

TORONTO ADMIRALTY DISTRICT.

THE NEW ONTARIO STEAMSHIP }
 COMPANY, LIMITED..... } PLAINTIFFS;

1907
 June 24.

VS.

THE MONTREAL TRANSPORTA- }
 TION COMPANY, LIMITED, }
 THE OWNERS OF THE SHIP } DEFENDANTS.
 WESTMOUNT }

Rule of the road—Definition of Fairway—Amendment of Preliminary Act.

In narrow channels every steam vessel shall, when it is safe and practicable, keep to that side of the fairway or midchannel which lies to the starboard side of such vessel, and the defendant ship having violated this rule, they were held liable.

When the pleadings and the Preliminary Act were at variance and no objection taken before trial, and nobody has been misled by the pleadings an amendment of the pleadings was allowed.

ACTION *in rem* for damages for collision between vessels of the defendants and plaintiffs.

The case was tried at Toronto before the Honourable Thomas Hodgins, Local Judge of the Toronto Admiralty District, on the 5th, 6th, 10th and 11th days of April, 1907, and written arguments were put in on the 27th and 30th May, 1907.

The facts of the case are stated in the reasons for judgment.

The arguments of counsel were submitted in writing on the 27th and 31st May, 1907.

HODGINS, L. J. now (24th June, 1907) delivered judgment.

Since the argument of this case I have re-read the evidence which I find to be conflicting in many particulars,

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and it has confirmed the impression I formed at the conclusion of the evidence that the plaintiffs were entitled to succeed.

The plaintiff's claim in this case is for damage caused to their steamer *Neepawah's* propeller by the defendant's steamer *Westmount*, and the main issue is whether the defendant's steamer, the *Westmount*, bumped the plaintiffs' steamer, the *Neepawah*, when passing her in the level between Locks 23 and 24 in the Welland Canal on the night of the 20th October, 1904. The night has been described by several witnesses as a "dark, rainy night;" and this fact and the conflicting statements of witnesses, so general in Admiralty cases, have increased the difficulty of deciding to which side a preferable credence should be given.

But the evidence as to the fact of the bumping of the *Westmount* on the *Neepawah* satisfies me that such bumping took place, and that, together with what must have been the resultant pressure of the water on the *Neepawah* caused by the swing of the *Westmount* in straightening her course in the middle of the canal so as to enter the lock while passing the *Neepawah*, caused the *Neepawah* to swing across the canal as described by several of the witnesses on both sides. See *Cadwell v. C. F. Biel-man* (1).

The Captain of the *Neepawah* states that he heard the reversing bell of the *Westmount*, and that her reversing had the effect of turning her against the *Neepawah* and moving her stern against his boat; and that he felt something touch his boat and that his boat "at once swung out," the stern swinging to the bank, and the bow swinging out into the canal, and that when the stern swung over the bank the two flanges of the propeller wheel were broken by striking the stone side-wall of the canal.

(1) 10 Ex. C. R. at p. 156.

The wheelsman Laroche states that he was at the wheel steering the *Neepawah* and kept her straight but did not feel the bump, but was sure that the *Westmount* had struck the *Neepawah* "because we changed direction instantly."

Legault, who was at the stern of the *Neepawah* with a fender, states that the *Westmount's* stern struck the *Neepawah* between the aftermast and the boiler house about five or six feet from the stern of the *Neepawah*, and shoved her on the bank and broke her wheel.

McLeary, one of the defendant's witnesses, states that when the steamers were passing their respective sterns were about three feet apart and that he saw the sterns come together, and that they were coming closer together as they passed.

Tracy, a lock tender, an independent witness on shore, states that when the *Westmount* was heading to enter the lock, she was three or four feet away from the *Neepawah*; that the *Westmount* was about half way past the *Neepawah* when she began to get straightened for dock 23 and that the sides of the after part of the end of the two boats came nearest together.

Captain Milligan, of the *Westmount*, states that all the time he was straightening the *Westmount* he was shifting her stern over the centre line; and that when he was straight for the lock he would necessarily be twenty feet into his port water, and therefore there would not be room for the *Neepawah* to lie between him and the shore. And he added that he would "let it go" that the *Neepawah* had got as far as the centre line,—but not across it,—though he afterwards varied this. The frequent changes of the position of the models made by this witness and his admissions that he was only guessing has affected his credibility. And similar changes of the position of the models by others of the defendants' witnesses have caused me to hesitate in accepting their fairness in giving evi-

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dence. At first some of them placed the models anglewise across the canal but when attention was called to such positions, some of them altered the anglewise for another position.

