2003 CarswellNfld 113, 2003 NLCA 21, 224 Nfld. & P.E.I.R. 234, 226 D.L.R. (4th) 285, 16 C.C.L.T. (3d) 250, 2 Admin. L.R. (4th) 1, 669 A.P.R. 234

Keeping v. Canada (Attorney General)

Attorney General of Canada, First Appellant and Minister of Fisheries and Oceans Canada, Second Appellant and George William Keeping and William J. Keeping, Respondents

Newfoundland and Labrador Court of Appeal

Wells C.J.N., Roberts, Welsh JJ.A.

Heard: February 17, 2003
Judgment: May 5, 2003
Docket: 02/16

Proceedings: affirming (2002), 2002 CarswellNfld 7, (sub nom. Keeping v. Canada (Minister of Fisheries & Oceans)) 210 Nfld. & P.E.I.R. 1, (sub nom. Keeping v. Canada (Minister of Fisheries & Oceans)) 630 A.P.R. 1 (Nfld. T.D.)

Counsel: Reinhold M. Endres, Q.C., and M. Kathleen McManus, for appellants

Robert M. Matthews and Bernadette Cole, for respondents

Subject: Public; Torts; Civil Practice and Procedure

Fish and wildlife --- Licences — Issuance — General

Fisher purchased boat in 1988 — In 1989, fisher applied for supplementary crabbing licence — Regulatory conditions precedent to issuance of supplementary crabbing licence required that minimum displacement of boat exceed 10 tons — Under s. 7 of Fisheries Act, issuance of supplementary crabbing licence was within Minister of Fisheries and Oceans' "absolute discretion" — Fisheries officer untrained in and unfamiliar with measurement of boats attended upon fisher's boat to measure its displacement — Officer, with assistance of fisher's son, negligently measured boat and found, incorrectly, that boat did not meet 10-ton minimum displacement requirement — In 1994, fisher and son discovered that boat displaced more than 13 tons, but by that time no new supplementary crabbing licences were available — Fisher and son brought action against officer and Minister of Fisheries and Oceans — Trial judge found that officer was negligent and that assistance from son did not bar action in negligence because son had been operating entirely under direction of officer — Trial judge further held that Minister was liable for officer's negligence and that absolute discretion provision did not bar fisher's action — Action was allowed and Attorney General for Canada appealed — Appeal dismissed — Trial judge properly and reasonably held that officer had been negligent — Had boat been properly measured, Minister's absolute discretion would not have entitled Minister to deny arbitrarily fisher licence — But for negligence of Crown servant in measurement, fisher would have been entitled to supplementary crab licence in 1989 and following years — Fisher

and son were entitled to, and did, reasonably rely on officer's conclusions, and officer's error was not reasonably discoverable to bar action by operation of any limitation period.

Crown --- Principles of tort regarding Crown — Liability of Crown for torts of servants — Conditions for imposition of liability — Whether duty of care existing

Fisher purchased boat in 1988 — In 1989, fisher applied for supplementary crabbing licence — Regulatory conditions precedent to issuance of supplementary crabbing licence required that minimum displacement of boat exceed 10 tons — Under s. 7 of Fisheries Act, issuance of supplementary crabbing licence was within Minister of Fisheries and Oceans' "absolute discretion" — Fisheries officer untrained in and unfamiliar with measurement of boats attended upon fisher's boat to measure its displacement — Officer, with assistance of fisher's son, negligently measured boat and found, incorrectly, that boat did not meet 10-ton minimum displacement requirement — In 1994, fisher and son discovered that boat displaced more than 13 tons, but by that time no new supplementary crabbing licences were available — Fisher and son brought action against officer and Minister of Fisheries and Oceans — Trial judge found that officer was negligent and that assistance from son did not bar action in negligence because son had been operating entirely under direction of officer — Trial judge further held that Minister was liable for officer's negligence and that absolute discretion provision did not bar fisher's action — Action was allowed and Attorney General for Canada appealed — Appeal dismissed — Trial judge properly and reasonably held that officer had been negligent — Had boat been properly measured, Minister's absolute discretion would not have entitled Minister to deny arbitrarily fisher licence — But for negligence of Crown servant in measurement, fisher would have been entitled to supplementary crab licence in 1989 and following years — Fisher and son were entitled to, and did, reasonably rely on officer's conclusions, and officer's error was not reasonably discoverable to bar action by operation of any limitation period.

Cases considered by Roberts J.A.**:**

Anns v. Merton London Borough Council, [1978] A.C. 728, [1977] 2 W.L.R. 1024, (sub nom. Anns v. London Borough of Merton) [1977] 2 All E.R. 492 (U.K. H.L.) — referred to

Central & Eastern Trust Co. v. Rafuse, 37 C.C.L.T. 117, (sub nom. Central Trust Co. v. Rafuse) [1986] 2 S.C.R. 147, (sub nom. Central Trust Co. v. Rafuse) 31 D.L.R. (4th) 481, (sub nom. Central Trust Co. v. Rafuse) 69 N.R. 321, (sub nom. Central Trust Co. v. Rafuse) 75 N.S.R. (2d) 109, (sub nom. Central Trust Co. v. Rafuse) 186 A.P.R. 109, 1986 CarswellNS 40, 1986 CarswellNS 135, 42 R.P.R. 161, 34 B.L.R. 187, (sub nom. Central Trust Co. c. Cordon) [1986] R.R.A. 527 (headnote only) (S.C.C.) — considered

Comeau's Sea Foods Ltd. v. Canada (Minister of Fisheries & Oceans), 1992 CarswellNat 169, 1992 CarswellNat 597, 11 C.C.L.T. (2d) 241, 54 F.T.R. 20, [1992] 3 F.C. 54 (Fed. T.D.) — referred to

Comeau's Sea Foods Ltd. v. Canada (Minister of Fisheries & Oceans), 24 C.C.L.T. (2d) 1, 29 Admin. L.R. (2d) 264, 123 D.L.R. (4th) 180, 179 N.R. 241, 93 F.T.R. 79, 1995 CarswellNat 692, [1995] 2 F.C. 467, 1995 CarswellNat 118 (Fed. C.A.) — considered

Comeau's Sea Foods Ltd. v. Canada (Minister of Fisheries & Oceans), 142 D.L.R. (4th) 193, 206 N.R. 363, 31 C.C.L.T. (2d) 236, 43 Admin. L.R. (2d) 1, [1997] 1 S.C.R. 12, 1997 CarswellNat 10, 1997 CarswellNat 11 (S.C.C.) — distinguished

