the *Ruabon* about dock expenses as concluding the questions in the *Chekiang* about damages for delay. This supports the view that in principle the two question are indistinguishable.⁴²

In fact, all three speeches in *The Chekiang* discussed the dock dues issue. Moreover, the report of *The Chekiang* had counsel for the Admiralty (the appellants) arguing

[t]he Cairo was dry docked solely to enable the collision repairs to be done, and the appellants, by taking advantage of the ship being in dry dock to do the refitment repairs, have not become liable to contribute to the dock dues.⁴³

Clearly, the issue of dock dues did arise in *The Chekiang*, and the court perceived it separately from the detention issue.⁴⁴

Lord Normand's speech in *The Carslogie* provided a better reasoned attack on the conceptual separation of detention from dock dues. His Lordship argues that the cost of dock dues for the period of collision repairs was not a loss to the Heimgar's owners, as the dock was already being paid for in order to effect the weather damage repairs. In this line of thought, dock dues are seen in the same light as detention (*i.e.* since the lesser accident does not increase detention time or dock dues there should be no liability attributable to that cause.). He argued that *Ruabon Steamship* and *The Chekiang* (cases where apportionment of dock dues was denied) governed the dock dues matter, and that "... the distinction between liability for dock dues and liability for detention is in principle unmain-tainable."⁴⁵

While the idea that the lesser accident had not caused "one hour more" of dock dues was the best argument to be made for treating dock dues as indistinct

⁴² *Ibid.* at 446.

⁴³ *Chekiang, supra* note 22 at 631.

⁴⁴ This was further supported by a review of the *Chekiang* decision at the Court of Appeal, (1925), 21 Ll. L. Rep. 179, wherein Atkin L.J. provided a rationale for apportionment.

⁴⁵ *Carslogie Steamship (H.L.)*, *supra* note 28 at 451.

from lost profits, it was unfortunately made in *obiter*, in a case where the parties had voluntarily agreed to apportion the dock dues. Lord Normand made no reference to the issue of "essential necessity" of an owner's repairs mentioned in both *Ruabon Steamship* and *The Chekiang*, nor does he distinguish *The Hawk* (which post-dated *The Chekiang*), in which the decision on detention clearly did not govern the decision on dock dues.⁴⁶

Both Lord Morton and Lord Tucker added a few words concurring with the other two judgments on the dock dues issue.⁴⁷ *The Carslogie's* judgment on dock dues has not been over-turned in the British or Canadian courts.⁴⁸ In fact, *McGregor on Damages* praises that decision for eliminating the "illogical and unsatisfactory distinction"⁴⁹ that had arisen in *The Haversham Grange*.

In *Lake Winnipeg*, L'Heureux-Dubé J. used the decision of the Lords in *The Carslogie* as grounds for awarding all of the lost profits against the first cause that rendered the *Kalliopi L. unseaworthy* (*i.e.* the tortious action of the ship *Lake Winnipeg*). In reference to dock dues she stated:

The internal inconsistency in *The Haversham Grange* ... appears to have been eliminated by the House of Lords in *The Carslogie* which overruled the Court of Appeal on this issue of dock dues ... consideration of that portion of the case apportioning dock

⁴⁶ Another decision of the Admiralty Court allowing for apportionment, "The Royal Fusilier" (1926), 25 Ll. L. Rep. 566, also post-dated *Chekiang*. In this case, however, Mr. Justice Bateson expressed concern over the apportionment concept, and at 569 added that "it wants reconsideration." This case might have been a better example for the Lords to use in *Carslogie*, except that it was from a lower court.

⁴⁷ *Carslogie Steamship* (H.L.), *supra* note 28. Lord Morton at 452 states: "I can see no logical reason for the distinction which was drawn in the *Haversham Grange* between the claim for damages for detention and the claim for dock dues." Lord Tucker at 453 states: "... the other part of the decision in the Court of Appeal in the *Haversham Grange* ... with regard to dock dues (which is quite immaterial for present purposes), cannot be reconciled with their decision as to demurrage and should be overruled."

