ON APPEAL FROM THE TORONTO ADMIRALTY DISTRICT

1924
April 8.

THE SHIP *ROBERT L. FRYER* (DEFENDANT) ..... } APPELLANT;

AND

THE STEAMER *WESTMOUNT* AND OWNERS (PLAINTIFFS) ..... } RESPONDENTS.

Shipping—Collision—Harbour—Narrow channels—Negligence.

On the 17th November, a little after 5.40 p.m. a collision occurred between the *W.* and the *F.* in Port Arthur harbour, at the entrance to a slip, 1,100 feet long and 175 feet wide, which is narrowed on the south side of the entrance by 20 feet, due to a wreck. In the south wall of the slip there are two recesses, and in one was the said wreck and in the other the *J.* Another steamer, 48 feet beam, lay at the north wall (Government dock) 450 feet from its end. Directly outward, 2,400 feet, is a breakwater forming the harbour between it and the shore. From the harbour proper is a slip channel leading into the slip. The *W.* a steel steamer, 550 feet long and 58 feet beam lay on the south side of the slip, and when the *F.* a wooden steamer 280 feet long, was not more than 300 feet from the end of the north wall, to which she was destined, the *W.* began to back out, swinging stern first across the slip, with considerable speed, intending to work along the north wall. The *F.*, unable to make her berth, signalled she was going to port, and in so attempting, the collision occurred. The visibility was low and the *W's* stern lights were out; she knew of the *F's* approach and gave no signal that she was to leave her dock.

Held, (reversing the judgment appealed from) that no fault should be attributed to the *F.* for not pursuing her efforts to make her dock; nor because she had got in too far into the slip channel to make a passage to port; that the *W.* by failing to signal her intention to leave dock, by her speed in swinging across channel and her general manœuvring was guilty of negligence, which was the proximate cause of the collision, and the *W.* was wholly to blame.

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APPEAL by steamer *Robert L. Fryer* from a judgment of the Local Judge in Admiralty of the Toronto Admiralty District (1) declaring that both ships were equally to blame for the collision in question.

February 1, 1924.

Appeal now heard before the Honourable The President.

The owner of the Robert L. Fryer in person.

R. I. Towers, K.C. for the respondent.

The facts are stated in the reasons of judgment.

THE PRESIDENT, this 8th day of April, 1924, delivered judgment.

This is an appeal asserted by the steamer *Robert L. Fryer* and owners from a judgment of Honourable Mr. Justice Hodgins, Local Judge in Admiralty, for the Toronto Admiralty District, given in an action for damages for collision brought against the steamer *Robert L. Fryer,* the appellant, by the steamer *Westmount* and owners, wherein it was pronounced that both ships were equally to blame for the collision. The appellant asks that it be declared that the steamer *Westmount* was alone to blame.

The appeal was heard by me with two nautical assessors, Capt. L. A. Demers, Wrecks Commissioner, and Capt. L. G. Dixon, Marine Superintendent of the Department of Marine and Fisheries.

The slip so-called, or basin, wherein the collision occurred is located in the harbour of Port Arthur. With slight variations the slip is rectangular in shape. The southern side of the slip is known as the Davidson & Smith elevator dock, and is about 1,100 feet in length. The northern side or wall of the slip is known as the Government elevator dock, and is of the same length as the south side of the slip. The width of the slip is 175 feet, narrowed at one point near the entrance on the south side, by reason of the wrecked steamer *Ritchie* projecting into the slip about 20 feet, thus narrowing the slip at this point to about 155 feet, and near which the collision occurred. The steamer *Jedd* lay also on the south side of the slip, but further in, than the *Ritchie,* but apparently was not projected into the slip proper. The south wall of the slip is not straight through-

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out, there being two recessions southerly, and towards the outer end, and it was in either of these recessions the *Jedd* and *Ritchie* lay. At the time of the collision the steamer *F. B. Squires,* of 48 feet of beam lay at the Government dock, and about 450 feet from its end.

