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BETWEEN:

JULIUS BARTH .....(PLAINTIFF) APPELLANT,

AND

B.C. WATER TRANSPORT CO. LTD. .....(DEFENDANT) } RESPONDENT.

Shipping—Collision between vessel and moored boom of logs—Failure to display proper lights on boom sole cause of collision—Vessel not "at anchor"—Article 11—Damages—Appeal allowed.

Appellant's fishing vessel sank and was a total loss following a collision with a moored boom of logs in charge of respondent's vessel. The trial judge found that the negligence of both the master and the mate of appellant's vessel caused the loss. On appeal this Court found no negligence on the part of the officers in charge of appellant's vessel and also found that respondent's vessel and the boom of logs were not properly lighted.

Held: That the failure of the master of respondent's vessel to display a suitable warning light, properly located and clearly visible from vessels approaching from the east, was the sole and effective cause of the collision.

2. That since the respondent's vessel was attached to the boom of logs and the boom attached to the shore, neither being attached to the ground, the vessel was not at anchor within the meaning of Article 11 of the Rules of the Road.

APPEAL from the judgment of the District Judge in Admiralty for the British Columbia Admiralty District.

The appeal was heard before the Honourable Mr. Justice Cameron at Vancouver.

G. F. McMaster and *F. H. H. Parkes* for appellant.

J. L. Farris, Q.C. and *A. D. Pool* for respondent.

The facts and questions of law raised are stated in the reasons for judgment.

CAMERON J. now (August 18, 1954) delivered the following judgment:

This is an appeal from the judgment of Mr. Justice Sidney Smith, Deputy Judge in Admiralty of the British Columbia Admiralty District, dated April 27, 1953, by which he dismissed the appellant's claim for damages arising out of a collision on October 8, 1950. Briefly, the circumstances were that the appellant's fishing vessel *Hummingbird No. 2,* at about 1:30 a.m. on that date was proceeding up the west coast of British Columbia and in Thulin Passage collided with a moored boom of logs in charge of the respondent's vessel, the tug *Hecate Straits.* The fishing vessel was holed, took water rapidly, sank shortly thereafter and became a total loss. The appellant claimed damages in the sum of $13,651.00, or in the alternative, damages occasioned by the failure of the Master of the respondent's vessel to perform his duty subsequent to the said collision, as required by the provisions of the Canada Shipping Act.

Many of the facts are not in dispute. On the preceding day the defendant's tug, the *Hecate Straits,* was proceeding from Port MacNichol to Victoria, towing a boom of logs. The weather was bad and the Master of the tug, Captain H. P. Ebbie, decided to put into Thulin Passage and to remain there until the weather improved. Thulin Passage is shown on the chart (Exhibit 2). It lies between Copeland Islands (commonly known as Ragged Islands) and the mainland. It will be convenient for the purposes of this case to assume that Thulin Passage runs east and west; it is approximately two miles in length. The tow consisted of three booms of logs, each approximately 65 feet in width, which were towed abreast. On reaching the position marked

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A to B on Exhibit 2, the boom was tied up to the north shore by means of chains attached to rocks on the shore, which chains had been placed there for that purpose. The boom consisted of 18 sections, each section being about 66 feet in length so that the overall length of the boom was about 1,200 feet. The tug, facing east, was then tied up to the outer side of the boom and about two sections from the head-end, this operation being completed by 6 p.m. on October 7. It is agreed that the head-end of the boom was approximately 198 feet in overall width. Captain Ebbie said that as he was prepared for towing, he had placed two coal oil lamps of standard equipment on the boom, one in the centre of the head-end and one in the centre of the tail. He had also placed a similar type of coal oil lantern on the stanchion below the flying bridge on the tug. Later herein it will be necessary to state more particularly the exact position of that light and the extent to which it was visible from vessels approaching it from the east.