Just v. British Columbia, 1 C.C.L.T. (2d) 1, [1989] 2 S.C.R. 1228, 18 M.V.R. (2d) 1, [1990] 1 W.W.R. 385, 41 B.C.L.R. (2d) 350, 103 N.R. 1, 64 D.L.R. (4th) 689, 41 Admin. L.R. 161, [1990] R.R.A. 140, 1989 CarswellBC 234, 1989 CarswellBC 719 (S.C.C.) — considered

Snell v. Farrell, 110 N.R. 200, [1990] 2 S.C.R. 311, 72 D.L.R. (4th) 289, 107 N.B.R. (2d) 94, 267 A.P.R. 94, 4 C.C.L.T. (2d) 229, (sub nom. Farrell c. Snell) [1990] R.R.A. 660, 1990 CarswellNB 82, 1990 CarswellNB 218 (S.C.C.) — referred to

Statutes considered:

Fisheries Act, R.S.C. 1985, c. F-14

s. 7 — referred to

s. 43(d) — referred to

s. 43(e) — referred to

s. 43(e.1) [en. 1991, c. 1, s. 12(1)] — referred to

s. 43(e.2) [en. 1991, c. 1, s. 12(1)] — referred to

s. 43(f) — referred to

s. 43(g) — referred to

Limitation of Personal Actions Act, R.S.N. 1990, c. L-15

s. 2(2)(d) — referred to

Regulations considered:

Fisheries Act, R.S.C. 1985, c. F-14

Atlantic Fishery Regulations, 1985, SOR/86-21

s. 12 "document"

s. 13(1)

s. 56

Fishery (General) Regulations, SOR/93-53

s. 2 "document"

s. 10

APPEAL by Attorney General for Canada from judgment reported at 2002 CarswellNfld 7, (sub nom. Keeping v. Canada (Minister of Fisheries & Oceans)) 210 Nfld. & P.E.I.R. 1, 630 A.P.R. 1 (Nfld. T.D.), allowing plaintiffs' action for damages in negligence against Minister of Fisheries and Oceans.

The judgment of the court was delivered by Roberts J.A.**:**

1 This appeal raises the question of whether the Minister of Fisheries and Oceans can be held liable for the negli-

gence of an employee whose negligence results in a fisher being denied a fishing licence, given that, pursuant to s. 7 of the Fisheries Act, R.S.C. 1985, c. F-14, the issuance of a fishing licence is in the Minister's "absolute discretion." The trial judge held that in the circumstances of this case the Minister was liable. Counsel for the Minister argues strenuously that the trial judge was in error.

Background

2 William Keeping was a lifelong fisher and up until 1988 had always fished from an open boat. In 1988 he was 59 years old. He was joined in his fishing enterprise that year by his 25-year-old son George. George had worked away, latterly with Coast Guard Canada, but then determined it was time to join his father and eventually to take over the enterprise.

3 In the fall of 1988 William decided to invest in a bigger boat, in the 35 ft. range, that would be decked in and have cabin facilities. He had the boat built, with the financial assistance of the Fisheries Loan Board, by Russell Bishop of Hatchet Cove. It would appear from the record that William's instructions to Mr. Bishop were general in nature, the most important measurement being that it be just under 35 ft., because that was the category in which his licence permitted him to fish. Gross tonnage was not one of the specifications. According to George Keeping, tonnage was never an issue before his father decided to apply for a supplementary crab licence.

4 The new boat was named the Christian and Shauna. Before he could use it for fishing, however, William had to obtain a Commercial Fishing Vessel (CFV) registration number from the Department of Fisheries and Oceans. George helped his father in doing that and it was George who gave the Department employee, when asked, the approximate dimensions of the boat. He was quite certain about the length and the width, but could only estimate the depth to be approximately 7 ft. Using those numbers, the Fisheries and Oceans employee calculated the boat's gross tonnage to be 18.8 tons.

5 Subsequent to obtaining the CFV registration, William had to arrange for the transfer of his groundfish fixed gear licence to the new boat. He and George had also become aware of the possibility of a supplementary crab licence. An extract from "Commercial Fisheries Licencing Policies for Newfoundland Region, revised October 5/89," entered as a consent exhibit, reads:

> **Snow Crab**
>
> Supplementary crab licences (150 pots) are available in NAFO Divisions 2J3KL3Ps to full-time fishermen who have groundfish fixed gear licences and are the registered owners of vessels 10.7 m. (35') - 19.8 m (65') LOA or a minimum of 10 gross tons. No new commercial licences (800 pots) are being issued.

6 This supplementary snow crab licence policy predated October 5, 1989, because by Memorandum dated April 7, 1989, addressed to "Fishery Officer, Grand Bank, NF," Rhonda M. Pittman, District Licensing Administrator at the Grand Bank office, wrote:

> WILLIAM J. KEEPING, FORTUNE, . . .
>
> VESSEL: CHRISTIAN & SHAUNA
>
> CFV - 130697
>
> Mr. Keeping has requested a Supplementary Crab Licence.

Please determine gross tonnage and advise.

$$= \frac{L \times W \times D \times .55}{100}$$

7 The memorandum went to fishery officer Leo Slaney and it was he who carried out the measurement requested by Ms Pittman. Mr. Slaney visited the Christian and Shauna a few days later and completed the requested measurement with the assistance of George Keeping. A great deal of time was taken during the evidence of both George Keeping and Mr. Slaney discussing how the measurement was done. The only measurement in contention, in the end, was the depth.

8 Two of the questions before the trial judge concerned Mr. Slaney's competence to carry out the measurement and what he instructed George Keeping to do, i.e., where to place the tape when measuring for depth.

9 Regarding the question of competence, Slaney said that up to the time of the trial he had done between eight and ten measurements for gross tonnage, but that at the time of the measurement of the Christian and Shauna he maybe had done one. He had received no particular training. His main duty as a fishery officer was the enforcement of regulations.

10 There was a difference between the evidence of George Keeping and Slaney concerning how the depth of the vessel was measured. George's evidence was that he placed the end of the tape where Slaney told him to place it. Slaney's initial evidence was that he told George to hold the tape on the top of the keel. However, when he was asked how he knew the tape was in place to take the measurement, his reply was, "And where the tape measured to the bottom of the hold is where I captured the reading, 4 feet, and then recorded it in my notebook." In his subsequent response to a question from the trial judge, he said, "[George] held the tape down to the bottom of the hold."

11 There was also discussion during the evidence of Slaney about the keelson as opposed to the keel, and it became clear that at the time Slaney did not know the difference, or even what a keelson was. A keelson, by dictionary definition, is a metal or wooden beam attached to the upper side of a boat's keel to reinforce it. Later, in cross-examination, Mr. Slaney said he couldn't recollect "if [he] saw where the tape was placed."

