QUEBEC ADMIRALTY DISTRICT.

1918
April 5

ROBERT R. McCORMICK,

PLAINTIFF;

v.

SINCENNES-McNAUGHTON LINE, LIMITED,

DEFENDANT,

AND

UNION LUMBER COMPANY, LIMITED,

PLAINTIFF;

v.

SINCENNES-McNAUGHTON LINE, LIMITED,

DEFENDANT,

Towage—Negligence—Defective steering gear—Inevitable accident.

A steering wheel in a tug, rendered inoperative by a defect in the steering gear, will not relieve the owners of the tug from liability for damage to a tow, resulting from the grounding of the tow when released by the master of the tug, on the ground of inevitable accident; the accident could have been avoided by passing the tow to another tug which was there to assist.

ACTIONS *in personam* to recover damages resulting from the negligent performance of a towage contract.

Tried before the Honourable Mr. Justice Maclennan, Deputy Local Judge of the Quebec Admiralty District, at Montreal, January 21, 22, 23 and April 5, 1918.

R. C. Holden, K.C., for plaintiff.

A. Geoffrion, K.C., and *Peers Davidson*, K.C., for defendant.

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MACLENNAN, Dep. Loc. J. (April 5, 1918) delivered judgment.

These two actions *in personam* were tried together and on the same evidence, as they both arose out of the same mishap. Plaintiff McCormick is the owner of the barge "Middlesex", and the Union Lumber Company, Limited, is the owner of the schooner "Arthur", which, along with another barge, the "Dunn", were being towed down the River St. Lawrence, near Morrisburg, Ontario, on August 13, 1917, by the defendant's tug "Myra", which was accompanied by the tug "Long Sault", also belonging to the defendant. The tow was made up of three vessels lashed abreast the schooner "Arthur" in the middle, the barge "Middlesex" to her port, and the barge "Dunn" to her starboard side. Each vessel of the tow had a line of about 150 feet attached to the "Myra". The tug "Long Sault" was lashed to the port side of the "Myra". The towing and steering was done entirely by the "Myra", which was equipped with a steam steering gear and was steered from a wheel on the top of the wheel-house. This steering-wheel turned a shaft on which there was a sprocket wheel which carried a chain that passed over another sprocket wheel in the wheel-house, where there was a small engine which controlled and operated the rudder. The sprocket wheel on the shaft on the top of the wheel-house was held in place by a key pin. This key pin fell out, the shaft jammed, and the steering wheel became inoperative. When this happened the tug and tow were opposite Ogden Island, a short distance above Canada Island, and in a current running about ten miles an hour. The captain and mate of the "Myra" were on the top of the wheel-house when the steering gear failed,

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the captain being at the wheel. The tug took a sheer to starboard and in the next ten or fifteen minutes made a complete circle, carrying the tow around with it. The tow lines were then cut on the "Myra" and the tow grounded and went ashore. When the captain of the "Myra" saw that something was wrong with the steering gear, he sent the mate to the wheel-house to ascertain the cause. The mate reported that the chain had fallen off the sprocket wheel, and he then went aft to place the tiller in position in order to steer by hand, but before he could use the tiller the tow lines were cut without warning or notice to those on the tow, with the result that both barges and the schooner went ashore on Canada Island. The plaintiffs in their respective actions claim from the defendant damages arising from the striking and grounding of their respective vessels, due, as they allege, to the fault and negligence of the defendant and its representatives and to the improper condition of the tug. The defendant pleads that the grounding occurred as the result of inevitable accident to the steam steering gear which, suddenly and without warning, failed to operate and which had always been in perfect working order, and from all appearances was in good condition up to the occasion in question, that it had been periodically and properly inspected, and no further or additional inspection could have prevented the accident, and that there was no fault on the part of the defendant or its servants.

The company defendant undertook to tow the plaintiff's vessels down the river and the defendant was bound to use reasonable care and skill in the performance of its undertaking. The duties of the tug under circumstances like these were clearly laid

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down by the Privy Council in *The Julia*,[1] a case under a contract of towage, where Lord Kingsdown, delivering the judgment of the court, said, p. 231:

"When the contract was made, the law would im-
"ply an engagement that each vessel would perform
"its duty in completing it; that proper skill and dili-
"gence would be used on board of each; and that
"neither vessel, by neglect or misconduct, would
"create unnecessary risk to the other, or increase
"any risk which might be incidental to the service
"undertaken. If, in the course of the performance
"of this contract, any inevitable accident happened
"to the one without any default on the part of the
"other, no cause of action could arise. Such an acci-
"dent would be one of the necessary risks of the
"engagement to which each party was subject, and
"could create no liability on the part of the other.
"If, on the other hand, the wrongful act of either
"occasioned any damage to the other, such wrong-
"ful act would create a responsibility on the party
"committing it, if the sufferer had not by any mis-
"conduct or unskilfulness on her part contributed
"to the accident. These are the plain rules of law
"by which their Lordships think that the case is to
"be governed."

This statement of the law was later approved by the House of Lords in *Spaight v. Tedcastle*.[2]

The defence to these actions is that the grounding of the tow was caused by an inevitable accident. In *The Uhla*,[3] Dr. Lushington said, p. 90: "Inevitable "accident is that which a party charged with an of-
"fence could not possibly prevent by the exercising
"of ordinary care, caution and maritime skill. It

[1] (1861), Lush, 224.
[2] (1881), 6 App. Cas. 220.
[3] (1867), 19 L.T. 89.