The fairway through Thulin Passage at that point was stated by Captain Ebbie to be approximately 400 feet wide and, except possibly for a few rocks on either shore, the fairway comprised the full width of the channel; there is no evidence to the contrary. In his judgment, the learned trial Judge stated that the channel at that point was 600 feet in width and he therefore concluded that two-thirds of the fairway was left free. In fact, however, and taking into consideration the width of the tug itself, less than half of the fairway was left free. Captain Ebbie agreed that at that point it is a "narrow channel" within the rules.

The plaintiff's fishing vessel, 43 feet long, 11 feet beam and 17 tons gross tonnage, at about 1:30 a.m. on October 8 was at the easterly end of the passage on its way to the north and was manned by the plaintiff as Master and by one Vincent Williams as Mate. It had left Vancouver at 4 p.m. on October 7 and was proceeding northerly. The Master had no papers but had been fishing up and down the coast for fourteen years and was familiar with Thulin Passage. The weather was not good on account of rain and mist and a slight sea was running. The vessel was travelling at a speed of about 7 knots, or slightly less, and when about one mile easterly of the boom, both the Master and Mate observed a single white light ahead on the starboard side.

The Master then went below to make a routine check of the engine, leaving the Mate at the wheel. No special instructions were given to the Mate to reduce speed or to take any special precautions because of the light which had been observed, and at that point neither the Master nor the Mate knew what the light indicated. Speed was not reduced thereafter to any appreciable extent, but the Mate steered the vessel so as to pass the light about 70 feet to the south thereof. About 10 minutes after the Mate had taken charge, the vessel struck the boom head-on at a point about 10 feet from its southerly limit. The Master, who had remained below, came on deck and both he and the Mate jumped on the boom. As I have said, the vessel was holed, took water rapidly, and in about one and one-half hours sank. Unsuccessful efforts were made later to salvage the vessel, but it could not be located. Both Master and Mate stated that they had not seen the tug or the boom itself until after the collision, that they saw no warning light on the tug at any time and that the only light which they saw prior to the collision was that on the fore end of the boom itself.

The contention of the appellant was that the boom light should have been at the southeast corner to mark its extreme limit in the fairway, but that view was not upheld by the learned trial Judge. The appellant also contends that there should have been a light on the tug clearly visible around the horizon and that it had no such light. The learned trial Judge found the Master (appellant) negligent in leaving the Mate alone in the wheelhouse at the entrance to the "dangerous channel", having seen a light whose meaning he failed to identify. He also found the Mate negligent in that he should have realized the likelihood of the light marking a boom, the precise position of which was obscure, and that he should have reduced speed in ample time until the position was clarified. He found that both the Master and Mate were experienced coasting men but was of the opinion that their experience bred a casual overconfidence which led to disaster.

Both the Master and Mate were familiar with Thulin Passage and knew that tugs frequently tied up tows of logs therein. Further to the west of the point where the collision occurred, there is a bight and the channel widens appreciably. Williams, the Mate, had at times seen three booms

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of logs tied up abreast in the wider area, but had never seen as many as three tied up abreast in the narrow part of the channel where the collision occurred. He knew that when a boom of logs was in tow, it was customary to have one white light centrally located in the fore-end and one similarly placed in the tail, and that a single boom is normally about 65 feet in width. On the evidence, I think it must be found that while he did not actually see the boom until the collision occurred, he assumed that the single light which he had observed was located on a single boom and therefore steered his vessel 70 to 75 feet to the south thereof so as to entirely clear it.

His evidence was that as rain was collecting on the window of the pilot house, he had opened it and was steering with his head out of the window. The learned trial Judge made no finding that Williams was not keeping a proper lookout from the time the light was first observed until the impact and on the evidence I think it is clear that he was keeping a proper lookout at all relevant times. At no time prior to the collision, did he see any warning light other than the one on the fore-end of the boom.

