

THE ONTARIO ADMIRALTY DISTRICT

BETWEEN:

THE BRITISH AMERICAN TRANS-
PORTATION COMPANY LTD. . . }

PLAINTIFF;

AND

THE SHIP *EXTAVIA* DEFENDANT.

1963
Mar. 29,
April 1, 2
1964
Nov. 2

Shipping—Collision in Welland Ship Canal—Stern of ship drifting across channel while ship being moored—Faulty mooring procedure—Failure to warn Canal authorities of approaching ships of mooring difficulties—Negligence of ship’s Master and officers.

This action arises out of a collision which occurred in the Welland Ship Canal at about or slightly after midnight on the night of June 15-16, 1962, when the ship, *B. A. Peerless*, owned by the plaintiff, while proceeding up-bound in a southerly direction in the canal, collided with the defendant ship which had been proceeding down-bound and was then in the process of tying up to a wharf on the east side of the canal.

The evidence disclosed that at the point of collision the canal was about 215 feet wide and that the length of the defendant ship was 420 feet and its maximum width was 60 feet. It was also established that the defendant ship was moored by the bow and that before the stern could be moored it swung out into the canal under the influence of the current in the canal and the propeller action used in stopping the defendant ship. The Captain of the defendant ship, when directed to tie up, was told that a large and deep tanker was coming up-bound and would pass him. It was disclosed by the evidence that the Captain of the defendant ship took no steps to warn anybody connected with the operation of the canal of the plight he was in, nor did he signal by whistle or in any other way that he was in difficulty.

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Held: That it could be fairly said that the situation in which the stern of the defendant ship drifted across the canal was caused by attempting to tie up the defendant ship bow first with the current coming from astern and in the presence of the effect of the propeller action and that this fact was one of which both the Master and the pilot of the defendant ship must have been aware.

2. That the radio officer of the defendant ship was guilty of irresponsible conduct which was shared by some of his fellow officers, when in face of the fact that the defendant ship was tying up to let a large ship pass and a query was received by radio as to whether they were in trouble, he took no steps to find out who was calling or to communicate with the Master or one of the mates of his ship.
3. That once those on the *B. A. Peerless* became aware of the danger of collision, their actions were the best possible ones that could have been taken in the circumstances considering the width of their ship and the sea room available.
4. That the Master of the *B. A. Peerless* was alert to the situation and when he realized the danger, which the defendant ship should have advised him of earlier, he did his best to prevent the collision which followed, using all the means which, practically speaking, were open to him.
5. That the Master of the defendant ship did nothing to cope with the effect of the propeller action he took to stop his ship and of the current in the canal which would tend to throw his stern out, which, when combined with the lack of enough men ashore to take the stern lines, led directly to the drifting of the stern of the defendant ship across the canal and made the collision inevitable.
6. That the plaintiff's action for damages succeeds and defendant's counterclaim is dismissed.

ACTION for damages to a ship in the Welland Canal resulting from collision.

The action was tried by the Honourable Mr. Justice Wells, District Judge in Admiralty for the Ontario Admiralty District.

Peter Wright, Q.C. and *Arthur Stone, Q.C.* for plaintiff.

F. O. Gerity, Q.C. and *S. G. Fisher* for defendant.

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

WELLS, D. J. A. now (November 2, 1964) delivered the following judgment:

This action arises out of a collision which took place in the southern area of the Welland Canal on or about June 16, 1962.

The defendant ship *Extavia* was down bound from Lake Erie to Lake Ontario and was proceeding northerly. The actual collision took place in the vicinity of what is known as McGees Dock, which is situated in the area known as

Rameys Bend. To the south of McGees Dock the canal proceeds slightly east of north and then makes a turn almost immediately after McGees Dock, going north it proceeds for a considerable distance slightly west of north.

