1949

Feb. 10 & 11
Mar. 30

BRITISH COLUMBIA ADMIRALTY DISTRICT

BETWEEN:

THE OWNERS OF THE M.S. *PACIFIC EXPRESS* ..... } PLAINTIFFS;

AND

THE TUG *SALVAGE PRINCESS*.. DEFENDANT.

Shipping—Ship "at home" struck by barge—Damages—Liabilty calculated on combined tonnage of tug and barge—Right to limitation of liability—Canada Shipping Act 1934, c. 44, s. 649.

Plaintiff ship while lying alongside the inner berth of the terminal dock in the harbour of Vancouver, B.C., and considered by the Court to be "at home" and entitled to assume she was in a place of safety, was struck by the corner of a barge which was being placed alongside her by defendant tug. The action is to recover compensation for the damages sustained by plaintiff ship.

Held: That the owners of the tug and barge are entitled to limit their liability under the provisions of the Canada Shipping Act, 1934, 24-25 Geo. V, c. 44, s. 649.

2. That the liability of the owners of defendant tug should be calculated on the combined tonnage of tug and barge.

ACTION for compensation for damages sustained by plaintiff ship when struck by barge being manoeuvered by defendant ship.

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The action was tried before the Honourable Mr. Justice Sidney Smith, District Judge in Admiralty for the British Columbia Admiralty District, at Vancouver, B.C.

F. A. Sheppard, K.C. and *W. G. Lane* for plaintiffs.

D. N. Hossie, K.C. and *Ghent Davis* for defendant.

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

SIDNEY SMITH D.J.A. now (March 30, 1949) delivered the following judgment:

In this action the owners of the Norwegian motor-vessel *Pacific Express* (3,400 tons gross, 387 feet long, 52 feet beam) claim compensation for damages sustained by their vessel, in her berth, when struck by the corner of a rectangular derrick-barge called the *Giant* (235 tons gross, 92 feet long, 38 feet beam) while the *Giant* was being placed alongside the *Pacific Express* by the defendant tug *Salvage Princess* (89 tons gross, 67 feet long, 18 feet beam) on 16th November 1946. Both tug and barge were then owned by the Pacific Dry-Dock & Salvage Co. Ltd., and the crew of both were in the employment of this company. On the day of the occurrence the plaintiff ship may be regarded as being "at home", and entitled to assume she was in a place of safety, *The City of Seattle* (1). It is therefore clear that if the collision be established, liability must follow as of course, for the defence is a simple denial of the striking, and negligence will be presumed.

The plaintiffs claimed in their writ $6,000; but as so often happens this proved an under-estimate of their losses. Accordingly I granted an amendment whereby this amount was increase to $20,000. I also granted an amendment to the defendant who sought to set up in its defence a right to limit its liability. As will appear later, this should have been accomplished by way of counter-claim.

The vessel was lying alongside the inside berth of the Terminal Dock with her starboard side next to the wharf, and so heading west. I am satisfied from the evidence and a consideration of the chart that this is one of the quietest

(1) (1903) 9 Ex. C R. 146 at 149.

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corners in Vancouver Harbour. On Friday the 15th November 1946 her No. 2 hold was inspected by the Chief Officer, preparatory to an expected visit from Mr. Robert Rennie (Lloyds Senior Surveyor at Vancouver) on the Monday, for the purpose of passing for fitness to receive refrigerated cargo. The Chief Officer found all in order. A bulk-head divides the after part of No. 2 hold from the fore part of the engine-room. On the same day the electrician was in that portion of the engine-room called the "schutzeroom," a small space four feet by twenty feet. This room is on the port side of the ship immediately abaft the bulk-head in question, and contains the instrument board for the electrical apparatus of the vessel. His object there and then was to change two fuses, and this he did. He too found everything in order.

On the Monday Rennie carried out the anticipated inspection, accompanied by the Chief Officer. In No. 2 hold they discovered that the ship's plating had been set inwards in the way of the bulk-head and the bulk-head itself damaged. On Monday also the electrician found certain electrical fittings in the "schutzeroom" dislocated and damaged. Later inspections disclosed that the ship's plating on the port side, at the bulk-head, had been indented for a length of nine feet and a height of three to four feet: that the deepest indent was two inches, tapering thence fore and aft, and up and down, to the extent mentioned. There was corresponding damage to the vessel members inside. This damage could only have been caused by a blow from the outside, occasioned at some time between the inspection on Friday, and its discovery on Monday. In effect the time interval may be narrowed, for on the Saturday afternoon the ship's port side was painted in the vicinity of and including the indented portion of plating. Subsequent examination showed this paint unmarred; so that the damage must have been caused between noon on Friday and the early afternoon of Saturday.