12 The trial judge took a view of the Christian and Shauna during the trial and in his reasons for judgment accepted the evidence of George Keeping and concluded that the measurement of the depth was from the keelson and not from the keel, as it was supposed to have been.

13 After Mr. Slaney completed the measurements he made a calculation before leaving the area and advised the Keepings that their boat was 9.41 gross tons. He also said he advised them that if they were not satisfied they could have another measurement done by the Coast Guard.

14 Mr. Slaney replied to Rhonda Pittman, the District Licensing Administrator, by memorandum dated April 28, 1989:

MEASUREMENT OF VESSEL - RE: Supplementary Crab Licence

As per your request, the measurements to determine gross tonnage on the fishing vessel "CHRISTIAN & SHAUNA", C.F.V. #130697 OWNED BY WILLIAM J. KEEPING, OF FORTUNE ARE:

LENGTH - 34.92 ft.

WIDTH - 12.25 ft.

DEPTH - 4.0 ft.

$$\text{FORMULA} = \frac{L \times W \times D \times .55}{100} = \frac{34.92 \times 12.25 \times 4.0 \times .55}{100} = 9.41 \text{ gross-tons}$$

Hoping this is satisfactory.

15 On the same date, M. Crummey, Area Manager for Fisheries and Oceans at Grand Bank, wrote the following letter to William Keeping:

This will acknowledge your request for a Supplementary Crab Licence.

Under present Licencing Guidelines you must meet the following eligibility criteria in order to qualify for a licence:

1. Must be a full-time inshore fisherman.

2. Holder of a groundfish licence for the Newfoundland Region, for a vessel greater than 35' or 10 gross tons, but less than 65' LOA.

3. Must be the registered owner of a Commercial Fishing Vessel greater than 35' but less than 65' LOA.

4. Must be a resident of the area for which the Supplementary Crab Licence is being issued.

Our investigation has revealed that your vessel is less than 35' LOA or 10 gross tons, therefore your request must be denied.

Should you not be in agreement with this decision and wish to appeal, you may do so by writing to the following address within twenty (20) days from the date of this letter.

Regional Licencing Appeal Committee

Attention: Mr. Dave Aylward

Fisheries & Oceans Canada

P.O. Box 5667

St. John's, NF

A1C 5X1

16 There was no formal policy for determining gross tonnage in evidence for 1989. The only instruction to Slaney was the memorandum from Ms Pittman referred to above. A copy of the 1993 policy, however, was entered by consent and was accompanied by a memorandum dated November 17, 1993, from J.C. Rose, Regional Licensing Manager, to area managers. The policy provided:

Process for Determining Gross Tonnage (Supp Crab.)

1. The individual will be asked to produce a certificate from the Coast Guard, indicating gross tonnage. Most all vessels 34' and greater will have such a document.

2. If this document, is not available the department can complete the following calculation for "UNDERDECK TONNAGE"

LOA × BREADTH × DEPTH × .50 divided by 100

LOA - Length Overall - The horizontal distance measured between perpendicular lines drawn at the extreme ends of the outside of the main hull of the vessel.

BREADTH - Beam mid-ship to outside of planking, doesn't include ribbings.

DEPTH - Top of deck at center, at mid-ship, to top of floor on Keel.

3. If the fisherman doesn't agree with the outcome of our calculation, he may contact the Coast Guard himself and have the tonnage measurement completed.

17 William and George Keeping continued fishing through the years 1989 to 1993. They received by post in each of these years partially completed application forms, William for vessel registration and fishing licence and George for a commercial fisherman's registration. The applications were completed, signed and returned and the registrations and licence issued. George's evidence was that William's documents were completed and signed by William's wife, his mother, as had always been the case, since William did not read or write.

18 In 1993, William decided it was time to transfer the Christian and Shauna and his fishing licence to George. He sought and received approval from the Department to do so. In the meantime, William had made no application for a supplemental crab licence after 1989 because, according to George, both his father and he felt there was no point since the Christian and Shauna did not have the required tonnage. George did apply again, however, in April 1994. He was told in a letter from Ms Pittman, the Area Licensing Administrator, dated April 20, 1994, that "there [was] presently a freeze on the issuance of new licences for 1994." His name was to be placed on file in the event new licences became available. There was no mention of the Christian and Shauna, which was now registered in his name, not meeting required specifications, i.e., 10 gross tons.

19 A marine service centre opened in Fortune, near Grand Bank, in 1994 and it was there that George and his father suddenly realized that all was not right with Slaney's measurement. With the Christian and Shauna out of the water, they were able to compare it with other boats, and, in particular, they were able to compare it with the boat of a Bob Stacey of St. Lawrence, whom they knew had a supplementary crab licence. George's evidence was that when they saw Mr. Stacey's boat he and his father quickly concluded that there was a mistake in the measurement of either their boat or Mr. Stacey's. His evidence was, "So we decided at that time to see what we could do about it."

20 George first contacted the office of Fisheries and Oceans in Grand Bank and was advised by Ms Pittman to have his boat remeasured. After further inquiries, he was referred to marine surveyor Eric Lindstol, who surveyed the boat in September 1994. Mr. Lindsol's Certificate of Survey, which he forwarded to Transport Canada in Ottawa, is dated September 19, 1994. The Certificate of Registry for the Christian and Shauna was signed and sealed by the Registrar of Shipping in St. John's on February 7, 1995, and George Keeping received it shortly afterwards. Mr. Lindstol calculated the gross tonnage of the Christian and Shauna to be 13.62 tons.

21 Lindstol, in his evidence, described in detail how he went about measuring the vessel and those details are not

relevant to this appeal. I would note, however, that it took him approximately three hours to do it as opposed to the "approximately 15 to 20 minutes" that it took Mr. Slaney.