The *Extavia*, as I have said, was coming down the canal in a northerly direction and the plaintiff ship *B. A. Peerless* was coming up the canal towards Lake Erie. Generally speaking, there is a steady drop from Lake Erie to Lake Ontario and according to the chart, the average water level at Port Colborne in the month of June would be somewhere about half way between 572 and 573 feet above sea level; whereas the average level at Port Dalhousie on Lake Ontario and I presume the levels would be roughly the same at Port Weller, the present northerly entrance to the canal from Lake Ontario, is just short of an average level of 247 feet. The rate of flow in the area was variously estimated from 1 to 1½ or 2 knots.

The ship *Extavia* is said to have been 420 feet long with a width at widest of about 60 feet.

At McGees Wharf the canal is apparently about 215 feet wide.

On the *Extavia* there was a pilot aboard, Captain Fred Hudson.

Apparently at about 23:00 hours on June 15 the *Extavia* entered the canal at the Lake Erie end and went through the first lock, which is known as Lock 8. At that time the *Extavia* received orders to tie up on the starboard side at McGees Wharf, which was on the eastern side of the canal. This order was transmitted to the Master of the *Extavia* by Captain Hudson the pilot and was either given him by radio telephone or by the lock Master at No. 8 Lock. Captain McKenna, who was the Master of the *Extavia* said Captain Hudson told him this. It was explained that a large and deep tanker was expected upbound. The purpose of the tie up was to let the tanker by.

Captain McKenna's examination for discovery was referred to in cross examination and it becomes clear from it and from his evidence before me that they do not vary in any substantial way. He described coming down from Lock 8 and passing another ship going in the opposite direction which created some suction on the *Extavia*. He then described what action he took to counteract this effect,

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which was apparently to use considerable rudder and put the engine, which had been going at "slow" and "dead slow" speed at "half ahead". Captain McKenna said this was necessary in order to make the ship steer properly. In turn this put too much headway on the ship for ease in handling and to counteract this it became necessary to back the engine for a short time at "half astern".

At Question 153 in the examination for discovery Captain McKenna recalled having told the pilot that the ship had too much headway and he said the pilot agreed with him. At Question 154 he gave the following description of what happened:—

We went to half astern for a very short time, just enough to check most of the headway. By then we were at the wall, by the time this backing action of the propeller had taken effect, as we got the bow in close enough to land two seamen by our swinging boom. Everything was fine forward but the action of the backing propeller turning left-handed, which normally tends to throw the stern to port—this motion of the stern to port was accelerated by the current coming out of that weir.

It is to be observed that only two seamen were landed to take the bow line ashore and no effort was apparently made to land others who might have been able to take stern lines or to carry them astern. The effect of the current of course, once the boat was secured, was to force the stern outward and to the knowledge of the Captain that was also the effect of the action of the propeller when he took steps to check the ship's forward progress. He had been told at the time he was directed to tie up to land that a large and deep tanker was coming up bound and would pass him. What actually happened from the action he had taken was that the stern swung slowly out into the middle of the canal, while the bow was still alongside the wall in the vicinity of McGees Wharf.

Admittedly the captain of the *Extavia* took no steps to warn anybody connected with the operation of the canal of the plight he was in, nor did he signal by whistle or any other way that he was in difficulty. His stern was slowly drifting westward across the canal to the west. One would have thought that it would have been an act of caution to put more men ashore and in any case try to prevent the vessel's stern from drifting out into the canal. I think it could be fairly said that this situation was caused by attempting to tie up the ship bow first with the current coming from astern and from the action of the propeller. This

was a fact of which both Master and pilot must have been aware. Having only two men on the dock to handle heaving lines and mooring lines was not enough. It would have seemed the better part of wisdom to have had at least one or two more men ashore. It is significant when it was found that the *Extavia* obviously occupied more than half the width of the canal no report was sent to the Guard Lock so that shipping could be warned.

Owing to the bend in the canal from east to west of north the *B.A. Peerless* was eventually sighted only when it was reasonably close and no warning, such as blasts and whistles or any warning by telephone was attempted to be given, in fact the contrary was the case.