It becomes necessary now to consider the position of the single light on the tug itself. The finding of the trial Judge was that "the tug was exhibiting a white light on her starboard railing opposite the fore-end of the house". He also found that the lights of both tug and boom were the ordinary coal oil lanterns, that they were properly placed, and at material times were burning brightly. Exhibit 3 is a photograph of the starboard side of the tug, and at the trial I asked counsel to agree as to the precise location of the light on the tug and to mark its position on the photograph. That was done and it appears thereon as a red dot. Its position as so marked is in accordance with the evidence of the tug captain that it was placed on the starboard rail and lashed to the rear stanchion which supports the flying bridge. Captain Ebbie also stated that it was about 10 feet above the water, that the house extended from 6 to 8 feet forward of the light, that there were a couple of ventilator pipes also (I assume that he means forward of the light), and that the railing rises as it goes forward. He also agreed that vessels approaching from the east, as was the appellant's vessel, would approach the tug from its (the tug's) port side. At

first Captain Ebbie said that none of the house was ahead of the light and "there is nothing there that can obscure the light whatsoever". When shown the photograph Exhibit 3, however, he admitted that the house extended 8 or 10 feet forward of the light, that the rise in the railing tended to obscure the light from the vision of the person approaching from the port side "if he got real close", and finally he agreed that if a vessel were approaching on the port side of the centre line of the tug, the light could not be seen from that vessel. He stated, also, that to the east of the point of collision "the channel bends to port, quite a lot, and widens". Moreover, an inspection of the photograph Exhibit 3 also leads to the conclusion that the light on the tug was placed in such a position that it would not be visible from a vessel on the course taken by the *Hummingbird No. 2*—a small fishing vessel low in the water. It was placed on the level of the railing at that point, but forward the railing rises noticeably and at the bow it is apparently 2 or 3 feet above the level of the light.

In view of the evidence that the fishing vessel was approaching the tug on the tug's port side, these admissions of Captain Ebbie, coupled with the evidence of Williams that he was keeping a careful lookout and saw no light on the tug, and that of Barth that he did not see the tug light but did see the light on the boom, are sufficient in my opinion to establish that the light on the tug was so placed that it could not be seen by vessels approaching from the east and which were keeping to the starboard side of the narrow channel as they were required to do (Art. 25).

The appellant submits that under the circumstances disclosed, the tug was "at anchor" and that therefore it was bound to carry the light required in Art. 11, the applicable part of which is as follows:

> A vessel under 150 feet in length, when at anchor, shall carry forward, where it can best be seen, but at a height not exceeding 20 feet above the hull, a white light in a lantern so constructed as to show a clear, uniform, and unbroken light visible all round the horizon at a distance of at least 1 mile.

At the trial, counsel for the appellant introduced as part of his case certain portions of the examination for discovery of Captain Ebbie, including the following:

> Q. 128. Now, did you consider that you were at anchor?
> A. Yes.

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Over the objection of counsel for the respondent that the opinion of the Master was irrelevant, the learned trial Judge allowed the question and answer to be read. At the appeal, counsel for the appellant referred to that question, but counsel for the respondent again objected to its admissibility on similar grounds, and also on the ground that the question as to whether the ship was or was not "at anchor" was a question of law to be determined by the Court in the light of the evidence adduced.

The question, however, was not whether the ship was at anchor—a question of law to be determined by the Court—but rather whether the witness considered it to be at anchor, as indicative of his state of mind as to the existing conditions and what, in view of those conditions, he actually did to comply with the regulations. In that view of the matter, I think it was admissible. Captain Ebbie agreed that an anchor light would be visible all round the horizon, which obviously and admittedly was not the case with the tug light.

