CASES

DETERMINED BY THE

EXCHEQUER COURT OF CANADA

QUEBEC ADMIRALTY DISTRICT.

1920
May 21.

ULRIC TREMBLAY *et al*.....PLAINTIFFS;

VS.

HYMAN *et al*.....DEFENDANTS.

Shipping—Collision—"Inevitable Accident"—Burden of Proof—Act of God.

During the night between the 14th and 15th November, 1918, the plaintiff's steam barge the *A.T.* and defendant's schooner *B.S.M.* were moored on the lee side of Fox River wharf, on the Gaspe coast, lying stern to stern, the former near the shore, and latter between her and the outer end of the wharf. The schooner had been moored in the usual way, ordinary care and caution in this regard being observed. Towards evening, there being indications of bad weather ahead, the master borrowed a half-inch cable and two large manila hawsers, which were put out as "springs," making in all five hawsers, with the anchor leading forward and four lines leading aft. These additional moorings were more than sufficient under ordinary circumstances to have held her. She was a small vessel of only 99 tons, with an anchor weighing 1,200 lbs., and having a chain suitable for a 250 ton ship. The breaking strain of the larger lines (1 forward and 1 aft) was about 20 tons each, and the smaller 10 tons each. There was another hawser and a second anchor on board, and as the wind increased the master attempted to make fast the hawser to the wharf but was unable to do so, and it was impracticable to make effective use of the anchor, when the lines broke.

About 2 a.m. in the course of a severe storm, a tidal wave swept over the wharf and vessel, tore the latter from her moorings and she began to drift astern colliding with plaintiff's barge causing her some injury. When the forward moorings parted, she dragged her anchor, and it being impossible to put to sea, the master let go the anchor allowing the vessel to drift ashore, in the hope of saving the crew.

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Statement of Facts

Held, on the facts, that the master had taken all the precautions that a man of ordinary prudence and skill exercising reasonable foresight would have taken, and the owners cannot be held responsible for the damage resulting from the collision.

2. Where a vessel collides with another lying at anchor, the burden of proof is on defendant to show that it was due to inevitable accident.

3. To constitute inevitable accident, it is necessary that the occurrence take place in such a manner as not to have been capable of being prevented by ordinary caution, prudence and maritime skill. Utmost caution, or extraordinary skill need not be shown, but it is sufficient if such is reasonable and as is usual in similar cases.

4. In such a case as the present, not only must the defence prove that the breaking of the moorings was due to the irresistible force of the wind and waves, but also that all ordinary care, caution and maritime skill was exercised in mooring the vessel and in the handling thereof.

AN ACTION in personam by the owners of the steam barge *A. Tremblay* claiming the sum of $5,819.36 for damages occasioned by the defendant's schooner *Beatrice S. Mack* colliding with the *Tremblay* whilst moored at Fox River wharf, in the Province of Quebec.

The case was tried at Quebec on the 28th day of January, 1920, and the 16th, 25th and 31st days of March, 1920, before The Honourable Mr. Justice Maclennan.

Messrs. *F. E. Meredith, K.C.*, and *A. R. Holden, K.C.*, counsel for plaintiffs.

Mr. E. Languedoc, K.C., counsel for defendants.

The facts are stated in the reasons for judgment.

MACLENNAN, D. L. J. A., this (21st May, 1920) delivered judgment.

This is an action in personam by the owners of the steam barge *A. Tremblay* claiming the sum of $5,819.36 for damages occasioned by a collision with the Defendants' schooner *Beatrice S. Mack* at Fox River wharf, in the Province of Quebec, on 15th November, 1918, and for costs

The plaintiffs allege in their statement of claim substantially: that between one and two o'clock on the morning of 15th November, 1918, their steam barge *A. Tremblay*, whilst on a voyage from Quebec to Gaspe and way ports, was lying moored alongside Fox River wharf where she had been all the day previous, that the Defendants' sailing vessel *Beatrice S. Mack* was also moored to the wharf between the *A. Tremblay* and the outer end of the wharf, when suddenly, about 1.30 A.M. those on board the *A. Tremblay* heard the Master of the schooner call out that his moorings had been carried away, and shortly afterwards the schooner collided with the barge causing the latter great loss and damage; that those on board the schooner improperly neglected to take in due time proper measures for avoiding the collision which was entirely due to the defective and improper mooring and want of due care and skill on the part of the schooner's Master and crew, and plaintiffs' claim for a declaration that they are entitled to damages and costs and such further relief as the nature of the case may require.