Mr. J. W. MacIntyre, the second mate of the *B.A. Peerless* was examined on commission in Halifax in March of 1963. He deposed that there had been communication by radio telephone with the *Extavia* within a couple of minutes after she was sighted by the *B.A. Peerless*. He said he was directed by the Master to make the call and that when he made it he identified his ship by name. He asked the person who answered on the *Extavia* if they were having any trouble and his answer was, "No—we are just getting lines out". He was asked again about this on cross examination. At page 10 of the Commissions' evidence the following questions and answers were put and replied to:—

Q. 76 Could you tell me what—as best as you can recall, what your query was?

A. Well, I asked him if he was having any trouble.

Q. 77 What made you ask that question?

A. From where we were watching with binoculars and by sight—and he appeared to be, say a little bit across the canal from what we could see at that angle.

Q. 78 And as best as you can recall, what was the answer to that query?

A. No, no trouble—just putting lines out.

Q. 79 Would the words: we are not exactly sure—end of quote—in answer to your query, would they be something like that, the words that were given?

A. No, no!, it was definitely—no trouble, we are putting lines out or getting lines out.

The radio officer of the *Extavia* also testified. His evidence was given on Commission in New York and his name is Edwin E. Whidden. He was apparently the only radio officer on the ship and he described two radio telephones both in the wheelhouse and he stated that his duties were to stand by the telephones in case anyone called so that he could

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answer and then he would call the captain or pilot. His attention was directed to the time the *Extavia* was attempting to tie up a McGees Wharf and he said that the message to tie up had not come over the telephone and at Line 11, Page 4 of his evidence he was asked—"Did you receive any message over your radio telephone?"—His evidence proceeds as follows:—

A. Someone called, *Extavia* are you having trouble?

Q. And can you tell me the approximate time of that call?

A. No sir, I can't.

Q. Was any entry made of this call in your log book?

A. No, sir, there couldn't, because I didn't know who it came from.

Q. And the query was—

A. *Extavia* are you having trouble?

Q. And did you answer that call?

A. I said the captain had orders to tie up at the wall; I don't know if he has the lines out yet.

Q. Did you say anything else at that time?

A. That was all.

Q. Was there any further query?

A. No sir.

He was later asked if he received any other messages over the telephones prior to the collision and he replied "No". He did not hear any other signals, horns or whistles.

Photostat copies of the radio log of the *Extavia* were produced, being copies of pages 53 and 54. These photostat copies became Exhibit 8 at the trial. None of the entries appear to throw any light on this conversation. At page 9 of his evidence he was examined by counsel for the plaintiff as follows:—

Q. Then subsequently you stated that a message was received over the radio-telephone, *Extavia* are you having trouble?

A. Yes, sir.

Q. Who was in the wheelhouse at this time?

A. I don't know.

Q. Do you recall anybody?

A. The man at the wheel.

Q. What was his name?

A. I don't know. He was a sailor.

Q. Did you see anybody else there?

A. No sir, or if I did, I didn't notice.

Q. What set was this received over, the FM?

A. The AM.

Q. How far from the telegraph is the AM set located?

A. The ship's telegraph?

Q. Yes.

A. I don't know. I would have to guess. Six or seven feet.

Q. If there had been anybody standing at the telegraph, would you have noticed him?

A. Not necessarily, no.

Q. Did you mention the message to the captain or pilot?

A. At that time, no.

Q. You didn't at that time?

A. No, sir.

Q. Did anybody come to you and ask you what the message was?

A. No, sir.

Q. Would you be able to tell me how long before the collision this message was received?

A. Not definitely. Just a few minutes. That's the best I could say.

Q. You couldn't tell me the number of minutes?

A. No, sir.

Q. Did the captain and the pilot remain in the wheelhouse throughout the mooring?

A. No; they work from the wing of the bridge.

Q. Outside the wheelhouse?

A. Yes.

Q. Who stands by the telegraph?

A. The mate on watch.

Q. Third mate?

A. Well, sometimes it's the junior third mate; whatever mate is on watch.

Q. I see. When did you tell the captain of the receipt of this message?

A. As soon as he finished tying up.

Q. After the tie-up?

A. Yes, sir: after the tie-up, while he was still on the bridge.

Q. And neither the pilot nor the captain knew before then?

A. No, sir.

Apparently nothing was done about recording the message and he apparently did not do it. He had heard the captain talking and saying that some large ships were coming by, so that he knew the purpose of the tie up at McGees Wharf.