The exact meaning to be attached to the words "at anchor" has been the subject of controversy, *Marsden's Collisions at Sea,* 10th Ed., p. 460. For example, a tug lying moored to a pontoon landing-stage in a river, *The Turquoise* (1), and a trawler moored outside another trawler at a quay, *The Esk and the Gitana* (2), have been held not to be "at anchor". In Marsden the following appears at p. 461:

> It is submitted, that in the light of these cases, the true meaning to be attached to the words "at anchor", is the meaning which they would appear naturally to bear, and that a vessel "at anchor" is a vessel which is in fact being held to an anchor, such an anchor being effectively, even if unwillingly owing to its having fouled an obstruction, employed for its normal purpose, that is, of keeping the ship in a fixed relation to the ground, or else fast to moorings which are themselves attached to the ground by an anchor or the equivalent of an anchor.

Now, in the present case the tug was attached to the boom and the boom was attached to the shore; neither was attached to the ground. Applying the principles set forth in the above cases, I am of the opinion that the tug was not then "at anchor" within the meaning of that expression in Article 11 of the Regulations.

(1) (1908) P.D. 148. (2) L. R. 2 Adm. Ecc. 350.

On p. 461 of the same text, the author, in a footnote, submits that when a vessel is made fast in a fairway, although she may not be "at anchor" within the Rules, good seamanship may demand the exhibition of an anchor light, and reference is made to the *City of Seattle* (1).

Counsel for the respondent submits that the tug master would have been wrong in placing an anchor light on the tug; that such a light would have been deceptive as indicating that an approaching vessel could have assumed that it could pass on either side of the tug, which, of course, it could not do in safety under these circumstances. I do not think, however, that I have to decide that particular point.

Article 29 of the 1910 Regulations is as follows:

> Nothing in these Rules shall exonerate any vessel, or the owner, or Master, or crew thereof, from the consequences of any neglect to carry lights or signals, or of any neglect to keep a proper-lookout, or of the neglect of any precaution which may be required by the ordinary practice of seamen, or by the special circumstances of the case.

Now there is evidence as to the precautions which are taken by tugs with tows sheltering in the narrow channel to give warning of the position of the tug and booms. Certain questions put to Captain Ebbie in his examination for discovery formed part of the appellant's case at the trial, and are as follows:

82. Q. Now, in that particular position have you ever seen the booms that are moored there with lights on them?
A. Yes. Generally we had lights.
87. Q. I was referring to the width of the booms.
A. Yes. The boat—the tug is generally moored outside of the booms; so the width is more indicated by the tug more than by the boom itself, that might have a light on it, but the tug always has a light on it.
88. Q. But you have seen booms with lights on them?
A. Yes.
89. Q. Now, has that light been on the outside boom?
A. Yes.
90. Q. And would you agree with me that if there was more than one boom that it would be safer to place the light on the outside boom?
A. Yes. Well, there is a lot of tugs there and we had a boom in a sort of exposed position. We always put a light right on the extreme corner so as to avoid accidents.
91. Q. The purpose of putting a light on would be to warn ships passing through?
A. That is right.

(1) (1904) 9 Ex. C.R. 146.

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92. Q. Of the presence of the boom?
A. Yes.

93. Q. So you think the safer position is on the outside corner?
A. Yes, that is right.

100. Q. Was there no light at all on the boom on the outside corner?
A. No.

That evidence indicates that the ordinary and proper practice of seamen in the particular circumstances of this case, where three booms of logs were moored abreast and projected into the centre of the fairway was to place at least one warning light on the boom itself and another similar warning light either on the extreme south corner of the fore-end of the boom, or, when the tug was lashed to the outer edge of the boom, then on a suitable place on the tug itself, thereby marking the limit to which the boom, or the tug and boom, extended into the fairway. Common prudence demands that tugs and tows appropriating one-half of a channel should use care to employ adequate means to make their presence and position known.