There is another fact which is established by the evidence of the captain of the *Westmount* that he commenced to straighten for the lock before he had passed the *Neepawah*, and that he thereby got into the *Neepawah's* water. The rule of the road provides that "in narrow channels every steam vessel shall, when it is safe and practicable, keep to that side of the fairway or midchannel which lies to the starboard side of such vessel." The "fairway" mentioned in this rule has been defined by Bargrave Dean J., in the *Glengariff* (1), thus: "A fairway is practically defined by this article to be the midchannel. There is no rule which says that you must keep in the fairway, but the rule says you must keep to the starboard side of the fairway or midchannel in narrow channels." The water-width of the canal between locks 23 and 24 is 108 feet; the *Westmount's* beam is 43 feet and the *Neepawah's* beam is 41 feet. But the *Westmount* began to straighten her course and thereby to get out of her starboard water and into the *Neepawah's* water before she had passed the *Neepawah*, and thus violated this rule of the road. I must also find that the *Westmount* further failed to observe the rules of the road which direct crossing steam vessels to "keep out of the way of the other." These violations of the rules of the road led to the bumping of the stern of the *Neepawah*, which I find was the primary cause of the propeller wheel of the *Neepawah* striking the boom or wall of the canal and breaking two of its blades.

The defence raises an objection to the plaintiffs' preliminary act in that article 13 states that "the parts of

(1) [1905] P. 106.

each ship which first came into collision were the port bow of the *Westmount* and the port quarter of the *Neepawah* abreast of the kitchen." The plaintiffs' statement of claim alleges substantially the same that the "*Westmount* sheered on the *Neepawah* and struck her on the port side abreast of the kitchen, and forced her stern against the boom along the stone wall * * * by reason thereof the *Neepawah's* screw came in contact with the said boom and two of her propeller blades were broken."

The rule of practice is that no mistake in the preliminary act can be amended unless an application to amend is made before trial (1). But in the *Frankland* (2), Sir Robert Phillimore, while refusing to allow the preliminary act to be amended, allowed an amendment of the pleadings—adding that it would be competent to counsel "to comment on the discrepancy between the pleading and the preliminary act." And in the *Miranda* (3), the same learned judge said: "The parties in an action of damages are not bound in their pleadings to repeat any errors or omissions which may exist in their preliminary act; and it is open to them in their statement of claim, or statement of defence to state correctly any facts which may have been omitted, or erroneously stated in their preliminary act."

Apparently from these decisions the only penalty for errors and omissions in the preliminary act is that they may be "commented upon by counsel." But they could be amended if an early application for leave to amend had been made.

In the *Dictator* (4), the court allowed an amendment of the writ by increasing the amount of the claim after judgment; and the plaintiffs were subsequently allowed to sue out execution for the increased amount allowed by the amendment of the writ.

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(1) Vortigern, Swab. 518.

(3) [1882] 7 P. D. 185.

(2) [1872] L. R. 3 A. & E. 511.

(4) [1892] P. 64, 304.

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But in the *Alice* and *Rosita* (1), the rule that a party seeking redress for an injury can only recover "*secundum allegata et probata*" was held to apply only to cases where the averments alleged in the pleadings were material to the issue. While I must find that the statement of claim incorrectly states the locality of the collision between the two steamers, I think the statement of defence is rather helpful in determining the locality of the bumping by stating that "the *Neepawah's* bow, being light, fell out from the bank and across the canal astern of the *Westmount* as the latter passed." The *Westmount* was in her own proper water and at a considerable distance from the point (*i.e.* the bow) where the alleged impact of the vessel is said by the plaintiffs to have taken place.

This pleading, I think, indicates the locality more fairly than the plaintiffs, that the impact was not near the bows of the two vessels but somewhere near their sterns—which the evidence warrants me in finding. And as the plaintiffs' pleading has not apparently misled the defendants, and as the points as to the preliminary act and pleadings were not taken at the opening, or early in the case, I think the plaintiffs may have leave to amend their pleading, as it seems the defendants have not been prejudiced.

After the amendment the decree will be for a reference to the Registrar to assess the damages and to tax the plaintiffs their costs of the action and reference.*

(1) [1868] L. R. 2 P. C. 214.

* REPORTER'S NOTE--This judgment was reversed on appeal to the Supreme Court. (40 S.C.R. 160).