BRITISH COLUMBIA ADMIRALTY DISTRICT

1955
Aug. 3

BETWEEN:

WILLIAM ROBERTSON ..... PLAINTIFF;

AND

THE OWNERS OF THE SHIP *MAPLE PRINCE* and OLAF NELSON ..... DEFENDANTS.

Shipping—The Canada Shipping Act, R.S.C. 1952, c. 29, s. 657—Limitation of liability—Tug and tow not owned by same persons—Limitation fixed on tonnage of tug only.

In an action resulting from the collision of a barge towed by a tug with a fishing vessel owned by the plaintiff it was held that the plaintiff was entitled to judgment for damages against the owners of the tug because of its improper navigation. The tow was not owned by the owners of the tug.

Held: That the tug is entitled to limitation of liability under the Canada Shipping Act, R.S.C. 1952, c. 29, s. 657.

2. That s. 657(1) of the Canada Shipping Act is not restricted to actual collision by the ships of the ship-owner but applies in terms to all damage caused to another vessel by the improper navigation of the owner's ship.

3. That the tug-owners are entitled to restrict their liability to the amount allowed by the Canada Shipping Act for each ton of the tug's tonnage and not for the combined tonnage of the tug and tow.

4. That the liability of a defendant is measured by considering only the ships which are owned and navigated by him, his liability being limited by the size of his individual ships.

DETERMINATION OF LIMITATION of liability.

The argument was heard before the Honourable Mr. Justice Sidney Smith, District Judge in Admiralty for the British Columbia Admiralty District, at Vancouver.

C. C. I. Merritt for plaintiff.

John I. Bird for defendants, owners of the ship *Maple Prince*.

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

SIDNEY SMITH, D.J.A. now (August 3, 1955) delivered the following judgment:

On May 26 last I gave the plaintiff judgment for damages caused by collision of his fishing vessel *Sarawak II* with

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a barge *Yorke No. 4* which with another barge *Yorke No. 5* was being towed alongside by the tug *Maple Prince* (*ante* page 221). It will be sufficient to say that the two barges were made fast "end on"; that the No. 4 was leading; that the tug was made fast to the port after end of the tow; that both barges were loaded with railroad cars to such a height as to obscure the tug's lights from any vessel approaching in the dark from the starboard side, as was the *Sarawak II*.

I found the collision due to a failure on the tug's part to comply with the provisions of National Harbour Regulation 35 (3). These called for a lookout man and the display of a white light, both on the outboard side of the tow. There was neither; at all events any white light there could not be seen by the *Sarawak II*.

The tug pleaded that, if found in fault, she was entitled to limitation of liability under Sec. 657 of the Canada Shipping Act. Argument on this submission was postponed till after a finding on the facts. The issue now comes forward for decision.

The defendants did not own either of the barges, whose owner was not sued. The writ in the action is against the "owners" of the *Maple Prince,* which means that this is an action *in personam*: see Admiralty form No. 3. (This would not appear to be so in England, where an action against "owners" as such is an action *in rem*: see Roscoe Admiralty Pract. 5th Ed. 452.).

The barges in this case were not manned or self-controlled in any way; they were wholly under the control of the tug. The material parts of Sec. 657 read:

> (1) The owners of a ship, whether registered in Canada or not, are not, in cases where all or any of the following events occur without their actual fault or privity, that is to say:
>
> .....
>
> (*d*) where any loss is, by reason of the improper navigation of the ship, caused to any other vessel, or to any goods, merchandise, or other things whatsoever on board any other vessel;
>
> liable to damages ..... to an aggregate amount exceeding thirty-eight dollars and ninety-two cents for each ton of the ship's tonnage.

Though this section refers only to the owner's liability and not to the ship's liability, it is construed as applying to claims *in rem* as well as *in personam*.

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The plaintiff contended that Sec. 657 did not apply to this case at all; that it was the improper navigation of the barge, and not of the tug, that caused the collision; and that the section only applies to an owner whose ship is in collision. The exact submission was made in this way:

> The Defendant's tug *Maple Prince* was not itself in contact with the *Sarawak II*, and where the combined mass of the two scows and the tug was in different ownership, and where the barges as well as the tug were being improperly navigated; the Defendant cannot bring itself under the limits or terms of the statute.