The defendants by their statement of defence admit that they were the owners of the schooner *Beatrice S. Mack* which, on 14th November, 1918, was lying moored to the wharf at Fox River, her stern being towards the shore, and on the morning of that day plaintiffs' steam barge arrived at Fox River and moored at the same wharf close astern of the schooner with her bows towards the shore, the two vessels being stern to stern in close proximity to one another, and during the afternoon and evening of that day the wind and sea gradually arose until 9 P.M., when they reached the height of a heavy gale from the northeast, which further continued to increase in

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violence making it impossible for the schooner to leave her berth or put to sea; that every possible precaution was taken to make the schooner absolutely fast both by hawsers and ground tackle; that she was heavily anchored and attached to the wharf as securely as could possibly be done; in addition to her usual hawsers a wire cable and heavy manila hawsers were borrowed to secure her; that by two o'clock on the morning of 15th November the wind had reached hurricane force and the sea was running at such a height that it reached half way up the masts of the schooner and was continuously breaking over the wharf and the schooner, the storm being the worst within the memory of the inhabitants of the locality; that those on board the schooner used every possible effort which good seamanship and determination could devise or apply to see that the hawsers strained evenly and that the schooner kept her berth, but shortly after 2 A.M. the wharf moorings parted and the schooner started to drift towards the shore and in doing so her main boom came into contact with the stern of the *A. Tremblay*, injured the planking thereof and carried away part of the railing surrounding the superstructure; that at the time the schooner had received and was receiving very severe injuries and was pounding heavily against the wharf and bottom and it was then resolved that the only chance for the safety of those on board was to slip her anchor chain and let her go ashore, which was done; after the collision, the *A. Tremblay* was found to be aground at her bows at low tide but got off under her own steam and proceeded to sea and was navigated without repairs, subsequently went ashore at Ile Rouge, and later on was in collision at or near Quebec, and the only damages caused by the

contact between the schooner and the *A. Tremblay* is of little or no pecuniary consequence, and the damages resulting from the said contact or collision is due to *vis major* and the act of God and is in no respect or manner imputable to the defendants;

The plaintiffs by their reply deny the statement contained in the defence, except the admission that defendants were the owners of the schooner and that, early in the morning of 15th November, 1918, she parted her wharf moorings and started to drift towards the shore.

The schooner *Beatrice S. Mack*, 100 feet long, 24 feet wide, drawing 13 feet aft and 8 feet forward and having a crew of six all told and of 99 tons net register, arrived at Fox River wharf, in the Province of Quebec, on the morning of 13th November, 1918. As she approached the wharf a large anchor weighing about 1,200 pounds on a chain suitable for a 250 ton ship was put out and the schooner moored on the southwest side and near the outer end of the wharf running out about 900 feet from the shore. The anchor was leading forward with 45 or 50 fathoms of chain. The schooner was moored to the wharf by two manila lines leading forward and one aft. Cargo was discharged during that and the following day. On the following morning, 14th November, the plaintiffs' steam barge, 111 feet long, 28 feet wide, and having a registered tonnage of 147 tons, arrived and tied up to the same side of the wharf facing the shore and a short distance astern of the schooner. Between 4 and 5 P.M. on November 14th there were indications of bad weather ahead; the moorings of the plaintiffs' barge were doubled and the Master of the defendants' schooner borrowed a half inch wire cable and two large manila hawsers two and