22 The Keepings commenced legal proceedings on March 1, 1996, and the matter went to trial in May 2001. The trial judge found that Leo Slaney was negligent in ascertaining the depth measurement of the Christian and Shauna and that the Minister was liable for the damages resulting therefrom. He ordered that damages be determined on the basis which he set out in paras. 76-78:

> [76] The evidence indicates that the master as owner and operator of the vessel would employ two crew members to assist him when harvesting crab. William was owner and master and George was a crew member of the Christian and Shauna from 1989 to 1993, that George was owner and master and William was a crew member from 1994 to 1998 inclusive, that subsequent to 1998 George was owner and master but there is no evidence as to who the crew members were from 1998 onwards. Furthermore, no claims were submitted by or on behalf of any crew member other than the Plaintiffs.
>
> [77] The Plaintiff, William Keeping, is entitled to recover 60 percent of the damages sustained as a result of the loss of the supplementary crab licence while he was owner and master from 1989 to 1993 inclusive and 20 percent for the years he was a crew member when George was owner and master from 1994 to 1998 inclusive. George is entitled to recover 20 percent of the damages sustained as the result of the loss of the supplementary crab licences for the years he was a crew member with his father as owner and master from 1989 to 1993 inclusive and 60 percent for the years he was owner and master from 1994 to 2001 inclusive.
>
> [78] In determining the damages sustained by the Plaintiffs their share of the value of the lobsters harvested under their permits shall be deducted from the losses they sustained as a result of having no supplementary crab licences during the same period.

Relevant Legislative Provisions

23 *Fisheries Act*, R.S.C. 1985, c. F-14:

> 7.(1) Subject to subsection (2), the Minister may, in his absolute discretion, wherever the exclusive right of fishing does not already exist by law, issue or authorize to be issued leases and licences for fisheries or fishing, wherever situated or carried on.
>
> (2) Except as otherwise provided in this Act, leases or licences for any term exceeding nine years shall be issued only under the authority of the Governor in Council.
>
> . . . . .
>
> 43. The Governor in Council may make regulations for carrying out the purposes and provisions of this Act and in particular, but without restricting the generality of the foregoing, may make regulations
>
> . . . . .
>
> (d) respecting the operation of fishing vessels;
>
> (e) respecting the use of fishing gear and equipment;

(e.1) respecting the marking, identification and tracking of fishing vessels;

(e.2) respecting the designation of persons as observers, their duties and their carriage on board fishing vessels;

(f) respecting the issue, suspension and cancellation of licences and leases;

(g) respecting the terms and conditions under which a licence and lease may be issued; . . .

Fishery (General) Regulations, SOR/93-53:

2. In these Regulations,

. . . . .

"document" means a licence, fisher's registration card or vessel registration card that grants a legal privilege to engage in fishing or any other activity related to fishing and fisheries;

. . . . .

10. Unless otherwise specified in a document, a document expires

(a) where it is issued for a calendar year, on December 31 of the year for which it is issued; or

(b) where it is issued for a fiscal year, on March 31 of the year for which it is issued.

Atlantic Fishery Regulations, 1985, SOR/86-21:

PART II

REGISTRATION OF FISHERMEN AND VESSELS AND LICENSING OF FISHERMEN

Interpretation

12. In this Part, "document" means a fisherman's registration card, a vessel registration card or a licence.

Requirement for Registration and Licences

13.(1) Subject to section 15,

(a) no person shall use a vessel, and

(b) the owner of a vessel shall not permit another person to use his vessel,

in fishing for any species of fish referred to in these Regulations unless

(c) a vessel registration card has been issued in respect of the vessel,

(d) the use of that vessel to fish for that species is authorized by a licence, and

(e) subject to subsection (2), the person using the vessel is named in the licence referred to in paragraph (d).

. . . . .

56.(1) No person shall fish with or have on board a vessel a crab trap unless a valid tag issued by the Minister is securely attached to the frame of the trap in the manner for which the tag was designed and in such a manner that the tag is readily visible when the trap is not in the water.

(2) For the purposes of subsection (1), a tag is valid only for the year indicated thereon and is valid only if it bears a tag number set out in a licence authorizing the use of that vessel in fishing for crab.

(3) No person shall fish with a crab trap that has attached to it a tag where the tag has been tampered with or where the tag number is illegible.

(4) No person shall have on board a vessel a crab trap that has attached to it a tag referred to in subsection (1) where the tag has been tampered with or where the tag number is illegible.

Issues

24 The issues on this appeal are:

1. Does the Minister of Fisheries and Oceans have absolute discretion in the issuance of fishing licences?

2. Was there was a duty of care owed by the appellants to the Keepings?

3. Did the availability of judicial review negate any possible claim in negligence? and

4. Were the claims by the Keepings statute-barred?

Analysis

1. Does the Minister of Fisheries and Oceans have absolute discretion in the issuance of fishing licences?

25 The appellants rely on Comeau's Sea Foods Ltd. v. Canada (Minister of Fisheries & Oceans), [1997] 1 S.C.R. 12 (S.C.C.), for the proposition that the Minister of Fisheries and Oceans has complete and absolute discretion to issue fishing licences. While certainly the Minister is given a very broad discretion by virtue of s. 7 of the Fisheries Act, I do not, after a close review of Comeau's Sea Foods, accept that that discretion is as untrammelled as the appellants suggest.

26 The Minister, in Comeau's Sea Foods, explicitly advised the company that he had authorized the issuance of four offshore lobster licences and that it was to be one of the recipients. Following that, in January 1988, the Department requested Comeau's Sea Foods and the others to whom an authorization had been issued to submit fishing plans for the balance of the current season for each vessel intended for the lobster fishery. Comeau's Sea Foods provided the requested information by letter and also advised the Department that the intended vessels were to be converted from their present use in the scallop fishery; the evidence showed that the cost of the conversion of one scallop dragger into a lobster fishing vessel was $500,000.00. The Department directed its officials in March 1988 to issue no lobster fishing licences without specific approval of the Assistant Deputy Minister. That directive came about as a result of lobbying by inshore lobster fishermen opposed to the issuance of such licences. Their lobbying had the desired result, because in April 1988 the Minister announced that the four offshore licences he had earlier authorized would not be issued pending a study of the lobster industry in the region. The Minister's decision was confirmed to Comeau's Sea Foods and the other applicants by letter. The authorized licences were never issued.

27 The Federal Court, Trial Division, held the Minister liable for the economic loss suffered by Comeau's Sea Foods [(1992), 11 C.C.L.T. (2d) 241 (Fed. T.D.)]. The Federal Court of Appeal, in a majority decision, reversed the trial judge. The Supreme Court of Canada dismissed the further appeal.

28 Major J., for a unanimous Supreme Court, began his analysis, at para. 21, by saying:

> The question which arises on this appeal is whether the Minister once having authorized the granting of fishing licences had the authority to revoke that authorization.