Directly outward from the slip 2,400 feet, is a lengthy breakwater running north and south, and about at right angles to the slip, forming a harbour between it and the shore line. The harbour extends very much north and south of the north and south lines of the slip if projected outwards to the harbour and breakwater. In the breakwater almost in line with the slip, is a gap through which ships enter the harbour, and from there the slip in question. The further statement should be made, however, that there is a channel leading into the slip from the shore limits of the harbour, this channel being of the same width as the slip. This point may perhaps be more clearly and accurately expressed by saying, that if the southern and northern sides of the slip were projected outwards 1,000 feet and 200 feet respectively, they would mark the channel from the navigable harbour proper into the mouth of the slip, and this may be designated as the slip channel. It would not be incorrect to describe the slip and the slip channel, as a narrow channel navigable for ships drawing a certain depth of water.

On the day in question, November 17, 1922, the *Westmount,* a steel freight steamer of 7,932 tons, and being 550 feet in length and 58 feet width of beam, was loading grain at the Davidson and Smith elevator on the south side of the slip. At 5.40 p.m. of that day the *Westmount* finished loading and proceeded to back out from her dock in the slip with a view to proceeding to another place for additional cargo, and about the same time the *Fryer,* a wooden steamship of 1,157 tons and 280 feet in length, was entering or approaching the slip.

I have restated chiefly the facts disclosed at the trial which are descriptive of the locus where the collision occurred, because, in my opinion the issue involved in the appeal relates entirely to the manner in which an incoming and an outgoing ship, to and from a common slip, which is connected with a harbour by a narrow navigable channel,

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were respectively navigated. All other relevant facts are fully stated in the judgment appealed from.

I have considered this appeal with my assessors with great care and at considerable length. They were very strongly of the opinion that the *Westmount* was alone to blame and I am of that view.

I think the evidence clearly and abundantly indicates that the *Fryer* had proceeded up the channel leading from the harbour into the slip, on her starboard side, to a point not more than 300 feet from the end of the Government dock, to which dock she was destined, before the *Westmount* commenced to move from her dock, and the trial judge so finds. That is to say, the *Fryer* had approached within a little more than her own length of the dock at which she was to lay, before she had any notice of the intention of the *Westmount* to move from her dock. That the *Fryer* was approaching the slip was known to the *Westmount*. The visibility was low, in fact it must have been after sundown before the *Westmount* commenced to move and her stern lights were not lighted. The mate of the *Westmount* states that he first observed the *Fryer* 300 feet out from the Government dock, and that it was then dusk, and so much so, that he did not recognize the approaching steamer as the *Fryer*, although she must have been well known to him owing to certain peculiarities of her superstructure. The *Fryer* was shewing her lights. The appellant urged on her own behalf but casually, the absence of lights on the *Westmount*, at the trial and on the appeal, and consequently I shall not allow this apparent neglect to enter into my consideration of the appeal, although my assessors were very strongly of the opinion that in this respect the *Westmount* was negligent. I think, however, that the *Westmount* did not show proper consideration of the fact that the visibility was low, and further, I am of the opinion that the lack of lights on the *Westmount* might very naturally lead the *Fryer* to conclude that the *Westmount* was not likely to soon move from her dock, and this view was urged at the trial.

Thus with the *Fryer* only her own length and a little more, from the end of the dock at which she intended to lay, the *Westmount* without the prescribed signal, with

the knowledge that the *Fryer* was approaching the slip, commenced to move from her dock in the manner described by the trial judge, swung stern first across the slip with very considerable speed, as the trial judge finds, towards the side of the slip directly opposite from where she was moored, and soon her stern was close to the Government dock, intending to work out along the Government dock wall, and indeed the witnesses of the *Westmount* say that at a certain stage of this movement she had lines fast to the Government dock. This is denied by the *Fryer,* but at all event it establishes the manœuvre contemplated by the *Westmount.* The *Fryer* finding it impossible to make this dock, signalled she was to go to port, the *Westmount's* position making it unsafe or impossible to attempt to go further ahead and on her starboard along towards the Government dock, at least the *Fryer* deemed it inadvisable to attempt to do so. In attempting to go to port a collision occurred as narrated in the judgment appealed from, the *Fryer* striking the port quarter of the *Westmount* a glancing blow.