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three quarters in diameter and having a circumference of seven and three quarter inches. These two large hawsers were put out as "springs," one being attached from the foremast forward to the wharf, the other from the aftmast and attached to the wharf leading astern. When these and other additional lines were put out the defendants' schooner had five lines and the anchor leading forward and four lines leading aft. These lines were considered by the Master of the Schooner, who had over twenty years' experience as a seaman, to be sufficient to securely hold the schooner in safety. The weather during the evening became very bad; there was another hawser on board one and a quarter inches in diameter and five inches in circumference which the Master tried to put out later, but was unable to do so owing to the sea coming over the wharf and the wind which was blowing hard from the northeast. As the night advanced the wind increased and the sea became more tempestuous until the storm reached its height near midnight. The wharf ran out to the northwest, the wind was from the northeast and the sea came against the wharf practically at right angles, went over it to a depth of eight or ten feet and then over the schooner, carrying away barrels on the wharf and anything that was loose on the schooner; some skylights on the schooner also were broken. During the night all possible attention was given to the lines on the schooner, slacking them when it was necessary, in order that they might all work together. About 2 A.M. on the morning of 15th November, when the wind was blowing, what several of the witnesses called *a gale*, a heavy sea, which some of the witnesses called *a tidal wave* and others *un raz de marée*, came over the wharf and schooner and the lines leading forward

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from the schooner to the wharf parted, the anchor dragged and the schooner began to drift astern, its main boom came into collision with the barge and began to beat violently against it. As the anchor was dragging and it was impossible to put to sea, the Master of the schooner thought it more prudent to let the anchor go and drift ashore in the hope of saving the lives of his crew. The schooner went ashore and became a total loss. The evidence shows that the storm was one of the worst which had occurred within the memory of the witnesses on the Gaspe coast. Several fishing boats and barges at Fox River and in the vicinity were driven ashore during the night.

In this case the plaintiffs' barge was moored to the wharf when the defendants' schooner broke loose from its moorings and collided with the barge. These facts are established by witnesses called on Plaintiffs' behalf and constituted a prima facie case against defendants, and the onus of proof was then shifted and the defendants were called upon to explain the cause of the collision and that it was due to inevitable accident. The defence of inevitable accident is well known in Maritime Law and the principles upon which it is applied are stated in the following cases:—

In the *Europa*, (1) Dr. Lushington said, page 629:—

"Inevitable accident is where one vessel, doing a lawful act, without any intention of harm, and using proper precaution to prevent danger, unfortunately happens to run into another vessel..... But it should be observed, that the caution which the law requires is not the utmost caution that can be used. The law is not so extravagant as to require that a man should possess that mind, and understanding, and

(1) 14 Jurist 627.

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firmness of purpose, as always to do what is right to the very letter. If it were so, it is obvious that the demands of the law would be seldom satisfied. It is sufficient that a reasonable precaution be taken, such as is usual and ordinary in similar cases—such as has been found, by long experience, in the ordinary course of things, to answer the end—the end being the safety of life and property."

In *The Thomas Powell* vs. *The Cuba*, (2) Dr. Lushington said:—

"To constitute an inevitable accident it was necessary that the occurrence should have taken place in such a manner as not to have been capable of being prevented by ordinary skill and ordinary diligence. We were not to expect extraordinary skill or extraordinary diligence, but that degree of skill and that degree of diligence which is generally to be found in persons who discharge their duty."

In *The Uhla*, (3) Dr. Lushington said:—

"Inevitable accident is that which a party charged with an offence could not possibly prevent by the exercise of ordinary care, caution and maritime skill. It is not enough to show that the accident could not be prevented by the party at the very moment it occurred, but the question is, what previous measures have been adopted to render the occurrence of it less probable.

