1923
April 26.

TORONTO ADMIRALTY DISTRICT

CANADIAN DREDGING COMPANY.....PLAINTIFF;

VS.

THE NORTHERN NAVIGATION CO. AND THE CANADIAN TOWING & WRECKING CO. ..... } DEFENDANTS.

Shipping—Collision—Negligence—"One Ship"—Joint Liability—Necessity for proper lookout.

Held that in cases of collision the active and vigilant services of the man on the lookout, under circumstances when those propelling the ship necessarily rely upon him, are indispensable and necessary.

2. When two vessels are to blame for inflicting damage on a third vessel they are jointly liable for the whole damage and where, as in this case, the action is *in personam,* the defendants, the owners of the ships, are jointly liable.

Note: The expression "one ship" (ship and her tug) discussed.

ACTION (in personam) brought by the plaintiff against the defendants for damages resulting from the collision of a ship of the defendant navigation company, towed or propelled by a tug owned by the defendant, the Canadian Towing and Wrecking Company, with a dredge owned by the plaintiff company.

April 20, 21 and 23, 1923.

Case now heard before the Honourable Mr. Justice Hodgins at Toronto.

F. W. Grant and *W. G. F. Grant* for plaintiff;

F. Wilkinson for the Northern Navigation Company.

S. C. Wood K.C., and *G. M. Jarvis* for the Canadian Towing and Wrecking Company, Ltd.

The facts are set out in the reasons for judgment.

HODGINS, L.J.A. now (April 26, 1923) delivered judgment.

On the 19th August, 1919, the SS. *Huronic* belonging to the defendant navigation company, was in the Port Arthur Dry Dock. The tug *Sarnia,* belonging to the defendant towing company was sent to assist her out of the dock, and to tow her to the passenger dock in Port Arthur harbour.

These two vessels on their way from that dock, came into a position which resulted in a collision with the dredge *Excelsior* owned by the plaintiffs, and for the damage caused to her thereby this action is brought. The action

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is *in personam,* and each defendant endeavours to throw the blame on the other.

The dredge was rightly working on what was then known as the "middle ground," performing a contract with the Government. Her position was seen by the master of the *Sarnia* on his way to the dry dock on the day of the collision, and she could be seen from the *Huronic* from the dry dock.

The channel from the dry dock runs in a straight line, in a southeasterly direction, until it joins what is spoken of as the "Saskatchewan Channel," which runs, roughly, northeasterly and southwesterly. This latter channel leads out to the harbour past the "middle ground," while to continue on the dry dock channel course involves crossing the "middle ground" into the waters of the harbour beyond. There was sufficient water on the "middle ground" and beyond for the *Huronic.*

When the collision took place, the arm or crane of the dredge was struck by the *Huronic* and scraped along the whole length of her starboard side, and was injured, as was the dredge itself. When the collision happened the master of the dredge was endeavouring to get up her anchors, but he had not succeeded when struck. He anticipated trouble when he saw that the *Huronic* did not turn southward into the "Saskatchewan channel." His bucket was down in the mud. It was urged that if he had got that up, and was then enabled to swing his crane, no accident would have happened.

For the reasons pointed out by the master of the dredge, I think his action was entirely proper, and intended to advantage both his dredge and the colliding vessel in case contact could not be avoided.

I cannot find that the dredge was in any way negligent. She was on her proper ground; her presence was known to the officers of both ships; her slow but usual movement in dredging was common knowledge, and there was no reason why her master should have anticipated what occurred under the circumstances existing that day. He acted when he saw that the turn into the "Saskatchewan channel"—which he says is usual for ships being taken out of dry dock—was not being made. His determination to

get up the anchors and to shift the dredge's position if possible, in preference to lifting her bucket, indicates good judgment, as, if the dredge had been struck with all her anchors down and they had broken, the damage would have been very seriously increased. These anchors, of which there are three, are not ordinary anchors, but are like staves or piles driven into the ground, and cannot be raised rapidly.

The defences filed by the defendants indicate that each vessel considered itself to be the servant of the other; but I have come to the conclusion, upon the facts before me, that the operation of taking the *Huronic* from the dry dock to the passenger dock at Port Arthur was a joint or combined operation, and not one in which either vessel can be said to have had the entire charge or control, or if one had it, that the other was not bound to co-operate actively. My reasons for thinking so are as follows:—

When the *Sarnia* made fast to the *Huronic* on the latter coming out of the dry dock, she laid up against the port bow of the *Huronic,* pointing her bow in a different direction from the bow of that vessel, and with her stern just about at the *Huronic's* stem. A line led from the bow of the *Huronic* to the bow of the tug. The method then contemplated and put in operation was that the *Huronic* should be shoved stern first by the *Sarnia,* and under the *Sarnia's* power in the position that I have described. There were two courses, as mentioned, which might have been taken, and it appears that before the vessels moved off from the dry dock and down the channel there was no communication between the masters of the vessels as to which course was to be pursued. This was a matter of very considerable importance, because, owing to the position of the *Sarnia* her range of vision was limited to the port side of the *Huronic* and to the southern face of the "Saskatchewan" and "Richardson" elevators, and the black buoy at the junction of the dry dock channel and the "Saskatchewan Channel." She could, therefore, see nothing on the starboard side of the *Huronic* as the huge vessel cut her off completely on that side. At the end of the dry dock channel and to the south of it there was a considerable amount of pile protection, and a red buoy, both as shown on Exhibit 1; and there was also the dredge on

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the "middle ground." These could not be seen by any one on the *Sarnia*.