This evidence was also taken on Commission and I have not seen either of these witnesses. It is in some conflict but in my opinion I should accept the evidence of MacIntyre in preference to that of Whidden. The fact that they were tying the *Extavia* up to let a large ship pass and that even on this version a query was made as to whether they were in trouble, should have alerted him to finding out who was calling and promptly communicating

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with the Master or one of the Mates. Whidden's conduct seems to have been one of irresponsibility which in my view was shared by some of his fellow officers. MacIntyre was not shaken on cross examination and in my opinion his is the much more probable version of what took place. It also seems to have been much more related to what the actual surrounding facts were.

Owing to the bend in the canal it was not possible for the *B.A. Peerless* to get an accurate view of the *Extavia* until they were very close. The *B.A. Peerless* first saw the lights of the *Extavia*, but not the whole ship. Speed was reduced and then reduced again. At Question 101 of his cross examination Mr. MacIntyre estimates the *Extavia* was about one mile away when she was first seen. His description of what occurred is I think worth setting out. It occurs at Page 13, Line 101 of his evidence:—

Q. Now when you first saw the *Extavia* you were about a mile away. What was your position in the Canal with regard to the west and east bank?

A. We were in the centre of the Canal or close to the centre.

Q. And up to the point where you were 1,000 feet away from the *Extavia*, at which point you went to the bow, did you change your position in the Canal at all?

A. Yes, we had changed it by then, yes.

Q. Where had you gone?

A. We had gone to starboard towards the west bank.

Q. When did you make that maneuver?

A. This was shortly before the time I left the bridge, about the time I was leaving, the Master was bringing the course to starboard.

Q. And you would be what, about 1,500 feet from the *Extavia*?

A. In approximate figures about 1,500 feet.

Q. And during that period from the time you first sighted the *Extavia*, which was about a mile away, to that 1,500 to 1,000 feet away from the *Extavia*, what was her position, what changes in her position took place in that period?

A. Well, the first sight I guess the Master figured there was sufficient room to pass between his stern and the west wall, and the closer we got to him, well, it was noticed that he was drifting down the Canal and closing up the open water. I think the Canal was about 250 feet wide from this point, around 250.

Q. Where was the—what was the position of the *Extavia* when you first sighted her?

A. As near as I can say, he was close to the east bank at this Magee's Wharf.

Q. Bow and stern?

A. Appeared to be bow and stern. From a mile away and at an angle it would be hard to tell. It was hard, I couldn't tell you then whether he was over across the wall or whether he was crossways.