The caution which the law requires is not the utmost that can be used, it is sufficient that it be reasonable, such as is usual in ordinary and similar cases, such as has been found by long experience in the ordinary course of things to answer the end, that end being the safety of life and property. I bring your attention

(2) 14 L. T. (N.S.) 603. (3) 19 L.T. (N.S.) 89–(See 90).

particularly to that, because we must not expect in vessels of this kind, that the master and crew should be possessed of such ordinary nautical skill that they would be quite certain to discover that which is the best to be done, and quite certain to do it; but we look at the general degree of intelligence, care, and caution which we find in people of the same description."

In the *Marpesia*, (4) Sir James Covile, in rendering the judgment of the Privy Council, said at page 219:—

"In the case of the *Bolina* (5) Dr. Lushington says:—With regard to inevitable accident, the onus lies on those who bring a complaint against a Vessel, and who seek to be indemnified,—on them is the onus of proving that the blame does attach upon the Vessel proceeded against; the onus of proving inevitable accident does not necessarily attach to that Vessel; it is only necessary when you show a prima facie case of negligence and want of due seamanship.

"Again in the case of *The Virgil*, (6) the same learned Judge gives the definition of inevitable accident:—"In my apprehension, an inevitable accident in point of law is this: viz., that which the party charged with the offence could not possibly prevent by the exercise of ordinary care, caution and maritime skill. If a Vessel charged with having occasioned a collision should be sailing at the rate of eight or nine miles an hour, when she ought to have proceeded only at the speed of three or four, it will be no valid excuse for the Master to aver that he could not prevent the accident at the moment it occurred, if he could have used measures of precaution that would have rendered the accident less probable."

(4) L.R. 4, P.C. 212. (5) 3 Note of Cases, p. 208, at p. 210.
(6) 2 Wm. Rob., p. 201, at p. 205.

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"Here we have to satisfy ourselves that something was done or omitted to be done, which a person exercising ordinary care, caution and maritime skill, in the circumstances, either would not have done or would not have left undone, as the case may be."

In *The William Lindsay* (7) Sir Montague E. Smith, in delivering the judgment of the Judicial Committee, said at page 343:—

"The master is bound to take all reasonable precautions to prevent his ship doing damage to others. It would be going too far to hold his owners to be responsible, because he may have omitted some possible precaution which the event suggests he might have resorted to. The true rule is that he must take all such precautions as a man of ordinary prudence and skill, exercising reasonable foresight, would use to avert danger in the circumstances in which he may happen to be placed."

In *The Merchant Prince* (8) in the Court of Appeal, Lord Esher, M.R., at page 187 said:—

"The great object of the judges in Admiralty cases has been to lay down a plain rule to govern the acts of sailors, and not to have niceties of argument about what they are to do; and the plain rule which they have laid down is this:—Unless you can get rid of it, it is negligence proved against you that you have run into a ship at anchor. The only way for a man to get rid of that which circumstances prove against him as negligence is to show that it occurred by an accident which was inevitable by him, that is an accident the cause of which was such that he could not by any act of his have avoided its results. He can only get

(7) L.R. 5, P.C. 338.
(8) 1892, P.D. 179.

rid of that proof against him by showing inevitable accident, that is by showing that the cause of the collision was a cause not produced by him, but a cause the result of which he could not avoid. Inevitable means unavoidable. Unavoidable means unavoidable by him."

Fry, L. J., p. 189, said:—

"The burden rests on the defendants to show inevitable accident. To sustain that the defendants must do one or other of two things. They must either show what was the cause of the accident, and show that the result of that cause was inevitable; or they must show all the possible causes, one or other of which produced the effect, and must further show with regard to every one of these possible causes that the result could not have been avoided. Unless they do one or other of these two things, it does not appear to me that they have shown inevitable accident."

"An inevitable accident is, according to the law laid down in the case of *The Marpesia*, Law Rep. 4, P.C. 212, that which cannot be avoided by the exercise of ordinary care and caution and maritime skill."

The *Merchant Prince* is now regarded as the leading English case on the defence of inevitable accident and has been followed in a number of cases in the Canadian Courts, some of which are referred to in Mayers Admiralty Law and Practice, pp. 146-147.