29 Major J. answered this question incrementally. I refer, firstly, to paras. 36, 37 and 39:

> It is my opinion that the Minister's discretion under s. 7 to authorize the issuance of licences, like the Minister's discretion to issue licences, is restricted only by the requirement of natural justice, no regulations currently being applicable. The Minister is bound to base his or her decision on relevant considerations, avoid arbitrariness and act in good faith. The result is an administrative scheme based primarily on the discretion of the Minister: see Thomson v. Minister of Fisheries and Oceans, F.C.T.D., No. T-113-84, February 29, 1984.
>
> This interpretation of the breadth of the Minister's discretion is consonant with the overall policy of the Fisheries Act . Canada's fisheries are a "common property resource", belonging to all the people of Canada. Under the Fisheries Act, it is the Minister's duty to manage, conserve and develop the fishery on behalf of Canadians in the public interest (s. 43). Licensing is a tool in the arsenal of powers available to the Minister under the Fisheries Act to manage fisheries. It restricts the entry into the commercial fishery, it limits the numbers of fishermen, vessels, gear and other aspects of commercial fishery.
>
> . . . . .
>
> What then is the nature of the Minister's power with respect to authorizing the issuance of a licence? The question is whether the Minister may revoke a subsisting authorization and in the words of the appellant, whether the Minister continues to have a "continuing role" with respect to the authorization or not. [Emphasis added.]

30 Major J. continued, at paras. 43 and 49:

> The power to issue the licence, once exercised in any single instance, is expended and may only be revised or revoked under the specific statutory conditions in s. 9. However, the power to authorize is a continuing power within the meaning of s. 31(3) of the Interpretation Act. I do not think that the authorization to issue the licence conferred upon the appellant an irrevocable legal right to a licence. Until the licence is issued, there is no licence and therefore no permission to do what is otherwise prohibited, namely fish for lobster in the offshore. Unless and until the licence is actually issued, the Minister in furtherance of governmental policy may reevaluate or reconsider his initial decision to authorize the licence. Until the Minister actually issued the licence, he possessed a continuing power to reconsider his earlier decision to authorize and or issue the licence: Reference re Maritime Freight Rates Act, [1933] S.C.R. 423.
>
> . . . . .
>
> It is only after a licence has been issued that the Fisheries Act imposes limits upon the Minister's direction. No such limits are imposed upon the Minister's authorization of a fishing licence and in the absence of any words or an indication of legislative intent to the contrary, none should be imposed.

31 Major J. concluded, at para. 53:

> The sole ground of negligence alleged by the appellant was breach of the "defendant's statutory duty". In light of my conclusion that the Minister had the continuing authority to revoke the authorization and did so legitimately for the purpose of implementing government policy, the appellant cannot establish any duty on the Minister to actually issue the licences previously authorized.

32 The appellants argue that the Minister's discretion to authorize and issue fishing licences under s. 7 of the Fisheries Act, confirmed by Comeau's Sea Foods, absolves the Minister from what happened to the Keepings in the present case. I do not agree. The circumstances in Comeau's Sea Foods are entirely distinguishable from those involving the Keepings. When William Keeping decided in the spring of 1989 to apply for a supplementary crab licence, the policy pertaining to the issuance of such a licence had already been adopted and implemented and licences were being issued pursuant to it. While there is no evidence as to when it first came into force, it was conceded by the appellants to be extant at the time of Keeping's application. A copy of the supplementary crab licence policy, which formed part of the "Commercial Fisheries Licencing Policies for Newfoundland Region," revised as of October 5, 1989, was entered by consent. The first page of the document contains this statement:

> This Manual is taken from the Minister's document entitled Commercial Fisheries Licencing Policy for Eastern Canada.

33 The policy pertaining to snow crab, which I repeat for emphasis, reads:

> **Snow Crab**
>
> Supplementary crab licences (150 pots) are available in NAFO Divisions 2J3KL3Ps to full-time fishermen who have groundfish fixed gear licences and are the registered owners of vessels 10.7m (35') - 19.8m (65') LOA or a minimum of 10 gross tons. No new commercial licences (800 pots) are being issued.

34 At the time of William Keeping's application, he was a full-time fisherman with a groundfish fixed gear licence. The only other criterion pertained to his boat. Because the Christian and Shauna was less than 35 feet in length, it had to be a minimum of 10 gross tons.

35 There has been no suggestion on the part of the appellants, apart from their Minister's absolute discretion argument, that William Keeping would not have received a supplementary crab licence if Mr. Slaney's calculations had been correct. Thus, the conclusion has to be, as the trial judge decided, that William Keeping would otherwise have been issued a supplementary crab licence for the 1989 season.

36 I return to the comments of Major J. in Comeau's, at para. 36 (above at para. 29), and underscore that the Minister's discretion under s. 7 of the Fisheries Act is not absolute. It is restricted by the requirements of natural justice and to regulations already in place, must be based on relevant considerations, must not be arbitrary and must be made in good faith. In the present case, if the Christian and Shauna had been properly measured, there would have been no valid reason for the Minister not to have issued William Keeping a supplementary crab licence. To not have done so, given that Mr. Keeping would have then met all the required criteria, would have been completely arbitrary and in bad faith.

37 The appellants' contention that the Minister's absolute discretion to issue or not issue fishing licences pursuant to s. 7 of the Fisheries Act prevents any claim in negligence by the Keepings, therefore, fails. The appellants have conceded that it is not otherwise necessary to consider the policy/operational dichotomy described in Just v. British Columbia,

[1989] 2 S.C.R. 1228 (S.C.C.). Specifically, paras. 39, 40 and 41 of the appellants' factum read:

> In Just, the Supreme Court of Canada held that the policy decisions by the Crown are not subject to tort liability. Conversely, though, the operational implementation of those policy decisions may be subject to claims in tort.
>
> The Learned Trial Judge correctly relied upon the principles of Just to determine that the action of Leo Slaney was operational and therefore subject to a claim in torts.
>
> The Appellants accept the Learned Trial Judge's finding that these activities are of an operational nature.

Clearly, the measurement of the Christian and Shauna carried out by Mr. Slaney to determine its gross tonnage was operational in nature and intended to assist in the implementation of the supplementary crab licence policy already in place.