⁴⁸ Two subsequent "ship collision plus owner repair" cases did not question *Carslogie*. In *The Hassel*, [1962] 2 Lloyd's Rep. 139, Mr. Justice Hewson, Admiralty Division held that a tortfeasor's detention damages were to be reduced from 29 and 1/2 days to 20 days as the owner's repairs, which were performed concurrently, required nine and a half days and were seen as necessary by the Court. The court did not apportion the wharfage charges for these nine and a half days, and provided no rationale for that part of the decision. In 1972 Brand J. in the Admiralty Court in *The Ferdinand Retzlaff*, [1972] 2 Lloyd's Rep. 120, held that the subject ship owners' had a non-essential work performed while the ship was in dry dock due to a collision caused in part by another ship. Following the *Ruabon Steamship*, the court held that the owners were merely enjoying an advantage, and were not liable for any contribution. However, Brandon J.'s reasons suggested that the *ratio* of *Ruabon Steamship* does not apply where the owner's repairs are immediately necessary, though he did not specifically comment on the dock dues issues.

⁴⁹ H. McGregor, *McGregor on Damages*, 16th ed. (London: Sweet & Maxwell, 1995) at 885.

dues seems inappropriate in view of the fact that the House of Lords emphatically rejected the reasoning on this point.⁵⁰

The Lords' decision in *The Carslogie*, despite inaccurate summations of previous cases, is still the leading case against the apportioning of dock dues. Courts have taken to treating detention and dock dues an indistinct. As a means of restoring the law of apportionment of dock dues to its status in the first part of the twentieth century, one must first address whether detention and dock dues can be viewed separately, and whether there is any justification for McLachlin J.'s apportionment of both items.

B. Why Separate Detention and Dock Dues?

The Lords in *The Carslogie*, and L'Heureux-Dubé J. in *Lake Winnipeg*, held that the payment of dock dues could not be separated from the detention cost. Just as the lesser accident would not add any additional days of lost profits, so too, the courts felt, the lesser accident would not add to the total number of days required in dry dock. Thus the party causing the major damage should be responsible for all of these costs. Where both causes rendered the ship unseaworthy, as in *Lake Winnipeg*, the first tortfeasor would be responsible for all costs related to his action.

Conversely, in at least three earlier cases (*The Vancouver*, *The Haversham Grange*, and *The Hawk*) the judiciary has separated the assignment of demurrage/detention and the apportionment of dock dues. *The Haversham Grange* reflected both these strains of thought in reference to the dock dues issue. The Registrar denied the claim for appointment and asked, "[w]hat further damage did the second wrongdoer do beyond what had already been done by the first?"⁵¹ The Court of Appeal overturned this decision, and focussed instead on the common factor in repairs, the dock dues, and apportioned them. This paper favours the view of dock dues as a common element that is part of the direct, physical repair costs for both parties; an element which can thereby be separated from the indirect concept of lost profits.

It can be argued that one should see the three sets of repair costs as points on a continuum. At one end lie the costs associated with repairing the physical damage caused by one party's negligence (e.g. 14 days of repair for second grounding in *Lake Winnipeg*, borne by the owners of the Kalliopi L). At the other end lies the other party's physical repair costs (e.g. 27 days of repairs paid for by the owners of *Lake Winnipeg*). The dock dues are a mid-point on the continuum, representing necessary expenses for both sets of repairs.

While detention awards are based on the loss of "profit-earning status," the dock dues are related both to the causation responsible for detention damages,

⁵⁰ *Lake Winnipeg* (S.C.C.), *supra* note 2 at 12.

⁵¹ *Haversham Grange*, *supra* note 23 at 158.

and to repairs that are essentially necessary for another reason (e.g. second grounding). Where both sets of repairs are essentially necessary, the docking dues should be seen as a common obligation related to the physical repair of the ship, rather than as an aspect of lost profits.