Upon this set of facts it appears to me that the *Westmount* is wholly to blame. Her failure to give the signal that she was to depart from her dock, the speed with which she swung across the channel, and generally her method of manœuvring to get out of the slip, to the apparent exclusion or danger of other ships seeking entry to the slip, were each acts of negligence, the proximate causes of the collision.

The trial judge found the *Fryer* at fault for not pursuing her efforts to make the Government dock, and making fast there. My assessors advise me that nothing would have justified such an attempt, and that it would in the circumstances be challenging disaster. The counsel for the *Westmount* on the appeal admitted that such a movement would not be justified on the part of the *Fryer.* I am clearly of that opinion and cannot reach the conclusion that in this respect the *Fryer* was to blame.

The *Fryer* was held also to blame in that she allowed herself to get in too far in the ship channel to safely make a passage to port. It is true in fact that the *Fryer* was unable to make a safe entry to port and a slight collision

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occurred. Nothing remained for the *Fryer* to do but attempt the passage to port, or go astern. I do not think it reasonable to say that the *Fryer* should earlier have anticipated the actual movement of the *Westmount* in swinging across the slip. Even after first observing the *Westmount* in this movement, the *Fryer* might well have expected the *Westmount,* when her stern was in mid-channel, to straighten herself up by various ahead and astern revolutions of her propellor so that she might go astern if necessary in the centre of the slip. She not only did not do this, but had even failed in any way to indicate her intention of leaving her dock. With very little action at the proper time on the part of the *Westmount,* by going ahead, the collision could have been avoided. I do not think that the *Fryer* was to blame for being too far in to make a safe voyage to port. I adopt the appellant's contention, and my assessors concur, that it was dangerous, if at all possible, for the *Fryer* to go astern with a view of reaching the navigable waters on the north side of the slip channel, owing to the fact that this movement would throw the stern of the *Fryer* into the bank on the south side of the channel. In fact had she gone astern her bow would probably have swung to starboard, and struck the stern of the *Westmount,* with probably more serious consequences than followed from the collision which did occur. It appears to me she adopted the only course open to her and just barely failed to accomplish successfully her movement to port.

The trial judge finds that the *Fryer,* like the *Westmount,* failed to give the signal required by Rule 27 applicable to the Great Lakes, and there remains to be considered the question, if this constitutes contributory negligence on the part of the *Fryer.* Regardless of this rule, I think that the *Westmount,* in view of her contemplated and executed manoeuvre, and in view of all the circumstances, was negligent in not giving earlier a danger signal, and this is the opinion of my assessors. A greater burden in this respect rested upon the *Westmount.* She was aware before moving of the close approach of the *Fryer.* The *Westmount* at her dock was visible to the *Fryer,* but her intention to move was not indicated, until the *Fryer* was well up the slip channel and quite close to her destined dock. I do not

think this failure constitutes contributory negligence on the part of the *Fryer*.

It seems to me that the reasoning of Viscount Birkenhead in his elaborate and comprehensive exposition upon the law of contributory negligence in *Admiralty Commissioners* v. *SS. Volute* (1), excludes the inference that this and other matters complained of on the part of the *Fryer*, were such acts of default or commission, contemporaneous, or subsequent and several, which constitute contributory negligence on the part of the *Fryer*. The facts suggest rather the case where the prior negligence of the *Westmount* could not by any appropriate measures be successfully avoided, or where even if mistaken measures were adopted by the *Fryer* she is not blameable for the consequences.

Therefore with great respect I allow the appeal with costs, together with the costs of trial.

Judgment accordingly.

(1) [1922] 1 A.C. 129.