1959
Oct. 21, 22
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BETWEEN:

THE SHIP *PRINS FREDERIK WILLEM* AND HER OWNERS ... APPELLANTS;

AND

GAYPORT SHIPPING LIMITED, OWNERS OF THE TANKSHIP *BRITAMLUBE* .... RESPONDENTS.

Shipping—Appeal from judgment of District Judge in Admiralty—Collision in Port of Montreal—Failure to obtain permission of Harbour Master to enter channel—Failure to keep to right hand side of channel—Failure to sound warning blast—Links in chain of causation ending in collision—Appeal allowed and judgment of trial court varied.

Held: That failure to obtain permission from the Harbour Master at the Port of Montreal to enter what is a dangerous and busy channel, by steering a mid-channel course, particularly when two ocean-going vessels were tied up alongside sheds 18 and 19, and failure to sound a warning blast when opposite the Marine Tower were acts of negligence on the part of those in charge of the respondent ship *Britamlube* which contributed to the collision with appellant ship *Prins Frederik Willem,* thereby causing damage.

APPEAL from the judgment of the District Judge in Admiralty for the Quebec Admiralty District.[1]

The appeal was heard before the Honourable Mr. Justice Kearney at Montreal.

Jean Brisset, Q.C. for appellants.

F. O. Gerity and *A. S. Hyndman* for respondents.

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

KEARNEY J. now (February 9, 1960) delivered the following judgment.

This is an appeal under the *Admiralty Act,* R.S.C. 1952, c. 1, s. 32, from a judgment rendered at Montreal on March 2, 1959, by the Hon. Arthur I. Smith, District Judge in Admiralty, sitting with Captain A. M. Lillis and Captain John M. Wilson as assessors[2]. The litigation concerned a claim by the respondents and a counter-claim by the appellants, arising out of a collision between the vessels *Prins*

[1] [1959] Ex. C.R. 205. [2] [1959] Ex. C.R. 205.

Frederik Willem and the *Britamlube* which occurred in the port of Montreal. By the aforesaid judgment the appellants were held solely responsible for the collision; their counter-claim was accordingly dismissed and the respondents' action maintained, with costs in each instance.

The only issues involved are whether the learned trial judge was justified in holding the appellants solely responsible for the collision; and if not, the extent to which the respondents should be held liable because of the contributory fault and negligence of those in charge of the *Britamlube* and for whose acts her owners are liable in law.

The broad facts of the case, which are dealt with in detail by the learned trial judge, are as follows. The locations of shed No. 24 and the McColl Frontenac dock mentioned later are to be seen on Exhibit D 13. Other places mentioned appear on Exhibit D 2.

On June 20, 1958, at about 11:45 a.m., the tankship *Britamlube,* arriving from the Great Lakes and bound for the McColl Frontenac dock in the town of Montreal East, entered lock No. 1 of the Lachine Canal which is a gateway to the Harbour of Montreal. She left the lock at 12:03 p.m. without permission from the Harbour Master; and at the same moment the *Prins Frederik Willem,* with the required permission, left her moorings at section 24 of Victoria Pier, bound for the Great Lakes via the Lachine Canal.

Ten minutes later, following a fruitless exchange of signals, when the *Prins Frederik Willem* headed cross-channel was coming out from behind Victoria Pier, her stem collided with the port side of the *Britamlube* forward of her afterhouse, at an angle of about 80°. The location of the collision is a subject of controversy which I will refer to later. The damages allegedly suffered by the appellants amounted to $20,000. The respondents' claim of $40,000 was referred by the learned trial judge to the District Registrar of the Court for assessment.

The distance from the mouth of lock No. 1 to section 24 is a little more than a mile, and section 24 is located about 750′ down-stream from the east end of Victoria Pier. About 1,500′ up-stream from the Clock Tower, and on the same side as this pier, stands the Marine Tower Jetty which is a signal point.

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Commencing at a point about 600′ up-stream from buoy 201M, a current known as St. Mary's Current with a velocity of five or six knots enters the south side of the channel at an angle of about 45°, causing an up-stream swirl on the opposite side of the channel where it meets Victoria Pier near the Clock Tower. The elements were in no way to blame, as the weather was fine and clear, the visibility good, and a light southeasterly wind was blowing.

In addition to the master and a pilot duly qualified for the district, the marine superintendent of the agents of the ship, the third mate and a radio operator were on duty in the wheel-house of the *Prins Frederik Willem*. In the wheel-house of the *Britamlube* were the master, a duly qualified pilot, a second mate and a sailor who was at the wheel.

The two ships are about the same size. The *Prins Frederik Willem,* a Netherlands ocean-going vessel registered at Rotterdam, is 258′ in length with a 42 foot beam. She is a motor ship fitted with a right-hand propeller, and her full speed loaded is twelve knots. She is both faster and more manœuvrable than the *Britamlube.* The latter is a lake motor tankship, 250′ in length and 44′ in breadth, with a maximum speed of about eight knots.

At the time of the collision two ocean-going vessels, *Thor No. 1* and *Whangaroa,* were tied up port side to at Victoria Pier alongside sheds 18 and 19 respectively, and the stem of the *Whangaroa* was protruding past the Clock Tower at the end of the pier. Down-stream from the Clock Tower the channel broadens and two ships, *Britamoco* and *Barrie,* bound up-stream and stemming the current near Jacques Cartier Bridge, about half a mile from Victoria Pier, were awaiting their turn to proceed up-stream to the Lachine Canal.