This discussion also helps to answer the question: why not apportion *both* detention and dock dues, as McLachlin J. did in her *Lake Winnipeg* dissent? McLachlin J.'s reasons for apportionment of detention were not based on any precedent. Instead, she argues that:

I see no reason ... why the general principle of apportionment found in *The Haversham Grange* should not apply. This approach would recognize that there were two causes for the detention of the ship and the consequent loss of earning capacity—the defendants' tortious act and the subsequent grounding incident Fairness suggests that the loss flowing from this [14 day] period be divided equally between the two causes of detention.⁵²

Aside from the lack of any precedent to defend the apportionment of detention, the logical response to McLachlin's approach is that, unlike the dock dues, detention damages cannot be linked with the repairs which each side is obliged to pay for (i.e. the actual physical costs of repair). The judiciary has repeatedly shown a willingness to assign detention charges against one cause for the ship's time out of service. As the detention relates only to this lost time aspect, not to the physical repair costs necessitated by the other causation, the apportionment of detention damages is therefore much harder to justify than the dock dues, which can be seen as a common obligation, relating to both sets of physical repairs.

The text, *McGregor on Damages*, states "the fallacy with regard to [apportioning] dock expenses appears to have arisen because they tended to be considered as part of the cost of repair."⁵³ With respect, this view overlooks both the basic fact that dock dues expenses *are* part of the costs of repairs, and that in instances of mutually necessary repairs both parties require the use of the dry dock to fulfil their obligation to fix the physical damages that they have caused.

IV. IS THERE A BENEFIT BEING GAINED?

THIS PAPER ARGUES THAT, IN TERMS OF THE LAW of restitution, the issue of apportioning dock dues should centre on whether the owner's repairs were a discretionary act (an incidental advantage) or essentially necessary, and therefore an incontrovertible benefit.

As stated in *Ruabon Steamship*, simply gaining an advantage from a situation did not automatically result in an obligation to contribute. The benefit de-

⁵² *Lake Winnipeg* (S.C.C.), *supra* note 2 at 38.

⁵³ *McGregor*, *supra* note 49 at 885, footnote 18.

rived from an incidental advantage can be subjectively devalued by the recipient, and therefore should not attract a liability for sharing or restitution. To borrow a concept from the seminal restitution case, *Taylor v. Laird*,⁵⁴ one puts another's ship in dry dock; what can the other do but take advantage?

However, when the repairs of the ship operators were essentially necessary, as in *The Vancouver*, a different conception applied. The insurers in *The Vancouver* opposed apportionment, claiming that:

... a contract of insurance is a contract of indemnity only, and ... urge that if the judgment stands the respondents will obtain something more than an indemnity for the injury to the sternpost—that they will obtain an actual advantage from its having been fractured ... they are relieved of one-half of the dock dues that they must otherwise necessarily have paid.⁵⁵

The answer provided by the Court to this argument was that:

... the whole, both what concerns the ship owners and what concerns the underwriters, has to be repaired. It is best and most cheaply done by doing them both together ... Neither is entitled to take the whole benefit of the reduction of cost and apply it to his own work exclusive.⁵⁶

As both sides received a benefit, either side would be enriched if it did not have to bear half the costs of the common element, the dock dues.

The American jurisprudence has also recognised a difference in situations where the owner of the damaged ship was doing incidental rather than essential repairs. Judge Learned Hand stated in regard to the former situation:

If the owner of a damaged vessel puts her into dry dock to repair damages done by a collision, and while she is there seizes the opportunity to make other repairs which do not extend the time consumed in the collision repairs, the tort-feasor may not abate his damages. ... It must be treated as a matter of indifference to the tort-feasor that the owner gets incidental benefit from the detention.⁵⁷

Judge Hand contrasted this incidental benefit with,

... if the ship would in any event go out of commission, collision or no collision, and if therefore, during the period when the collision repairs are actually made, she would have earned no profits for her owner he cannot be said to have been damaged.⁵⁸

This judgment was restated by Judge Swan, in *The Pocahontas*, to specify that where the owner's own repairs were "of a character ... necessitating an immedi-

⁵⁴ [1856] 156 E.R. 1203. The relevant quotation is "One cleans another's shoes; what can the other do than put them on?"