In a combined operation such as this, it is clear that the lookout would have to be kept on the *Huronic*, as from that vessel alone the course in front could be seen, as well as any obstructions on the starboard side. Owing to the absence of any communication between the masters as to the course to be taken, the tug assumed that its course would be straight out along the dry dock channel and across the "middle ground"; while the master of the *Huronic* assumed that when they reached the "Saskatchewan channel" a turn would be made to take the *Huronic* out that way.

I do not think it is material to determine whether or not the engines of the *Huronic* were sufficiently warmed up when in the dry dock to enable her to work her propellers effectively when she came out. If I had to decide this I think I should give a Scotch verdict of "not proven"; but the fact is that the propellers of the *Huronic* were not in use, and that the propelling power was with the *Sarnia*. The vessels having proceeded in this position through the dry dock channel and begun to cross the "Saskatchewan channel" it occurred to the lookout on the stern of the *Huronic* that they were in danger of striking the dredge, and he signalled to his captain, who communicated with the master of the *Sarnia*. What was done then was ineffectual as it was then impossible to avoid the collision, the responsibility for which must, I think, rest upon both vessels. The negligence of the *Sarnia* was to my mind (1), failing to communicate with the master of the *Huronic* as to the course to be taken in view of the fact that from the *Sarnia's* position no part of the course could be seen, but only obstructions which lay to the north or west of the proposed line of movement, and (2) in propelling a vessel, the obstacles in the course of which her master could not see, without any information being conveyed to the lookout which would enable him to be of any use,—that is, such knowledge of the proposed course as would enable him to realize what were obstacles to be expected in that course and to be avoided. The negligence, in respect of the *Huronic* is (1) in not ascertaining the course proposed

to be taken by the tug, and (2) in stationing a lookout without proper information as to the course, thereby permitting the ship to get into a position of danger too late to avert the collision; and (3), as following from the other two, that the services of the lookout were rendered useless, or so little useful as to amount to negligence by these errors of the masters of the *Huronic* and of the *Sarnia.*

I have said that the operation was in its practical carrying out a joint one, and the acts of negligence or the omissions which were negligent of the officers of each ship, appear to be similar in character and effect. Undoubtedly the operation could not be performed without there being a lookout, which lookout must necessarily be stationed upon the *Huronic,* nor could the *Huronic* be moved as it was proposed to move her without the steam power of the *Sarnia.* The course determined upon by the *Sarnia* was one which ought to have dictated to its master the necessity of communicating particulars to the lookout, in order that he might through the master of the *Huronic* advise the master of the tug as to his speed and direction. And this duty applied equally to the master of the *Huronic.* I think Lord Watson in the *Niobe* (1) expresses the condition imposed on these two ships by the necessities of the case, during the operation on which they were engaged, namely, that they were in effect " one ship," an expression which he says has been borrowed by text writers and is familiar to persons conversant with maritime law. He then proceeds:—

> The expression is figurative, and must not be strained beyond the meaning which the learned judges who have employed it intended that it should bear. As I understand their use of the expression, it signifies that the ship and her tug must be regarded as identical, in so far as the two vessels, with their connecting tackle, must be navigated as if they were one ship, and the motive power being with the tug must, in order to comply with the regulations for preventing collision at sea, be steered and manoeuvred as if they formed a single steamship.

I am inclined to think that the language of Lord Shaw of Dunfermline in SS. *Alexander Shukoff* v. *Gothland* (2), contains a principle which can be profitably used as applicable in defining the relation and duty of the lookout in a case of this kind. He says:—

(1) [1891] A.C. 401, at p. 407. (2) [1921] 1 A.C. 216, at p. 237.

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My Lords, when a ship is put under compulsory pilotage it is no doubt true that the entire control of her movements is under the command of the pilot so charged with the vessel. It is not, however, in any sense true that the pilot is thus charged with a vessel deprived of the ordinary and proper services of her crew. It would be a strange result if it were so. The testing instance is the case of the man on the lookout. His responsibility as the servant of the vessel remains, and if there were degrees in such a case it is of course specially acute when the vessel is under compulsory pilotage. If it were not so the situation in law would indeed be peculiar, because it would place the pilot, who presumably is in a position where exceptional skill and knowledge are required for the navigation of the vessel, in a situation in which he had to render those services to it, deprived of the ordinary and elementary facilities for navigation which are afforded by the active and vigilant services of the men on the lookout.

Having come to the conclusion that both ships were at fault, what is the proper judgment as between the two.

The English cases of *The Avon and the Thomas Joliffe* (1) and of *The Englishman and the Australia* (2) show that where both vessels are to blame for inflicting injury on a third vessel, they are jointly liable for the whole damage.

In the Canadian case of the *A. L. Smith, et al* v. *Ontario Gravel Co.* (3), Mr. Justice Duff expresses the opinion that the effect of the judgment of the Court of Appeal in *The Gemma* [1899] P. 285, and of Sir Francis Jeune in *The Dictator* [1892] P. 304, is that the owners of the appellant ships, by appearing and contesting the liability of the vessels, became parties to the action and subject to have personal judgment pronounced against them in the action for the full amount of damages for which according to the principles of law appropriate for the decision of the case they are personally liable.

Having regard to these cases, I cannot divide the damage between the two ships, and must give judgment holding the defendants jointly liable for the full amount of the damage. There will be a reference to the Registrar of this Court to assess the damages. The defendants will pay the costs of the action and of the reference.

Judgment accordingly.

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(1) [1891] P. 7. (2) [1894] P. 239.

(3) [1914] 51 S.C.R. 39.