- Q. And when you made your radio communication, she appeared to be having difficulty?
- A. He appeared to be having difficulty, yes.
- Q. You indicated that the *Extavia* appeared to be coming toward you. Do you mean the entire vessel appeared to be coming toward you or some part of the vessel?
- A. I would say the stern of the vessel.
- Q. Did the bow change its position at all, best as you can recall?
- A. As I can recall, the bow did not appear to be.
- Q. Did you notice whether any lines were out?
- A. Shortly before I did not notice if any lines were out, but shortly before the collision, or the impact, I had heard someone on the *Extavia* say to: Slack the lines off. Slack your lines off. Or something to that effect. Then, this was then, this was pretty damn close to the time I hit him. Pardon me, strike that out. It was very close.
- Q. When you were one thousand feet from the *Extavia*, what was the position of the *Extavia* at that point with regard to the west and east bank?
- A. Well, he was done, I would say he was taking up more than half of the Canal by this time, well over half of the Canal.
- Q. And prior to that, how far prior to that had he been taking up over half of the Canal?
- A. Well, I couldn't give you an answer on that.
- Q. Well, you indicated earlier about 1,500 feet.
- A. Yes.
- Q. He appeared to be.
- A. He appeared to be then, there was about half the room of the Canal, I guess.
- Q. Was his position changing constantly?
- A. As we were going towards him, he was drifting this way—down.
- Q. The stern appeared to be coming out to port, is that correct?
- A. Well you can put it that way, yes.
- Q. You indicated that it was the Captain's intention to pass, is that correct?
- A. Um'hm. It was his intention to pass.
- Q. When did it become obvious to you that you were not going to be able to—your ship was not going to be able to pass?
- A. I guess it was just about the time that I was directed to go to the bow, that is when the room was getting pretty short.
- Q. You were about a thousand feet away at that point?
- A. I would say approximately 1,000 feet when I got on the bow of the ship. How far we went from the time I left the bridge until I got to the bow wouldn't be too far because I was moving fairly fast.
- Q. Well, would you say it would be 300 feet in that period?
- A. I would imagine it could go 300 feet, yes.
- Q. So that at about—when your vessel was about 1,300 feet from the *Extavia* it was obvious to you that you were not going to have room to pass?
- A. Yes that's correct.

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From a fair reading of the evidence it would appear that the *B.A. Peerless* proceeded down the Canal at a reduced speed and under good control. At a distance of about one mile on first sight there seemed nothing to cause any alarm, but as she came closer it became evident that the *Extavia* was drifting out into the canal. The radio inquiry was then made and as Mr. MacIntyre has said it was entirely reassuring and undoubtedly postponed further preventative measures at a time when seconds were of great importance. It is clear I think that once those on the *B.A. Peerless* were aware of the danger, their actions were the best possible ones that could be taken in the circumstances considering the width of the boat and the sea room available.

As my assessor has pointed out to me:—

The possibility of a screw propelled vessel to stop in a certain distance is primarily a function of the displacement. In other words, with two vessels of the same size, power and shape at different draughts, the more deeply laden one will take a greater distance in which to stop. It is estimated that from a speed of six knots the crash full stop distance for the *B.A. Peerless* would lie between the limits of 1,000 and 1,500 feet, which is two to three ship lengths. No witness on either ship thought the speed of the *B.A. Peerless* to be excessive.

Under all these circumstances, in my opinion, the Master of the *B.A. Peerless* did his utmost to ascertain what was happening to the *Extavia*, although at the time of the radio phone call he was lulled into a false sense of security by the reply of the radio officer of the *Extavia* to the call from his ship. It appears to me that he was alert to the situation and when he realized the danger, which the *Extavia* should have advised him of earlier, he did his best to prevent the collision which followed using all the means which practically speaking were open to him. On the other hand what should have been a commonplace operation of tying up to the east wall at McGees Wharf was handled in so casual a manner as in my view to amount to negligence. The fact that they had been told that a large and deep tanker was coming up the canal should have led them to act with promptness and take every precaution, so that the stern would not drift out as it did. The Master of the *Extavia* was well aware of the effect of the propeller action he took to stop his ship and he was also aware of the current in the canal which would tend to throw his stern out.

In my opinion he did nothing to cope with either of these conditions, which in their combined effect, together with the lack of enough men ashore to take the stern lines in my opinion led directly to the drifting west of the stern of the *Extavia* which made the collision inevitable.

In these circumstances there should be Judgment for the plaintiff and the Counterclaim of the defendant dismissed. If the parties cannot agree there will be a reference to the Registrar of this court to assess the damages by the *B.A. Peerless* as a result of this collision. The plaintiff should have its costs to this action and the counterclaim is dismissed with costs. The costs of the reference are to be in the discretion of the Registrar.

Judgment accordingly.

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