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BETWEEN:

SAINT JOHN TUG BOAT COMPANY, } SUPPLIANT;
 LIMITED

AND

HIS MAJESTY THE KING RESPONDENT.

Shipping—Collision in Harbour at Saint John, New Brunswick during fog—Whether proper signals given—Articles 15 and 28 of International Rules—Failure of both vessels to reverse in time—Fault in equal degrees—Liability under s. 19 (c) of Exchequer Court Act—Section 640 Canada Shipping Act—Liability to make good damage in proportion to degree in which each vessel at fault—Fault equal damages divided—Where only one vessel damaged the other bears half the loss.

The tug *Ocean Hawk I* and tow and H.M.C.S. *Beaver* collided in the harbour at Saint John N.B., during a fog.

Held: That the failure to reverse in time on the part of both vessels was, under the circumstances, negligence and the direct cause of the collision.

2. That the damage to the *Ocean Hawk I* was caused by the fault of both vessels and that the fault was in equal degrees.
3. That the liability of the Crown is to be determined by the law that was in force on the 24th day of June 1938, the date upon which the amendment 19 (c) imposing liability for such negligence upon the Crown, came into effect: *Tremblay v. The King* (1944) Ex. C.R. 1 followed.
4. That Section 640 of the Canada Shipping Act 1934, Statutes of Canada, Chapter 44, was in force on the 24th day of June 1938, and the provision that, where by the fault of two or more vessels damage is caused to one or more, the liability to make good the damage shall be in proportion to the degree in which each vessel was at fault, is therefore applicable.
5. That the fault being in equal degree, the damage is divided, and where only one ship is damaged, the other bears half the loss sustained: *The Iroquois* 18 B.C.R. 76 and *The Hiawatha* 7 Ex. C.R. 446 followed.

PETITION OF RIGHT by suppliant to recover from the Crown damages for loss resulting from a collision between the suppliant's tug *Ocean Hawk I* and H.M.C.S. *Beaver* owned by the Crown, due to the negligence of an officer or servant of the Crown acting within the scope of his duties or employment.

The action was tried before the Honourable Mr. Justice O'Connor, at Saint John, N.B.

C. F. Inches, K.C., and *N. B. Tenant*, for suppliant.

H. A. Porter, K.C., for respondent.

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

O'CONNOR J. now (October 3, 1945) delivered the following judgment:

The action is for damages arising out of a collision which occurred in a dense fog about 8.00 A.M., Atlantic Daylight Saving Time, on the 17th of September, 1942, on the east side of the harbour of Saint John, New Brunswick, between the tug *Ocean Hawk I* and tow, owned by the suppliant, under Captain Hurley, proceeding down the harbour, and H.M.C.S. *Beaver*, belonging to His Majesty in the right of Canada, under Commander Swansburg, proceeding up the harbour.

In a dense fog, at 7.55 A.M., Atlantic Daylight Saving Time, on the day of the collision, the *Ocean Hawk I* left the Dominion Coal Company's wharf on the northeast side of the harbour with a tow attached, to go down the harbour and across to a steamer at Berth No. 10, which berth is on the southwest side of the harbour. The tow was a converted steamer equipped with an endless crane and loaded with six to eight hundred tons of coal, and was attached stern first and parallel to the starboard side of the tug. The stern of the tow was approximately 125 feet ahead of the bow of the tug.

The tug and tow travelled down the harbour, keeping the loom of the wharves on the east side of the harbour in sight, to assist in navigating. The tug was sounding one prolonged blast followed by two short blasts in accordance with Article 15 of the International Regulations for Preventing Collisions at Sea, being Annex II of the Canada Shipping Act, Chapter 44 of the Statutes of Canada, 1934, and this signal would indicate that a tug and tow were under way in the harbour. When opposite McAvity's wharf, the captain of the tug heard one prolonged blast which indicated to him a steam vessel under way, and he

1945

SAINT JOHN
TUG BOAT
COMPANY
LIMITED

v.

THE KING

O'CONNOR J.

1945
 SAINT JOHN
 TUG BOAT
 COMPANY
 LIMITED
 v.
 THE KING
 O'CONNOR J.

stated that the sound came from "down ahead of me on the port bow". He answered with one prolonged and two short blasts and stopped his engines, and they remained stopped until he actually saw the steamer, which turned out to be H.M.C.S. *Beaver*. He gave evidence that the water was "slack" and that the engines remained stopped until the vessels were within approximately 40 feet of each other.

He heard the prolonged blast from the *Beaver* two or three times and he answered each time with one prolonged and two short blasts.