The plaintiff also argued that the owner of the barges was privy to this improper navigation because he knew that they were not fitted with brackets for carriage of the white lights.

On reflection I do not think either of these arguments can be supported. The first reads language into the statute that is not there. Sec. 657 (1) is not restricted to actual collision by the ship of the "ship-owners", but applies in terms to all damage caused to another vessel by the improper navigation of the owner's ship. Here the damage to the *Sarawak II* was caused by the improper navigation of the tug, regardless of whether there was actual collision between the two. Nor can I accept the argument that the owner of the barges was privy to their improper navigation. It was the duty of the tug to adjust the white light in such place and manner as it could properly be seen. It was not the responsibility of the bargeowner, who was entitled to leave this to the tug.

I do not think it can be suggested that the barges were in any way "guilty". It was settled by the House of Lords in *Owners of S.S. Devonshire* v. *Owners of Barge Leslie* (1) that where a collision takes place between a tow and a third vessel, and the tow is completely under the control of the tug, then the tow is an "innocent" ship, in no sense identified with a delinquent tug. I must therefore reject these contentions.

However there is another and more difficult question: namely, whether the measure of the tug's liability should be calculated on the tug's tonnage alone, or on the combined tonnage of the tug and the barge *Yorke No. 4* which actually collided with the *Sarawak II*. In several cases, such as

(1) [1912] A.C. 634.

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The Ran, The Graygarth (1), *The Harlow* (2) and my own decision in *The Pacific Express* (4), it was held that where the tug and the tow belong to the same owner, then the tow may be made liable for the negligence of the tug, when the tow either comes into collision or makes the collision more serious by its added weight. In such cases the plaintiff can proceed against the tow because it is being navigated negligently by the servants of the owner. But here the *Yorke No. 4* was not being navigated by the servants of the owner, and the *Devonshire* decision would appear to bar any action against her.

However, the tug was responsible for the damages done by the barge and the question remains whether, that being so, the liability of the tug-owners is limited by the tonnage of the tug or by this plus the tonnage of the barges or one of them.

I can see that there is some anomaly in holding that the tug-owner is more protected when handling a stranger's barge than when handling his own. But to hold the opposite could have even more startling results. If a tug were helping to shift, say the *Mauretania,* the tug-owner's limitations might be measured by millions. On the other hand in this case the plaintiff will recover from the tug only a fraction of his loss. Actually anomaly is inherent in the whole concept of the statutory limitations which are bound to produce irrational results. There is nothing logical in holding that a tug-owner can limit his liability by the tonnage of the one tug involved in an accident when he may have a whole fleet of ships available to make amends for his negligence. But we must take the policy of Parliament as we find it; though it may be that the entire question is now ripe for re-consideration.

I think the language of the decisions on limitations taken in its full effect indicates that the ships that must be brought into account in fixing a tonnage-basis of liability are the defendant's ships that are "guilty" in the affair of the collision. Thus in *The Harlow, (supra)*, the tug was towing six barges belonging to the tug-owner; but only two were involved in damaging the plaintiff, so only those two

(1) [1922] P. 80. (2) [1922] P. 175.
(3) [1949] Ex. C.R. 230.

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were taken into the reckoning of the tug-owner's limited liability. Where the barges do not belong to the tug-owner, they are not "guilty", and so are not to be considered.

I think this result is indicated by the very language of the Act which measures the liability of a defendant by looking only at ships which are both owned and navigated by him. His liability is limited by the size of his individual ships. As I have said, this is anomalous, and it is not surprising that particular workings of the rule emphasize the anomaly.

There is no submission that the owners of the tug contributed to the collision by their "actual fault or privity". Their servants were responsible. I find the tug-owners are entitled to restrict their liability to $38.92 for each ton of the tug's tonnage calculated in the prescribed manner.

Judgment accordingly.