During that period the only craft of any consequence in any proximity to the vessel were the Barge *Giant* and the Tug *Salvage Princess*. On Saturday morning the tug berthed the *Giant* alongside for the purpose of hoisting some pistons out of the engine-room and conveying them

to North Vancouver for repairs. This was done. The tug had the barge made fast alongside her port side during the whole period. On Monday night the tug and barge returned with the pistons, which were then duly hoisted on board and replaced in the engine-room. The plaintiffs say that on the first arrival the starboard forward corner of the barge, while under control of the tug, struck the vessel's plating and did the damage which forms the subject of this action. In this I think they are right.

I accept in full the testimony of Rennie, an experienced ship's surveyor who gave his evidence with quiet confidence that was convincing. His inspection of the barge on the following Thursday revealed the starboard corner "which is massive wooden construction, (was) roughened and abraded and there were paint marks." These paint marks corresponded to the colour (gray) of the ship's side, corresponded in height above water to the dent in the ship's plating, and corresponded moreover to the position the barge would occupy for the purpose it had fulfilled. On the other hand, I do not think the defendant's witnesses told me the whole story. Given the known fact of the damage caused by an outside blow to the ship's plating there seemed no doubt, to me at least, in the surrounding circumstances, that such blow was occasioned by the starboard corner of the barge striking the ship. The only doubt I entertained was as to when the collision occurred—whether on arrival, while alongside, or when leaving. But after prolonged consideration and re-reading of all the evidence I am convinced that the collision took place on the arrival of the barge on the Saturday morning. There is direct evidence from the vessel's carpenter, Sture, confirming this view. I am not prepared to believe that the crew must necessarily have been aware of the blow. As Rennie says, "this was a welded ship of comparatively light structure" and again, "those dents are made much more easily than one would imagine." I am satisfied he has ample warrant for these views.

The plaintiff's witnesses (except Rennie and another who spoke only of the local conditions at the wharf) gave their evidence at Portland, Oregon, on commission. At that time evidence of a witness for the defendant was

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also taken. This was a surveyor who inspected the *Pacific Express* at Portland. At the trial the defendant chose not to put in this evidence. Having in mind the decision of my predecessor in this Court, Chief Justice Macdonald, in *Gogstad* v. *S.S. Camosun* (1), I held that the defendant had the right to take this stand. But I was thus deprived of the benefit of hearing this testimony, which was perhaps to be regretted.

I find the defendant liable for the damage sustained by the *Pacific Express*. I find such damage was done by the Barge *Giant* while under control of the Defendant Tug, and was due to the negligence of those on board the said tug, all of whom were the servants of the owners of both tug and barge. But on the evidence I also find the owners of tug and barge entitled to limit their liability under the provisions of the Canada Shipping Act 1934, Ch. 44, Sec. 649.

The question then arises whether such liability should be calculated on the tonnage of the tug, or of the barge, or on the combined tonnage of tug and barge. On the authority of *The Ran; The Graygarth* (2), and *The Harlow* (3), I think the calculation must be made on their combined tonnage. It is true that the tug alone is sued in this action: and the defendant therefore contends that the liability must be confined to her tonnage only. But, with respect, this view seems to involve some confusion of thought. A defendant by entering an absolute appearance in an action *in rem* thereby renders himself personally liable for the amount of any judgment that may be recovered against him in that action. *The Dupleix* (4); *The Joannis Vatis* (No. 2) (5); *The Valsesia* (6). The defendants here, by the judgment in this action, thus become personally liable for the total damage suffered by the plaintiff vessel. They now by way of counter-claim,—a quite different proceeding —seek to limit their liability. But to do this they must bring into account the tonnage of those of their vessels as may have contributed to the damage by actual impact, or by their momentum. Liability must be calculated on the aggregate tonnage of the wrong-doing mass. I think this is

(1) (1940) 56 B.C.R. 156.
(2) (1922) P. 80.
(3) (1922) P. 175.
(4) (1912) P. 8.
(5) (1922) P. 213.
(6) (1927) P. 115.

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the effect of *The Ran; The Graygarth* case *supra,* as explained in the *Harlow* case *supra.* Here the tonnage in question must be that of tug plus barge; for, to slightly modify the language of plaintiffs' submission, "the tug and derrick-barge were lashed together as a unit during the whole of the relevant period; it was a case of the one vessel, one owner, one master, one group of employees of that owner."

One final matter must be noted. The defendant should have raised its plea for limitation of liability in a counter-claim. It did not do so. The *Sonny Boy* (1). But the plaintiffs do not seek to take advantage of this omission and I therefore allow an appropriate amendment to be filed, so as to put the pleadings in order.

There will be judgment accordingly. Unless the parties can agree there will be a reference to the Registrar to assess the damages. Plaintiffs will have their costs.

Judgment accordingly.