⁵⁵ *The Vancouver*, *supra* note 18 at 69, Lord Chancellor Herschell.

⁵⁶ *Ibid.* at 71, Lord Blackburn.

⁵⁷ *Clyde*, *supra* note 26 at 381.

⁵⁸ *Ibid.*

ate lay-up,"⁵⁹ there would be a reduction in the tortfeasor's liability. The extent of this reduction was not clear, but the American courts seem to favour an approach analogous to that of the Federal Court of Appeal in *Lake Winnipeg*—the party responsible for a second set of repairs which renders the vessel unseaworthy must pay the associated detention.⁶⁰ It is worth noting however, that the Supreme Court did not cite any of the American ship collision cases in assessing damages in *Lake Winnipeg*.

In summary, either the concept of incidental advantage matters, or it does not. If we are to apply the concept, then we must also apply the associated principle of an obligation to contribute. The courts have emphasised the importance of necessity of repairs when it comes to determination of responsibility for lost profits. If repairs are not essential (*e.g.* the damage caused by the negligent actions of the *Carslogie*) then in some circumstances the tortfeasor may bear no responsibility. It seems like a logical corollary that, in situations where a second set of repairs is essential, the owners of a damaged ship should be called upon to contribute to the common element of expenses, the dock dues.

V. LACK OF JURISTIC REASON FOR ENRICHMENT?

IS THERE A LACK OF JURISTIC REASON FOR ONE PARTY to gain a benefit from having all dock dues paid for by another party? One is conscious of the warning issued in *The Acanthus* to avoid arguments based on "vague propositions" like "general justice or good sense." The House of Lords and a majority of the Supreme Court of Canada would clearly argue that there is juristic reason for the enrichment, in that the common law of tort has evolved in this matter.

However, Canadian courts and legislatures have long recognised the concept of contributory negligence,⁶¹ wherein a tortfeasor can be found less than wholly responsible for damages, due to the action of the injured party, or due to the presence of another tortfeasor. In the particular strand of tort law that governs multiple collision cases, the idea of apportioning dock dues, which would reduce the liability of one of the parties, has gone out of fashion. In accordance with the idea of contribution, this paper argues that the juristic reason devel-

⁵⁹ *The Pocahontas*, 109 F. 2d 929 at 931 (1940).

⁶⁰ For an overview of the American doctrine on this see *Bouchard Transportation Co. Inc. v. Tug Ocean Prince*, 691 F. 2d 609 (1982).

⁶¹ In *Lake Winnipeg* (S.C.C.), *supra* note 2 at 38, McLachlin J. summarised the contributory negligence provisions in the *Canada Shipping Act* and the *Ontario Negligence Act*, but admitted that, "[c]ontributory negligence *per se*, although arguably available on the legislation, was not canvassed in the case at bar."

oped in the Lake Winnipeg should be amended to allow apportionment of dock dues.⁶²

The core of this new idea of juristic reason lies in the reasons developed in *Ruabon Steamship*. In that case Lord Halsbury stated,

... the liability of each of the persons held to be bound to contribute is assumed to exist either by contract or by some obligation binding them all to equality of payment or sacrifice in respect of that common obligation.⁶³

A parallel with *Lake Winnipeg* emerges from this *ratio*.

The owners of the Lake Winnipeg could have argued to the Kalliopi L., "The repairs we caused were essential. The repairs you occasioned were, however, also necessary. They cannot be characterised as an incidental advantage, as per *Ruabon Steamship*. Once you chose to do the repairs for the second grounding at the same time as the repairs we caused, you created a common element in the repairs. The courts in the early twentieth-century decisions recognised that the use of the dock to perform two separate sets of repairs rendered it a common element, the benefits of which should be shared between the parties. Thus, the common obligation (*i.e.* dock dues) must be seen as a shared expense, for the duration of the time when both sets of repairs are being conducted."