2. Was there a duty of care owed by the appellants to the Keepings?

Duty of Care and Proximity

38 The test to determine whether a duty of care is owed by a government agency was detailed in Just by Cory J., writing for the majority, at p. 1235:

> In cases such as this where allegations of negligence are brought against a government agency, it is appropriate for courts to consider and apply the test laid down by Lord Wilberforce in Anns v. Merton London Borough Council, [1978] A.C. 728. At pages 751-52 he set out his position in these words:
>
> > Through the trilogy of cases in this House - Donoghue v. Stevenson, [1932] A.C. 562, Hedley Byrne & Co. Ltd. v. Heller & Partners Ltd., [1964] A.C. 465, and Dorset Yacht Co. Ltd. v. Home Office, [1970] A.C. 1004, the position has now been reached that in order to establish that a duty of care arises in a particular situation, it is not necessary to bring the facts of that situation within those of previous situations in which a duty of care has been held to exist. Rather the question has to be approached in two stages. First one has to ask whether, as between the alleged wrongdoer and the person who has suffered damage there is a sufficient relationship of proximity or neighbourhood such that, in the reasonable contemplation of the former, carelessness on his part may be likely to cause damage to the latter - in which case a prima facie duty of care arises. Secondly, if the first question is answered affirmatively, it is necessary to consider whether there are any considerations which ought to negative, or to reduce or limit the scope of the duty or the class of person to whom it is owed or the damages to which a breach of it may give rise: see Dorset Yacht case [1970] A.C. 1004, per Lord Reid at p. 1027. [Emphasis added.]
>
> That test received the approval of the majority of this Court in City of Kamloops v. Nielsen, [1984] 2 S.C.R. 2. As well it was specifically referred to by both Beetz and L'Heureux-Dubé JJ. in Laurentide Motels Ltd. v. Beauport (City), [1989] 1 S.C.R. 705. It may be that the two-step approach as suggested by Lord Wilberforce should not always be slavishly followed: See Yuen Kun Yeu v. Attorney-General of Hong Kong, [1988] A.C. 175 (P.C.), at pp. 190, 191 and 194. Nevertheless it is a sound approach to first determine if there is a duty of care owed by a defendant to the plaintiff in any case where negligent misconduct has been alleged against a government agency. [Emphasis added.]

39 As mentioned above, the appellants admit in their factum that the measurement carried out by Slaney was operational in nature and, thus, subject to a claim in torts.

40 The trial judge wrote concerning the questions of proximity and duty of care, at paras. 62 to 65:

> [62] Because of the close and direct relationship between Slaney and the Plaintiffs there was proximity or neighbourhood and harm to the Plaintiffs was foreseeable; in these circumstances Slaney owed the Plaintiffs a duty to take care. The standard of care required of fishery officers performing such tasks as measuring the gross tonnage of vessels is like that of every other individual engaged in a similar activity, that is that of a reasonable person in their position. What is required of Slaney is that he perform his duties in a reasonably competent manner, to act as a reasonably competent fishery officer in similar circumstances would act, no more and no less.
>
> [63] Slaney knew that the Plaintiffs, William with the assistance of his son, George, had applied to the licencing branch of DFO at the Grand Bank office for a supplementary crab licence; and that the Director of Licencing, Rhonda Pittman, directed him to measure the gross tonnage of the vessel to determine if it met the requirement of being not less than 10 gross tons. Slaney knew when Rhonda Pittman directed him to measure the gross tonnage of the vessel and provided him with a formula, that he had virtually no training and limited experience in performing such a task and that he, in fact, had never before measured a vessel of this type for gross tonnage.
>
> [64] I am satisfied on the evidence that Slaney had relatively no training and very limited experience in measuring gross tonnage of fishing vessels; that this was a first time he had measured a vessel of this type; that Slaney knew or should have known that the DFO records on file at the time disclosed that the vessel was 18.8 gross tons, which was twice the 9.41 gross tons he calculated; that Slaney knew or should have known that his depth measurement of 4 feet was considerably less than the 7 foot depth measurement which George had given the DFO as his estimate of the vessel's depth at its deepest point; and that an additional 3 inches in depth would have meant that the boat would have met the required gross tonnage. I find that a reasonable fishery officer in the same circumstances would have re-measured the vessel.
>
> [65] Mr. Lindstol's certificate of survey discloses two depth measurements, first, the depth in the hold from tonnage deck to ceiling amidships 4 foot 9 inches, the second from top of deck at side of midships to bottom of keel 6 foot 1 inch. Both Lindstol's depth measurements exceeds Slaney's by a significant amount considering that inches on the depth measurement were of such significance in calculating the gross tonnage.

41 The appellants accept the trial judge's findings of proximity between Slaney and William Keeping, but submit that the evidence does not support a similar finding for George Keeping. I do not agree.

42 It is true that William was the owner of the Christian and Shauna and holder of the groundfish licence in 1989 when the application for a supplementary crab licence was made. Mr. Slaney, however, dealt with George Keeping to assist in measuring the vessel and would have learned that George was part of the operation with his father. I quote from Mr. Slaney's evidence in response to questioning by the trial judge:

> Q. Well, when you went to the boat, you knew who they were then, did you?
>
> A. I knew who they were when I went to the boat.
>
> . . . . .
>
> A. My understanding and my - is that they had a groundfish license, which would entitle them to fish any of the groundfish species that were open at the time. And Mr. William Keeping held the license, but - and in my dealings with him it appeared like Mr. George Keeping was basically the head of the enterprise, although he wasn't

the license holder at the time. But it seemed like he was running the operation.

43 Furthermore, it would not be unforeseeable by a person of Mr. Slaney's background with the Department that an adult son fishing with his father would share in the proceeds of the enterprise and that at some time the son would take it over in accordance with the Department's intergenerational transfer policy. Nor is it an answer that, in any event, William's licence in 1989 was only for that year and its reissuance wholly at the discretion of the Minister. The evidence shows that, in fact, William's licence was reissued for the ensuing years and was done so as a matter of course. The Department regularly sent out partly completed renewal forms for signing by William and return. The Department also approved the intergenerational transfer of the Christian and Shauna and William's groundfish licence to George in 1993 and the evidence is that George, as owner, continued with his father, as helper, i.e., their roles were reversed, up to and including 1998, the last year claimed for.

44 The following is an extract from a March 22, 1993, letter from Karen Snook, Assistant Area Licensing Administration at Grand Bank, to George Keeping:

> This is to advise you that approval has been given to reissue Groundfish Gillnet/Longline Licence and Commercial Fishing Vessel Registration 130697 (34' LOA) previously held by William J. Keeping of Fortune.

A copy of the March 22, 1993, letter was sent to Regional Licensing in St. John's. Regional Licensing eventually replied by memorandum dated May 8, 1995:

> **Subject: Inter-generational transfer request from**
>
> **William J. Keeping to his son, George Keeping**
>
> We have reviewed the documentation on the above fishers and have approved this request. Please proceed with this transfer.

Breach of Standard of Care and Causation

45 The appellants argue that, in determining that Slaney was negligent in his measurement, the trial judge failed to account for George Keeping's participation in the measurement and the fact that William Keeping had the Christian and Shauna custom built. They also suggest that there was no evidence before the trial judge that Slaney's knowing the meaning of the word "keelson" would have made a difference, as neither Slaney nor George Keeping used the word during the measurement procedure.