He stated that when he first saw the *Beaver* she was 400 feet away and that he then altered his course to starboard, without putting on his engines, and sounded one short blast to indicate that he had done so, as required by Article 28 of the International Regulations, and that he did not get an answer from the *Beaver*.

He stated that the *Beaver* seemed to be swinging to port as he was "going down along" and that as the *Beaver* got so close to him, about 40 feet, he put his helm aport and went full speed ahead to throw the stern of the tug clear of the *Beaver* and called to the captain of the *Beaver* and asked him if he was going astern and received the reply that the *Beaver* was going astern. The bow of the *Beaver* came in contact with the tug aft of midship on the port side. The tug was brought up standing, causing the hawsers to part and the lines went adrift and the tow went down the harbour.

At 8.08 A.M., Atlantic Daylight Saving Time, H.M.C.S. *Beaver* slipped its mooring from Reed's wharf, which is also on the east side of the harbour, to proceed to the C.P.R. wharf, which adjoins Reed's wharf on the north. Commander Swansburg was the captain of the *Beaver* and he proposed to proceed to a point slightly north of the C.P.R. wharf, pivot the *Beaver* on her stern by means of her engines, and bring her into the jetty on her port side. There were two officers and two ratings on the bridge of the *Beaver* and one officer and four ratings in the bow of the *Beaver*. After clearing the jog at the south end of the C.P.R. wharf, the *Beaver* proceeded alongside the wharves, and as they cleared the jog Commander Swansburg heard for the first time the one prolonged and two short blasts from the *Ocean Hawk I*.

He gave evidence that he then stopped both engines and put the engines astern, and he then went ahead on the port engine, going very slowly with just steerage way, while attempting to get some idea of the course of the tug and tow and her distance from him, which he stated was "very near ahead". Skipper Foster on the bow of the *Beaver* reported, "He is getting close", so Commander Swansburg gave the order "Full speed astern" and the helm order "Starboard 30" and right at that instant the ship came out of the fog, and the captain of the tug called to him to go astern and he replied that the engines were going full speed astern.

1945
 SAINT JOHN
 TUG BOAT
 COMPANY
 LIMITED
 v.
 THE KING
 O'CONNOR J.

His evidence was that he was then about 168 feet from the jetty and when the ships came in sight of each other they were approximately 150 feet apart. He stated that the *Beaver* did not have any more headway than was necessary for steering and to keep her under control, and that at the moment of collision the way was practically off his ship; that only four minutes elapsed from the time they slipped the jetty until the collision took place and that he heard the tug's blast of one prolonged and two short "two or three times".

His evidence showed also that the tug and tow appeared to him as if the tide had control of her and she was coming down on him across his bow "bodily", "out of control". And that at the time the ships sighted each other there was nothing that the tug could do to avoid the collision.

He swore that when the ships sighted each other he did not hear the tug sound one short blast and his evidence was confirmed by Commander Rooney, the Quartermaster, who was on the bridge, and by Skipper Lieutenant Foster, who was in the bow.

Commander Rooney stated that when the collision took place "the tow left the tug fairly rapidly and disappeared in the fog quickly down or out the harbour".

I accept the evidence of Pilot Ronald V. Cobham as to the currents that would be operating in the harbour at 8.12 A.M. on the 17th of September, 1942, and the fact that when the tow broke from the tug it disappeared quickly in the fog, down the harbour, appears to confirm his evidence.

1945
 SAINT JOHN
 TUG BOAT
 COMPANY
 LIMITED
 v.
 THE KING
 O'CONNOR J.

The estimates given in the evidence as to the distance between the point of collision and the jetty on the east side of the harbour vary from 168 feet to 400 feet, and the distance between the vessels when they first saw each other varies from approximately 100 feet to 400 feet.

These estimates of distance are made in good faith but because of the difficulty of judging distance in fog they must frequently be inaccurate.

This is clearly shown by the evidence of the mate of the tug who on examination estimated the distance between the ships as, "I don't know—it was around I suppose 400 or so feet". Under cross-examination as to the distance he replied, "I can't just say. You cannot swear how far because she was coming through the fog. At a rough guess . . . I was just going to say I don't know whether 100 yards or 200 yards or 300 yards, you know what I mean, through the fog you cannot exactly tell." He went on to say that it was very hard to estimate distance through fog, and that a fellow finds that all his lifetime goes to sea.

I find that the visibility was approximately 200 feet, and I find that the ships were approximately 200 feet apart at the time when they sighted each other, and I find that the impact took place approximately 200 feet from the jetty. Both captains were navigating by keeping the loom of the wharves within sight, and as I have already found, the visibility did not exceed 200 feet.