The immediate cause of the collision in this case was the irresistible force of the wind and waves, which caused the moorings of the schooner to break, and the question *which the Court has to decide is:*—Did the Master of the schooner, on the evening preceding, exercise ordinary care, caution and maritime skill when he tied up his schooner for the night with five

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lines and an anchor leading forward and four lines leading aft? Were these all the reasonable and ordinary precautions, in the circumstances of the case, which a Master in his position and for a vessel of the size of the defendants' schooner, should have taken to ensure her safety? As has been said by Dr. Lushington, the caution which the law requires is not the utmost caution which can be used, and we are not to expect extraordinary skill, but it is *sufficient if the caution and skill bs reasonable and such as is usual in ordinary and similar cases*. The schooner was a small vessel of 99 tons and we must not expect in vessels of that kind that the Master and crew should be possessed of such extraordinary nautical skill that they would be quite certain to discover and apply what was the very best thing to be done. The true rule as laid down by the Privy Council is, that the *Master must take* all such precautions as a man of ordinary prudence and skill exercising reasonable foresight would use to avert danger in the circumstances in which he may happen to be placed, and his owners are not to be held responsible for what cannot be avoided by the exercise of ordinary care, caution and maritime skill. Until late in the afternoon before the accident the schooner was moored by the anchor and two lines leading forward and one line leading aft. These lines were five inches in circumference and about one inch and a half in diameter. When the additional lines were put out there were five lines and the anchor leading forward and four lines leading aft. The large lines, one forward and one aft, had a circumference of seven and three-quarter inches. A reference to standard Engineering Works of authors of repute show that the breaking strain of the large lines was about twenty tons each,

and the small lines nine or ten tons each, which shows that there must have been a tremendous strain on the forward lines before they broke. The schooner was moored on the lee side of the wharf and the moorings only gave way when the tidal wave came over wharf and schooner to a depth of eight or ten feet. It is established that the storm was one of the worst on the Gaspé coast during the last twenty-five years. Other shipping at Fox River was driven ashore by the force of the storm. When the forward moorings of the schooner parted, it is proved that it was quite impossible for the schooner to have put to sea. The Master of the plaintiffs' barge had chosen the berth where he tied up immediately astern of the schooner and so close to the schooner that as soon as the schooner broke loose its boom came into contact with the barge. Plaintiffs' Counsel suggested that another small anchor on board the schooner should have been used. That anchor was ready for use and had a chain attached to it, but it was quite impracticable to make any effective use of it when the moorings parted. The plaintiffs also suggested that another cable which the schooner had on board should have been put out when the weather got dirty, but it is proved that in the course of the night, when the sea became boisterous and the wind high, it was impossible for any one to go on the wharf and attach any additional ropes or cables to the posts on the wharf.

This case has to be considered in the light of the situation on the evening before the accident, and I have to decide if the Master of the schooner omitted to do something which a person exercising ordinary care, caution and maritime skill in the circumstances would not have left undone. The violent storm with

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the tidal wave which came on some hours later could not have been foreseen. The additional moorings in the circumstances were more than sufficient under ordinary circumstances, they were in fact extraordinary precautions against the possibility of a bad night, but unfortunately proved insufficient and, in my opinion, it would be going too far to hold the owners responsible because the Master had not the extraordinary foresight to take some additional measures which would have withstood the force of the wind and sea in one of the worst storms ever known on the coast.

Evidence was adduced at the trial as to the extent of the damages to the plaintiffs' barge and the cost of the repairs, but I refrain from expressing any opinion in this phase of the case, as I have come to the conclusion that reasonable care, caution and maritime skill were exercised and did not and could not prevent the accident, and that the defence of inevitable accident has been fully established.

In these circumstances, the loss must rest where it has fallen, and there will be judgment dismissing the action with costs.

Judgment accordingly.

Solicitors for plaintiffs: *Pentland, Gravel & Thomson.*
Solicitors for defendants: *Greenshields, Greenshields, Languedoc & Parkins.*