ON APPEAL FROM THE NOVA SCOTIA ADMIRALTY DISTRICT

1925
Oct. 14.

BETWEEN:—

WENTWORTH N. MACDONALD (PLAINTIFF) ..... } APPELLANT;

AND

THE ATLANTIC SALVAGE CO. LTD. ET AL (DEFENDANTS) ..... } RESPONDENTS.

Shipping and Seamen - Collision—Passing vessel—Rule 24—Damages—Negligence

The *L.E.* had been aground on the northern entrance of the Strait of Canso and the *C.* having been successful in pulling her off shore was engaged in towing her at a distance of some three miles from shore, when the plaintiff's tug, the *A.* came to assist in the operations. The *A.* passed the C. and her tow port to port some distance away; she then pursued a circuitous course and coming about on a parallel course with the tug and tow, placed herself in a direct line between them and stopped, when she was struck on the stern by the tow and damaged so that she subsequently sank. Both the tug and tow were displaying all proper lights indicating they were under way.

Held (affirming the judgment of the Local Judge in Admiralty for the Nova Scotia Admiralty District) that the *A.* was an overtaking vessel and was bound, under the Rules, to keep clear of the overtaken vessel, and that the collision was entirely due to her blundering and unseamanlike conduct in misconceiving instead of properly appreciating the dangerous position into which she had wrongly placed herself.

(1) [1923] Ex. C.R. 56.

1925

MACDONALD v. THE ATLANTIC SALVAGE CO., LTD.

APPEAL from the judgment of the Local Judge in Admiralty for the Nova Scotia Admiralty District (1).

Halifax, 17th September, 1925.

Appeal now heard before the Honourable Mr. Justice Audette.

C. J. Burchell K.C. for the appellant.

W. C. Macdonald K.C. for the respondents.

The facts are stated in the reasons for judgment.

AUDETTE J., now this 14th September, 1924, delivered judgment.

I have read with great satisfaction the succinct but convincing reasons for judgment of the learned trial judge and

---

(1) The following are the reasons for judgment of Mellish L.J.A.:

(December 30, 1924.) This is an action for damages from collision. The SS. *Lake Elmsdale* had been ashore at the northern entrance to the Strait of Canso, near Cape Jack on the western side. The SS. *Canadienne* had been successful in pulling her off shore and was engaged in towing her off, when the plaintiff's tug boat, the *Alert* came presumably to assist the operation. The *Alert* came north out of the Strait and passed *La Canadienne* and her tow port to port some distance away. The *Alert* then came about on a parallel course with the tug and her tow and placing herself in a direct line between them stopped, when she was struck on the stern by the tow and damaged so that she subsequently sank. The tow was then proceeding very slowly and the *Alert* if alive, as she should have been, to the situation would have had no difficulty in keeping clear of the tow. The *Alert*, however, had not paid proper attention to the lights of the other tug and her tow but wrongly concluded that the *Lake Elmsdale* was still fast on the ground.

It is contended on behalf of the *Alert* that notwithstanding these facts and even admitting them (they were not admitted) that the tow must be held in some measure at least responsible for the accident. I cannot come to that conclusion. Neither of the other ships had I think any reason to suspect that the *Alert* would do what she did, viz: stop in front of the tow, and I cannot find either of defendants guilty of negligence under the circumstances. The accident occurred near midnight. And even if the *Alert* had been watched by the other ships in the closest and minutest way I am not at all satisfied that anything would have been discovered which would have made it the reasonable duty of either of the other vessels to have avoided or minimized the accident, or that they would then on such discovery have had the power to do so. And it is to be remembered that "it is not in the" mouth of those who have created the danger of the situation to be "minutely critical of the conduct of those whom they have, by their own fault involved in the danger." *U.S. Shipping Board* v. *Laird Line Ltd.* (93 L.J. P.C. 123.)

In my opinion therefore the plaintiff's action must be dismissed with costs.

I have much pleasure in concurring in every word he says in his determination of the case.

The facts of the case are indeed so clear that it appears to me quite obvious that there is no excuse or justification on behalf of the plaintiff's ship (*The Alert*) for placing herself in the position of peril which she did. Indeed, she left port under instruction to assist the tug in floating the *Elmsdale* which was aground on the shore; but when she arrived or met at about 10.30 hrs. p.m., the *Elmsdale,* which had been pulled off the shore at about 4.45 hrs., was being towed and the tug and the tow were three miles away from the shore with all nautical display from their lights indicating they were under way. After the *Alert* passed them port to port she circuited around, steamed in the same direction in a parallel course at a speed of about 2½ miles through the water, when she suddenly starboarded her helm, proceeded ahead and placed herself between the tug and the tow which were travelling at about 1½ miles through the water. The *Alert* then stopped her engines and thereby inevitably collided with the bow of the tow. She was also, under Rule 24, an overtaking vessel manoeuvring ahead on a parallel course, and she should therefore have kept clear of the overtaken vessel. The *Elmsdale* was not under power, she had stripped off all the blades of her propeller on a big bolder when she had grounded.

Counsel at bar on behalf of the appellant contended that the tow should have noticed when the *Alert* had stopped her engine and she should have steered clear of her. A doubtful manoeuvre, indeed, under the circumstances. *Inman* v. *Reck* (1). Moreover, the bow of the tow was about 30 feet above the water line and obstructed the view below. Why did not the *Alert* herself notice that the engine of the tug was all the time going? Why did she not govern herself accordingly?

The *Alert* had no excuse to place herself in such an unusually dangerous position and, as was held in *The Cape Breton* (2) if a steamer is following a course which may possibly appear unusual to other steamers, even when jus-

(1) [1868] L.R. 2 P.C. 25, at p. 34.

(2) [1904] 9 Ex. C.R. 67 at 116; 36 S.C.R. 564 at 579; [1907] A.C. 112.

1925

MACDONALD v. THE ATLANTIC SALVAGE CO., LTD.

Audette J.

tified by special reasons (and there were none here) she does so at her own risk and peril and ought to signal her intention, for the others have the right to assume that she will conform her course to the ordinary rules. See also *The Lancashire* (1). Having manoeuvred in such reckless position she had at her own risk and with proper signals to right herself back into the fairway. *The Glengariff* (2).

It is quite obvious that the collision was caused by the blundering navigation and unseamanlike conduct of the *Alert*, the appellant vessel, in misconceiving, instead of promptly appreciating, the dangerous position into which she had placed herself,—notwithstanding the proper lights which were displayed by both the tug and the tow indicating clearly they were under way,—and in not taking the proper steps to avoid the collision, such as sheering off sufficiently or otherwise as circumstances required, instead of persisting in her unseamanlike conduct which eventually brought her in collision with the respondent's vessel.

The appeal is accordingly dismissed with costs.

Judgment accordingly.