I find that the captain of the tugboat in putting the helm aport and full speed ahead on the engines took this action in an effort to try and avoid the collision and that it was not negligence and was done in the "agony of collision".

The suppliant alleges negligence on the part of the servants of the respondent as follows:

- (1) Failure to give three short blasts, meaning "My engines are going full astern," pursuant to the provisions of Article 28 of the International Regulations, as soon as the vessels sighted each other.

I hold that the failure to sound three short blasts was not the cause or part of the cause of and did not contribute to the collision.

I find that at the time the vessels came in sight of each other the distance between them was so short that it was too late for either of them to take any action that would have avoided the collision.

1945
 SAINT JOHN
 TUG BOAT
 COMPANY
 LIMITED
 v.
 THE KING
 O'Connor J.

- (2) Failure to give the fog signal on leaving the wharf until it got opposite the C.P.R. wharf.

The failure to do so was not negligence and did not in any way cause the collision. When the two ships first exchanged signals and each knew that the other was there, they were approximately 1,500 feet apart, so each had ample warning of the presence of the other.

- (3) Failure to draw into the nearest wharf on hearing the fog signal of the tug.

I find that this was not negligence and that the *Beaver* was not required to go into the nearest wharf on hearing the fog signal from the tug and tow.

- (4) While it is not contained in the amended particulars of negligence, the petition of right alleges that when the vessels sighted each other, the tug put its helm to starboard and sounded one short blast indicating that it was altering its course to starboard, but the *Beaver* failed to go to starboard and to signal that she had done so.

There is a very sharp conflict between the evidence of those on the tug and tow and those on the *Beaver* as to this. Captain Hurley swears positively that as soon as he saw the *Beaver* he put his helm to starboard and sounded one short blast indicating that he was going to starboard. The three officers on the *Beaver* swore that they did not hear this signal. The ships at that time would be approximately 200 feet apart and this makes it difficult to understand.

The captain of the tug and the three officers on the *Beaver* are all experienced men and appeared to me to be credible witnesses. I find that Captain Hurley sounded the signal, one short blast, but that at the time he did so, the officers on the *Beaver* had not yet picked up the loom of the tug and tow. The explanation of this may be that the fog allowed the men on the tug and tow to see the bow of the *Beaver* and the number "110" and yet hid

1945
 SAINT JOHN
 TUG BOAT
 COMPANY
 LIMITED
 v.
 THE KING
 O'Connor J.

the tug and tow from the view of the officers and ratings on the *Beaver*. This is probable, because in the evidence of the men on the tug they emphasized that they saw the number "110" on the bow of the *Beaver*. The correct number was "S10". Skipper Foster on the *Beaver* was the first one to see the tug and tow, and his evidence was that he saw the "loom" of the tug and tow.

In any event I accept the evidence of Captain Hurley that he did sound the signal, and the officers of the *Beaver* that they did not hear the signal after they saw the tug and tow. If the officers of the *Beaver* heard the short blast, after they had sighted the tug and tow, they should have directed their course to starboard and signaled one short blast, as required by Rule 28, but if they were not able to see the tug and tow, at the time the short blast was sounded, then Rule 28 would not apply.

Marsden's (9th Edition) *Collisions at Sea* at page 45 discusses the weighing of credible evidence from witnesses on board a ship A, that they were listening but heard no fog signal from ship B, against the credible evidence from B that the signal was properly sounded when the ships were in the same neighbourhood and subsequently came into collision. He points out that the atmospheric conditions under which sounds are readily transmitted are peculiar; the attention of scientific men has been directed to the subject only in recent years, and the subject is at present imperfectly understood, and he sets out in a footnote some interesting conclusions reached by Professor Tyndall based upon elaborate experiments at sea and on shore in the neighbourhood of the fog siren at the South Foreland.

He goes on (page 47) to point out that in collision cases the court will not impute perjury to the witnesses if any other conclusion is reasonably possible, based on the judgment of Evans P. in *Olympic* and *H.M.S. Hawke* (1).

(5) Failure to do anything whatever to avoid the collision after the vessels hove in sight of each other.

I have already held that at that time nothing whatever could have been done.

(6) Not giving free room to the tug and tow. I will deal with (6) and (7) together.

(7) After stopping her engines pursuant to the provisions of Article 16, in putting the engines ahead again before ascertaining the position of the barge and tug.

1945
 SAINT JOHN
 TUG BOAT
 COMPANY
 LIMITED
 v.
 THE KING
 O'CONNOR J.

Because of the fog, both vessels were proceeding close to the east side of the harbour, so as to use the loom of the wharves in navigating and when the first signals were exchanged the ships were only approximately 1,500 feet apart, and within approximately three minutes the collision took place.