It is telling that the parties themselves have often arrived at the same disposition of dock dues. Notably, in *The Carslogie*, the parties agreed to apportion dock dues for the period of joint repairs. Similarly, a maritime law text states that in multiple damage situations, "[t]here is no agreed or universal method of dealing with the dry-dock charges, but a common practice might be as follows [apportionment]"⁶⁴ The idea that the parties might find it logical to split dock fees is significant in light of the Supreme Court of Canada's statement in *Peter v. Beblow*,

What matters should be considered in determining whether there is an absence of juristic reason for the enrichment? ... In every case, the fundamental concern is the legitimate expectation of the parties...⁶⁵

The speeches in *Ruabon Steamship* offered one further example of the juristic reason behind the duty to contribute. Lord Halsbury dismissed the idea that

⁶² There may be economic efficiency reasons for favouring the McLachlin J. dissent, in that it encourages concurrent repairs unlike either the Supreme Court majority or Federal Court of Appeal decisions. This paper is not able, however, to address the implications of what legal rule a law and economics approach might dictate to the ship collision repair issue.

⁶³ *Ruabon Steamship*, *supra* note 1.

⁶⁴ D.J. Wilson & J.H.S. Cooke, eds., *The Law of General Average and the York-Antwerp Rules*, 11th ed. (London: Sweet & Maxwell, 1990) 480.

⁶⁵ *Peter v. Beblow* (1993), 101 D.L.R. (4th) 621 and 645 (S.C.C.), McLachlin J.

duty to contribute arose from some general principle of justice, and queried whether "... if a man built a wall so as to shield his neighbour's house from undue wet or danger from violent tempests, he ought to be entitled to contribution because his neighbour has got an advantage from what he did." The answer could be yes, under certain circumstances. The ancient Jewish law text the *Mishna*, for example provides that:

If a man's land surrounded his fellow's land on three sides, and he fenced it on the first and second and third sides, the other is not bound [to share in building these walls]. R. Jose says: If the other rose up and fenced it on the fourth side he is compelled to bear his share in the cost of all the other walls. [footnoted: from which he now profits, since they provide three-quarters of the fencing of his land].⁶⁶

The parallel with the ship repair cases is plain: where one is only receiving an incidental advantage, there is no obligation to contribute. However, once one begins to profit from such common elements, there arises an obligation to contribute. Similarly, once a ship owner begins to profit from the common elements of repair, there is a duty to apportion the related dock dues.

VI. CONCLUSION

IN HER DISSENTING JUDGMENT IN *LAKE WINNIPEG* McLachlin J. argued that the establishment of an apportionment rule would, "... [have] the advantage of being generally applicable to all causes and producing a fairer result than the all-or-nothing approach exemplified by *The Carlslogie*."⁶⁷ This paper defends the re-establishment of the old rule on apportionment of dock dues, which would not only be fairer than an all-or-nothing approach, but which would accord with principles of tort and restitution law.

Why does it matter? It matters because while the amount at stake for detention for the second grounding in *Lake Winnipeg* was considerably greater than the dock dues (\$157 000 vs. \$100 000), under apportionment of dock dues the defendant would still have recovered \$50 000 out of the \$257 000 in dispute, a not inconsiderable amount. Moreover, in *The Vancouver* the decision to apportion dock dues pushed repair costs over the threshold level needed to get any recovery from insurers, so the amounts at stake could greatly exceed the costs of the dock dues.

Finally, it matters because the issue is one of justice between the two parties. The justice system should attempt to return the parties to the positions they occupied before any wrongdoing took place. The insurers and the owner of the Ruabon Steamship considered dock dues sufficiently important that they went to court over the matter of two pounds. That decision is still cited, a century

⁶⁶ *Mishna, Nezikin* 1:3.

⁶⁷ *Lake Winnipeg* (S.C.C.), *supra* note 2 at 39.

later, in contemporary cases like *Lake Winnipeg*. Hopefully, it will take much less than a century to return to one of the core concepts in *Ruabon Steamship*—some advantages are more than incidental, and lead to an obligation to contribute.