I think Captain Ebbie fully realized the necessity of giving adequate warning of the position of the tug and boom in the narrow and dangerous channel and that he was—to use his own words—"in an exposed position". Moreover, I think he intended to comply with what he knew was required by the ordinary practice of seamen in the special circumstances of the case by placing lights in the centre of the fore-end and tail of the boom, and also on his tug. Unfortunately, however, the location which he chose for the light on the tug was wholly unsuitable for the purpose for which it was intended; obscured as it was by the house and the railing it was wholly useless as a warning to vessels such as that of the plaintiff approaching from the east on the north side of the fairway. There is evidence, also, that on the same occasion another tug and tow of logs also operated by the respondent company, was similarly moored in the channel immediately to the west, and that that tug carried a riding light in the rigging, and a white light on the outside of the boom itself.

In my opinion, the failure to exhibit a light suitably located, either on the extreme south corner of the fore-end of the boom or on the tug itself, or on both, was under these circumstances, negligence on the part of the Master of the

tug. In my opinion, also, the conclusion is inescapable that his negligence in that regard caused or contributed to the collision. Had the light on the tug been properly placed, the position of the obstruction in the channel would undoubtedly have been observed by Williams and he would have been able to alter his course so as to avoid it.

There remains the question as to whether there was any negligence on the part of the Captain or Mate of the *Hummingbird*. The learned trial Judge found that both were negligent in the manner I have stated above. At the trial some effort was made to establish that Williams—the mate—was unable to keep a proper lookout on the ground that he was blinded by the light in the pilot house. The trial Judge made no finding on that point and it was not stressed before me. On the evidence as I read it, that contention cannot be supported.

With the greatest respect, I find myself unable to agree with these findings of the learned trial Judge whose very great experience in these matters is well known. He found that the appellant was negligent in leaving the Mate alone in the wheelhouse at the entrance to a dangerous channel when he had seen a light whose meaning he failed to identify. Now the evidence is that both the Master and Mate were fully acquainted with Thulin Passage and knew that tugs with booms of logs took shelter there in bad weather. There is nothing to suggest that had the Master remained at the wheel or in the wheelhouse he would have been more observant or would have followed a course other than that taken by the Mate. Each knew from the position of the light which they had observed, that the light was in the fairway, and since that was the only light observed, each was entitled to assume that whatever it represented was not underway. From past experience, each knew that it was either on a vessel or on a boom of logs. Each was entitled to assume that whether it was a vessel, a boom, or a tug and boom, its position and the extent to which it projected into the fairway would be marked by a warning light. I am quite unable to find that the result would have been otherwise than it was had the Master not gone below to attend to the engine.

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The learned trial Judge found the Mate—Williams—to have been negligent in failing to realize the likelihood of the light marking a boom, the precise position of which was obscure. I think the evidence is clear that the Mate did realize that possibility and that if it were not a boom it was probably a tug or other vessel moored in some way to the shore. But as I have said above, I think he was entitled to assume that no matter what it was, its position and the extent to which it projected into and blocked the fairway would be suitably marked by a warning light properly displayed. The Mate was also found to have been negligent in not having reduced speed in ample time until the position was clarified. The speed, as I have said, was about 7 knots or perhaps somewhat less over the ground as the vessel was "bucking the tide". I do not consider that speed to have been excessive for a vessel of that type, under the circumstances. It was a small craft capable of being rapidly manoeuvred and under all the circumstances I think the speed must be considered to have been moderate.

In my opinion, the failure of the tug Master to display a suitable warning light, properly located and clearly visible from vessels approaching from the east, was the sole and effective cause of the collision, and the respondent is therefore liable for such loss as the appellant has sustained by reason of the loss of his vessel, all apparel, gear and stores.

It is not necessary, therefore, to consider the other submissions advanced on behalf of the appellant, namely, that the respondent had failed to comply with the provisions of sections 2 and 4 of the Navigable Waters Protection Act, R.S.C. 1927, c. 140; and that the damage sustained by the appellant resulted from the failure of the respondent, its servants or agents to render assistance following the collision.