"is not enough to show that the accident could not "be prevented by the party at the very moment it "occurred, but the question is, what previous meas- "ures have been adopted to render the occurrence "of it less probable." This definition of inevitable accident was followed and approved by the Privy Council in *The Marpesia,*[1] In the case of the *William Lindsay,*[2] where a ship attempted to cast anchor, but failed because the cable became jammed in the windlass, the vessel collided with another ship, and the defence of inevitable accident was sustained. Sir Montague E. Smith, delivering judgment in the Privy Council, said:

"The master is bound to take all reasonable pre- "cautions to prevent his ship doing damage to "others. It would be going too far to hold his own- "ers to be responsible, because he may have omitted "some possible precaution which the event suggests "he might have resorted to. The true rule is that "he must take all such precautions as a man of "ordinary prudence and skill, exercising reasonable "foresight, would use to avert danger in the cir- "cumstances in which he may happen to be placed."

Later the Court of Appeal in the *Merchant Prince,*[3] considered and applied the defence of inevitable accident in a case where the steam steering gear of the defendant's vessel failed to act and a collision happened, for which the defendant was sued in the Admiralty Court, and the defence of inevitable accident was sustained. The judgment was reversed in the Court of Appeal, where Lord Esher said that the only way for the defendant to get rid

[1] (1872), L.R. 4 P.C. 212.
[2] (1873), L.R. 5 P.C. 338 at 343.
[3] [1892] P. 179.

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of liability for the accident was to show that he could not by any act of his have avoided the result. In that case the steam steering gear failed because the chain connecting with the rudder had stretched and kinked and the gearing jammed. Fry, L.J., observed that this was a danger which any person who had applied his mind to the matter might have avoided by the use of the hand steering apparatus instead of the steam.

The plaintiff's cases are based upon allegations of insufficient equipment and crew on the tug and upon failure to take effective measures to save the tow between the time the steering gear failed and the tow lines were cut.

The first question to be considered appears to be: When the steam steering gear on the "Myra" failed, could the tow have been saved by the exercise of ordinary maritime skill and careful seamanship on the part of those in charge of the tugs? An affirmative answer to this question will put an end to the defence of inevitable accident. The failure of the steam steering gear was caused by a key pin of the sprocket wheel dropping out, the steering wheel and shaft becoming jammed and the chain from the sprocket wheel having dropped off the wheel in the wheel-house. This made it impossible for the captain to operate the valves of the small engine controlling the rudder from the top of the wheel-house. He sent his mate to see what had happened. It is proved by the evidence of Thomas Hall, a marine engineer of long experience, examined on behalf of the defendant, and who had made a careful examination of the steering gear on the "Myra", that the lever controlling the valves of the small engine which did the steering could have been operated in the

wheel-house quite easily by hand and almost instantly. The captain admits he did not ask the mate to try to work these valves by hand. If the mate of the "Myra", who went into the wheel-house to see what was wrong, had exercised reasonable foresight and ordinary maritime prudence and skill he could, in my opinion, have easily operated by hand the small engine which controlled the rudder until the shaft on top of the wheel-house had been unjammed and a new key pin put in the sprocket wheel or until other measures had been taken to ensure the safety of the tow. That would have saved the situation and the accident would have been avoided.

When the steam steering gear failed, it was the imperative duty of the captain of the "Myra" to take the most prompt and immediate measures to meet the obvious dangers to which the tow was exposed. The *Santandarino*,[1] Ordinary seamanship and maritime skill would have required him to have stopped the engines on the "Myra" and the "Long Sault" and to have at once passed the tow lines to the "Long Sault". He made no such attempt. There was ample time to have done so. He gave orders to the "Long Sault" to starboard her helm and afterwards to reverse her engines, but he omitted to instruct the "Long Sault" to take over the tow lines. Both tugs were there to bring the tow down the river, and the defendant is responsible for the acts of the crew on both tugs. The "Long Sault" refused to give any assistance to the tow, although it is proved that the captain of the "Middlesex" asked the captain of the "Long Sault" to take a line from the "Middlesex". For a period of from 10 to 15 minutes the "Myra" manœuvred with the tow

[1] (1893), 3 Can. Ex. 378; 23 Can. S.C.R. 145.

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and made a complete circle, when suddenly, without warning to the barges or schooner, the tow lines were cut on board the "Myra" and the tow was abandoned and allowed to go ashore on Canada Island. I am advised by my assessor that the conduct of the captain of the "Myra" in the circumstances was unseamanlike. The captain and pilot of the "Long Sault" acted under the orders of the captain of the "Myra" and proved themselves absolutely inefficient and incompetent. They made no reasonable effort to assist the tow or to keep it out of danger. The captain of the "Myra" manœuvred for nearly a quarter of an hour before he abandoned the tow. He had ample time in which to consider what ordinary care, precaution and maritime skill imperatively called for. He had another tug to assist him in taking care of the tow, and there was ample room in which to take effective measures to avert disaster. The burden was on the defendant to prove that the unfortunate result could have been prevented at the very moment it occurred by the exercising of ordinary care, caution and maritime skill. In my opinion the defendant has not made that proof, and after careful consideration I have come to the conclusion that the evidence establishes that the grounding of the tow was caused by the want of reasonable promptitude, foresight and seamanship on the part of the master and crew of the two tugs when and after the dangerous situation arose. My assessor concurs in this conclusion.

Under these circumstances it is not necessary for me to express any opinion on the allegations of the plaintiffs, that the tugs were insufficiently equipped and supplied and insufficiently and improperly officered and manned.

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There will be judgment for the respective plaintiffs for damages and costs with a reference to the Deputy District Registrar to assess the damages in each case.

Judgment for plaintiffs.

Solicitors for plaintiffs: *Meredith, Holden, Hague, Shaughnessy & Heward.*

Solicitors for defendant. *Davidson, Wainwright, Alexander & Elder.*