Each knew he was approaching the other and getting closer and closer, and the four men on the tug and tow and nine men on the bridge and bow of the *Beaver* were keeping a proper lookout, they were peering intently through the dense fog, all on the alert. There is no suggestion by either side that the other failed to keep a proper lookout.

Both sounded the proper fog signals two or three times. The witnesses on both sides use that expression, "two or three times".

A steamship in a fog so dense that a vessel could not be seen her own distance off, hearing the whistle of another continually approaching, was held in fault for not reversing until the other vessel was seen. Marsden's *Collisions at Sea* (9th Edition) p. 384, citing *The Dordogne* (1); *The Bremen* (2).

The length of the *Beaver* was 247 feet. The tow was 200 feet in length and the tug projected 25 feet behind the tow, so the over-all length of the tug and tow was 225 feet. The visibility was approximately 200 feet, so that in this case the fog was so dense that neither vessel could see or be seen her own distance off. They heard the signals of each other getting closer and closer and yet they both failed to reverse their engines. The captain of the *Ocean Hawk* states that he stopped his engines on hearing the first signal and kept them stopped, and that the water was "slack". But he does not explain why the tug and tow in approximately three minutes travelled 1,000 feet, and it is clear that when he sighted the *Beaver* there was nothing that he could do to avoid the accident.

(1) [1885] 10 P.D. 6

(2) [1931] 47 T.L.R. 505

1945
 SAINT JOHN
 TUG BOAT
 COMPANY
 LIMITED
 v.
 THE KING
 O'CONNOR J.

The captain of the *Beaver* states that his ship was moving with only sufficient way on it to keep it under control. But when he sees the tug and tow at a distance of 200 feet it is too late for him to do anything.

The *Ocean Hawk's* failure to reverse at all and the *Beaver's* failure to reverse until just a moment before it saw the tug and tow was, under the circumstances, negligence, and was the direct cause of the collision.

I find that the damage and loss to the *Ocean Hawk I* was caused by the fault of both vessels and that the fault was in equal degree.

I find that Commander Swansburg, who was in command of *H.M.C.S. Beaver*, was a member of the naval forces of His Majesty in the right of Canada and is, by virtue of the amendment of the Exchequer Court Act, Statutes of Canada, 1943, Chapter 25, deemed to be a servant of the Crown.

Where a claim is made against the Crown under section 19 (c) of the Exchequer Court Act, as amended in 1938, for loss or injury resulting from the negligence of an officer or servant of the Crown while acting within the scope of his duties or employment, the liability of the Crown is to be determined by the law that was in force on the 24th day of June, 1938, the date upon which the amendment imposing liability for such negligence upon the Crown came into effect.

That where a claim is made against the Crown under s. 19 (c) of the Exchequer Court Act, as amended in 1938, for loss or injury resulting from the negligence of an officer or servant of the Crown in driving a motor vehicle while acting within the scope of his duties or employment, the liability of the Crown is to be determined by the law of negligence of the province in which such alleged negligence occurred that was in force in such province on June 24, 1938, the date upon which the amendment imposing liability for such negligence upon the Crown came into effect, except in so far as such provincial law is repugnant to the terms of the said section or seeks to impose a liability upon the Crown different from that imposed by the section itself. *The King v. Armstrong* (1908) 40 Can. S.C.R. 229 and *Gauthier v. The King* (1918) 56 Can. S.C.R. 176 at 180, followed and applied.

Tremblay v. The King (1), Thorson P. at page 2.

Section 640 of the Canada Shipping Act, being Chapter 44 of the Statutes of Canada 1934, was in force on the 24th of June, 1938.

This section provides that where by the fault of two vessels damage or loss is caused to one or more of the vessels, the liability to make good the damage or loss shall be in proportion to the degree in which each vessel was at fault.

1945
SAINT JOHN
TUG BOAT
COMPANY
LIMITED
v.
THE KING
O'Connor J.

These provisions are in my opinion applicable, and in view of my finding that the fault was in equal degree, the damage will be equally divided.

I fix the damage to the *Ocean Hawk* at \$2,367.00 and the loss of her earnings at \$1,400.00.

No evidence was given of damage to *H.M.C.S. Beaver* and so the respondent must bear half the loss sustained by the *Ocean Hawk I. The Iroquois* (1); *The Hiawatha* (2).

There will be judgment for the suppliant in the sum of \$1,883.50 and the costs of the action.

Judgment accordingly.