The appeal will therefore be allowed and the judgment below set aside. There will be a declaration that the appellant is entitled to recover from the respondent such damages as he has sustained by the loss of his vessel *Hummingbird No. 2*, its apparel, gear and stores, together with his costs below and on this appeal, as well as such costs as may be occasioned in the Court below in the ascertainment of the damages to be awarded to the appellant. The matter will

be referred back to the District Judge of the British Columbia Admiralty District to ascertain and fix the amount of such damages, either personally or by a reference as he may direct, or as the parties may agree.

Judgment accordingly.

Reasons for judgment of Sidney Smith, D.J.A.:—

The plaintiff's fishing vessel *Humming Bird No. 2*, 41 feet long, 11 feet beam, and 17 tons gross tonnage, at about 1.30 a.m. on 8th October, 1950, was at the southerly entrance to Thulin Passage between Copeland Islands (commonly known as Ragged Islands) and the mainland on her way through the passage on a voyage to the northward. She was proceeding at the rate of 7 knots (her registered speed), and was manned by the plaintiff as Master and one, Vincent Williams, as Mate. At this time the latter relieved the Master at the wheel, and both saw a white light on the starboard side of the channel, a mile or so away. The channel is 2 miles long, and varies in width from half a mile to 600 feet. The weather was hazy, rainy, and the visibility poor. Logs in the water could not be seen till close by. The Master went below to have a look at the engine (which required no special attention other than a check of oil and water) and remained there till after the collision some 10 minutes later. He apparently gave no instructions to the Mate who proceeded without reducing speed, heedless of what the light indicated. It was in fact attached to the fore end of a boom which had been brought thither that day by defendant's tug *Hecate Straits* seeking shelter from a southeasterly wind and sea, then prevailing. The boom was tied up snugly along the shore of the mainland, in the narrow part of the channel. It consisted of 54 sections fastened three abreast, and so about 1200 feet long. The total width was about 200 feet. This left a free passage of 400 feet. The head of the boom was to the eastward, and the tug was made fast alongside, heading in the same direction, and almost 130 feet from that end of the boom. The tug was exhibiting a white light on her starboard railing, opposite the fore end of the house. I find the lights on both tug and boom were the ordinary standard coal-oil lanterns, were properly placed and at material times burning brightly. The tug light was seen by neither the plaintiff nor his Mate. I find there was nothing unusual or improper in the position of the boom from the point of view of traffic up and down.

In these circumstances the *Humming Bird No. 2* crashed into the corner of the boom, and shortly thereafter sank. The men saved their lives by jumping on the boom. The light seen by the Master and Mate was attached to the centre of the boom at the fore end. There was a similar, and similarly placed, light at the after end. The plaintiff and his Mate conceded this was the orthodox way of placing lights on booms, whether under way or sheltering from the weather. They both conceded, too, that Thulin Passage was a recognized shelter area in storms, and made constant use of by tugs with tows. Their complaint was that the boom light should have been at the corner of the boom and not half way across the width of it. But the evidence, including their own, fails to bear this out.

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I find the Master negligent in leaving the Mate alone in the wheel-house at the entrance to this dangerous channel, having seen a light whose meaning he failed to identify. I also find the Mate negligent. He should have realized the likelihood of the light marking a boom, the precise position of which was obscure, and should have reduced speed in ample time until the situation was clarified. As it was, he saw nothing of the boom till the crash. They were both experienced coasting men, but I think their experience bred a casual over-confidence which in this instance led to disaster.

Two other points were raised: one that the placing of the boom there was an infringement of the provisions of the Navigable Waters Protection Act; I am of opinion that Act has no application in the circumstances here. The other, that those on the tug failed to render assistance when called upon to do so; but I accept the evidence of the tug's Master and Mate and find that this plea was not made good.

Plaintiff's counsel, Mr. Parkes, said all that could be said for his case; and, while natural sympathy makes the inclination lean towards a desire to compensate a fisherman who thus loses his vessel and thereby his means of livelihood, I must find that the claim fails and the action must be dismissed with costs.