46 The evidence indicates, however, that George Keeping only participated in the measurement at the request of Slaney, and to assist him. He merely held the end of the tape and placed it where he was asked to place it. He had no expertise and no knowledge of what Slaney was about, except in a general way. The tonnage of the boat, for any purpose, and in particular for the purpose designated in the supplementary crab licence policy, was outside his knowledge. There is, furthermore, no evidence that the Christian and Shauna was custom built to a particular tonnage specification. William Keeping's contract with Russell Bishop of Hatchet Cove was for a boat that was just less than 35 ft. in order to comply with his then current groundfish fixed gear licence. The findings of the trial judge, at para. 89, are in accord with the evidence:

> [89] George testified that in April 1989 when William applied for the supplementary crab license neither he nor his father knew or understood anything about gross tonnage in particular how it was calculated. Furthermore, since Slaney had been designated by DFO to measure the vessel and determine its gross tonnage they both concluded that

> Slaney must have known what he was doing otherwise DFO would not have delegated him to measure the vessel and calculate the gross tonnage. Any reasonable uneducated or inexperienced fisherman in the Plaintiffs' position and circumstances would in my opinion have accepted Slaney's measurement of gross tonnage. Furthermore, I concluded as previously stated that had Slaney advised the Plaintiffs in April, 1989, when he calculated the gross tonnage of 9.41 tons that if they were not in agreement with his measurements they could contact Coast Guard as directed in the Guidelines, they would have contacted Coast Guard in 1989 and would have done as they did in 1994.

47 I am satisfied that the evidence supports the conclusion of the trial judge that Slaney did not meet the requisite standard of care.

48 On the issue of causation, the appellants argue that the Keepings did not meet the test, confirmed in Snell v. Farrell, [1990] 2 S.C.R. 311 (S.C.C.), that a plaintiff is required to prove on a balance of probabilities that but for a defendant's negligence he would not have suffered the injury of which he complains. In other words, the appellants submit that the Keepings have not shown that but for the incorrect measurement of Slaney they would have received a supplementary licence to fish crab in 1989 and in the subsequent years up to and including 1998, as the trial judge found. The appellants contend that the trial judge erred in law because he disregarded the legislative regime that only allows fishing licences for one year with no right of renewal.

49 As already mentioned, the circumstances in this case are completely different from those in Comeau's Sea Foods on which the appellants place so much reliance. While it is true that fishing licences are issued for one year at the discretion of the Minister, the fact is that in the present case the Minister did, indeed, issue the Keepings groundfish fixed gear licences for use with the Christian and Shauna for all of the years in question. The supplementary crab licence policy from at least 1989 to 1993 explicitly provided that fishers holding a groundfish fixed gear licence, such as William Keeping did, were entitled to a supplementary crab licence provided their vessel was between 35 to 65 ft. or ten tons. The Christian and Shauna, as measured by Eric Lindstol and shown in the Certificate of Registry of the Department of Transport issued to George Keeping on February 7, 1995, was 13.62 tons. Had Mr. Slaney known what he was doing when he measured the Christian and Shauna in 1989 he would have arrived at that figure or something close to it. He was negligent in completing the measurement, although his negligence has to be somewhat qualified by the fact that he was asked by his supervisors to perform a task he had not been trained to do. The appellants cannot shift the blame to the Keepings, either William or George. The Keepings continued to be issued groundfish fixed gear licences until 1998 and, but for the negligence of Mr. Slaney in 1989, they would have, in turn, received supplementary crab licences for each of these years. Assuming a proper measurement in 1989, and knowing that the Keepings received groundfish fixed gear licences until 1998, the Minister, being "bound to base his or her decision on relevant considerations, avoid arbitrariness and act in good faith," could not legitimately have refused to issue supplementary crab licences for that same period.

Mitigation

50 There was nothing that the Keepings could reasonably have done to mitigate their loss. They received the results of Mr. Lindstol's measurement in February 1995 and commenced their action a year later on March 1, 1996. The damage done could not be undone. George Keeping had been advised in 1994 that no further supplementary crab licences were being issued. The statement of claim was issued on March 1, 1996. The delay from February 1995 in starting the action which led to this appeal can have no negative effect on the amount of damages to which the trial judge has determined they are entitled.

3. Did the availability of judicial review negate any possible claim in negligence?

51 This consideration engages the second step of the two-step approach suggested in Anns [Anns v. Merton London

Borough Council (1977), [1978] A.C. 728 (U.K. H.L.)].

52 The appellants, to support their position that the availability of judicial review negates any possible claim in negligence, rely on the following statement from C. Lewis, Judicial Remedies in Public Law (London: 1992), at p. 379:

> Decisions taken in the exercise of statutory power will be subject to judicial review, and sometimes a statutory right of appeal. Unlawful decisions can be nullified and the individual relieved of the consequences of such a decision. The existence of these remedies is regarded by the courts as an indicator that no additional remedy in negligence need be provided, particularly where the judicial review or appeal is adequate to rectify matters, and the only real damage suffered by the individual is the delay and possibly the expense involved in establishing that a decision is invalid. This seems in part an axiomatic decision on the part of the court, that there should be a division between public law remedies and private law remedies. Where an ultra vires decision can be set aside on appeal or review, there should not normally be any additional liability in damages, unless the individual can establish misfeasance. Simple negligence is insufficient. The fact that the decision may be set aside may also mean that the only damage suffered is the expense involved in challenging the decision. [Emphasis added.]

53 The above statement from Lewis was quoted by Stone J.A. of the Federal Court of Appeal in Comeau's Sea Foods Ltd. v. Canada (Minister of Fisheries & Oceans), [1995] 2 F.C. 467 (Fed. C.A.), at pp. 485-486, and referred to in his conclusion, at p. 488:

> I have concluded that the availability of adequate administrative law remedies by way of judicial review is a consideration to be taken into account under the second branch of the Anns test in deciding whether the scope of prima facie duty of care should be negatived in the circumstances of this case. In my view that duty is so negatived. Accordingly, in my view, as the appellant owed no duty of care to the respondent the appellant should not be held liable in negligence.

54 While it is correct that the decision not to grant William Keeping a supplementary crab licence, communicated to him by letter dated April 28, 1989, by Area Manager M. Crummey was theoretically subject to judicial review, I do not accept that in the circumstances of this case it was a remedy "adequate to rectify matters." The appellants refer to the fact that in Mr. Crummey's letter William Keeping was advised that he could appeal the decision to the Regional Licensing Appeal Committee in St. John's. They also suggest that Mr. Keeping could have sought judicial review of the decision in the Federal Court of Canada. They further argue that he could have sought judicial review in February 1995 after receiving confirmation of Lindstol's calculated tonnage from the Registrar of Shipping.

55 The trial judge wrote regarding the right to appeal to the Regional Licensing Appeal Committee, at paras. 15 and 16 of his reasons:

> [15] Slaney's testimony is that he told the Plaintiffs of their right to appeal. George's evidence is that Slaney did not tell him. Even if I accept Slaney's evidence, which is denied by George, the evidence discloses that even if aware of their right to appeal, William Keeping, being uneducated, and George being inexperienced would not have pursued the appeal. George testified that they both felt that if a fisheries officer designated by DFO measured the boat and calculated the tonnage, they would have known what they were doing. George asked the question "why in such circumstances would we appeal to a committee of DFO for errors and calculations made by its own officials"?
>
> [16] I am satisfied on the evidence, that had the Plaintiffs been asked by Rhonda Pittman or Slaney in April 1989, to produce a certificate from the Coast Guard indicating the gross tonnage of their vessel; or told by Slaney, Pittman, Mr. Crummy, or any other authorized fishery officer, that if they did not agree with Slaney's gross tonnage measure-

ment they could contact the Coast Guard and have the tonnage determined; they would have done so in April 1989. I refer to the Plaintiffs, notwithstanding the application was signed by William and the rejection addressed to him, they both had a financial and material interest in obtaining the supplementary crab licence; William as owner and master, later as a crew member with George; similarly George as crew member with William and subsequently as owner and master.

56 I accept the findings of the trial judge and would add that there was no reason why William Keeping should have questioned the ability of Mr. Slaney to carry out the measurements he was sent to do. His reliance on Mr. Slaney was not unreasonable. In addition, what would he have appealed without a further measurement showing the Christian and Shauna with a capacity in excess of 10 tons?

57 An appeal to either the Regional Licensing Appeal Committee or an application to the Federal Court for judicial review, in other words, would have been a useless exercise. Equally as useless would have been an application for judicial review after notification of the correct tonnage of the Christian and Shauna in 1995. George Keeping had already been advised in April 1994 that there was "a freeze on the issuance of new licences for 1994" and that his name was placed "on file in the event new licences become available."

58 The availability of the appeal to the Regional Licensing Appeal Committee and the possibility of judicial review by the Federal Court, given the facts of this case, were not adequate to rectify the harm done by Mr. Slaney's faulty measurement.

4. Were the claims by the Keepings statute-barred?

59 The appellants accept that the governing limitation provision is that in s. 2(2)(d) of the Limitation of Personal Actions Act, R.S.N.L. 1990, c. L-15, which states:

(2) Actions

. . . . .

(d) of account and upon the case, . . . ;

shall be started within 6 years after the cause of action arose.

60 They also agree with the applicability of the discovery principles as stated by the Supreme Court of Canada in Central & Eastern Trust Co. v. Rafuse, [1986] 2 S.C.R. 147 (S.C.C.). Le Dain J., for the court, wrote, at p. 224:

I am thus of the view that the judgment of the majority in Kamloops [(City of) v. Nielsen, [1984] 2 S.C.R. 2] laid down a general rule that a cause of action arises for the purposes of a limitation period when the material facts on which it is based have been discovered or ought to have been discovered by the plaintiff by the exercise of reasonable diligence . . . [Emphasis added.]

61 The appellants argue, however, that the record before the trial judge established that the Keepings discovered, or ought to have discovered by the exercise of reasonable diligence, the relevant facts no later than April 27, 1989, when Slaney gave them the tonnage of the Christian and Shauna and "advised" them that they could appeal. The appellants rely on the evidence that the Christian and Shauna was custom built and that the application for commercial vessel registration signed by William Keeping on April 8, 1989, showed the gross tonnage was given to be 18.8 tons.

62 It is an overstatement to say that the Christian and Shauna was custom built. The evidence was that the one specification which William Keeping was concerned about was the length. Tonnage was not a concern. It only became an issue when William applied for the supplementary crab licence. The following is from the evidence of George Keeping, which evidence was accepted by the trial judge:

> MR. KEEPING
>
> When we got the boat, after we had the boat - you know, we took ownership of the boat, crab was one of the things back in '89 that was just starting up new in this area, so we decided that we were going to try to get into it. And we went down to Department of Fisheries and filled out the applications and they told us that the boat had to be over 10 gross tons.
>
> THE COURT
>
> Had to be over 10 gross tons.
>
> MR. KEEPING
>
> Because she was registered under 35 feet.
>
> BY MS. PELLETIER
>
> Q. So when you were having it built, you never said to make sure it's 10 gross tons.
>
> A. No.
>
> Q. You said make sure it's under 35 feet.
>
> A. Yes.
>
> THE COURT
>
> And then they told you when you went to go for the crab license she had to be over 10 tons.
>
> MR. KEEPING
>
> Yes.
>
> THE COURT
>
> But before that, did you know there was any requirement with respect to tonnage for crab fishery?
>
> MR. KEEPING
>
> Not until we went down and filled out the application.

63 As for the gross tonnage of 18.8 tons, the evidence of George Keeping was that, when he was asked for the measurements of the Christian and Shauna when he went with his father to register it, he was quite certain about the length and width but could only estimate the depth. Furthermore, returning to Slaney's measurement for purposes of the supplementary crab licence policy, it was Slaney who knew what he wanted and, as the evidence of Eric Lindstol and the Certi-

ficate of Registry show, there are a number of ways to measure the depth of a boat, but a particular methodology to determine gross tonnage. By way of example, the Certificate of Registry issued to George Keeping on February 7, 1995, shows, among others, these measurements: depth in hold from tonnage deck to ceiling amidships - 4.9 ft., depth from top of deck at side amidships to bottom of keel - 6.1 ft., gross tonnage - 13.62, and registered tonnage - 7.31. Both of the depth measurements substantially exceed the 4 ft. recorded by Slaney and, as was noted by the trial judge, a depth of 4 ft. 3 inches would have given the 10 ton minimum required.

64 Mr. Slaney did not know how to properly carry out the measurement of the Christian and Shauna for the purpose required and, as was said above, if he had known, his gross tonnage calculation would have matched that of Mr. Lindstol.

Conclusion

65 I am satisfied that on the issues which have raised questions of law the trial judge was correct in his findings. Furthermore, there was no palpable and overriding error in his interpretation of the evidence as a whole.

Disposition

66 The appeal must, therefore, be dismissed, the Keepings to have party and party costs.

Appeal dismissed.

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