In the present case, as in nearly all cases where a conflict of interests is involved and quick decisions must be made in the face of imminent danger, there exists a considerable amount of contradictory evidence. The case is unusual, however, since the parties, except in a few instances, accept the findings of fact as made by the learned trial judge. Thus to justify an appeal based on alleged contributory negligence on the part of the *Britamlube,* the appellants point to the following findings in the judgment

appealed from. She failed to obtain permission of the Harbour Master to enter the Harbour of Montreal from the Lachine Canal, in breach of regulation 42 of the Montreal Harbour Regulations; she failed to blow one prolonged whistle blast when opposite the Marine Tower Jetty to warn upbound traffic, in breach of regulation 43(*b*); she failed to keep to her right-hand side of the channel (in contravention of regulation 43(*a*) and article 25 of the *International Rules of the Road*).

Counsel for the appellants conceded that the following faults committed by the *Prins Frederik Willem* contributed to the accident: her failure, notwithstanding that there was no statutory obligation under the harbour's rules to do so, to blow one long blast before coming out into the channel past the Clock Tower, and similarly her failure to give a radio security call; and the failure of her navigators to take full astern action as soon as the *Britamlube* was sighted. It was stated on behalf of the appellants that, immediately upon sighting the *Britamlube,* the *Prins Frederik Willem* was already irrevocably committed to a cross-channel course and had neither the time nor the space to avoid a collision. Speaking of this aspect of the case, the learned trial judge stated that, in his opinion, the evidence does not support such a view. I will comment on this finding later. The judgment then goes on to say:

> Moreover, regardless of whether or not the *Prins Frederik Willem* could by the exercise of reasonable care and skill have avoided the collision after she sighted the *Britamlube,* I am convinced, and I am so advised by the Assessors, that those in charge of the *Prins Frederik Willem* were negligent in entering and proceeding to cross the channel as they did without warning and without taking reasonable means to assure themselves that this manoeuvre could be made without risk of collision with downbound shipping.

I fully concur in the last mentioned finding because in my view this act of negligence on the part of the *Prins Frederik Willem,* though not admitted yet clearly proven, constituted not only a contravention of a statutory duty but a grave delinquency in good seamanship.

In further support of such finding it should be noted that the *Prins Frederik Willem* was headed in the direction of buoy 201M, admittedly with the intention of proceeding up-stream on the south side of the channel, which would

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contemplate passing any downbound vessel starboard to starboard. There is evidence to the effect that further downstream, in the vicinity of Jacques Cartier Bridge, ships by exception sometimes pass starboard to starboard, but such toleration does not extend to the narrow channel up-stream, beginning at the Clock Tower. Those in charge of the ship, before attempting to shape any course, much less the abnormal one which would take her in the normal path of downbound traffic and, notwithstanding a previous authorization by the Harbour Master's office to enter the channel, should have complied with Rule 12 of the *St. Lawrence River Regulations*, which reads as follows:

> A vessel navigating against the current or tide shall before meeting another vessel at any sharp turn or narrow passage, or where the navigation is intricate, stop, and if necessary, come to a position of safety below or above the point of danger, and there remain until the channel is clear.

I also agree that the weight of evidence indicates that those in charge of the *Prins Frederik Willem* were not sufficiently on the alert as they failed to hear the following radio-telephone warning calls given by the *Britamlube* just prior to leaving lock No. 1:

> Security call. . . . security call. . . . security call. *Britamlube* leaving Lock No. 1, going down the river.

It can likewise be said that the *Prins Frederik Willem* should have heard the warning blast given by the *Britamlube* just before she entered the channel from the canal, as required by the Montreal Harbour Regulations, since this signal as well as the security calls were heard by the *Barrie* and the *Britamoco* waiting on the south side of Jacques Cartier Bridge for the *Britamlube* to come down. That the *Prins Frederik Willem* was in a large measure to blame for the collision in my opinion has been proved beyond peradventure.

Before dealing with the main issues I wish to comment on the factual findings as appear in the judgment of first instance, which were the subject of contestation before me. The first concerns the down channel course followed by the *Britamlube* which the judgment dealt with in the following short paragraph:

> Although it was also alleged that the *Britamlube* was at fault, in that she failed to keep to her starboard side of the channel and was proceeding at an excessive speed, I am advised that in keeping to midchannel

and proceeding at the speed she did the *Britamlube* was acting in accordance with the usual practice, having regard particularly to the contour of the channel and the currents which characterize that area.

Counsel for the respondents met the issue by submitting that the best evidence indicated that the *Britamlube*, both before and at the time of the collision, remained close to the right-hand side of the channel and made no comment on the so-called practice of following a mid-channel course. Counsel for the appellants, while maintaining that the learned trial judge rightly held that the *Britamlube* had kept to mid-channel, submitted that he erred in holding that she was justified by practice in doing so, and that some misunderstanding between him and his advisers must have occurred because, although it is the practice for downbound vessels to go down-stream at up to ten knots, no practice exists to justify following a mid-channel course such as described in the judgment.

The evidence, particularly of the master and pilot of the *Britamlube*, indicated that their ship passed within 30 or 40 feet of buoys 205M and 203M and that, when the collision occurred, buoy 201M which is on the southern edge of the channel was not more than 40 to 50 feet off the starboard quarter of the *Britamlube*. It was probably this last piece of testimony which caused the pilot's evidence on the subject to be discredited by the learned trial judge. Those on board the *Prins Frederik Willem* and others testified that the collision occurred in mid-channel and such was the finding of the learned trial judge. With reference to usual practice, the only evidence in the record is found in the testimony of the pilot of the *Britamlube* who stated that as usual he followed a course very close to the southern limits of the channel, and my advisers tell me that the practice described is correct.

Another point of controversy was the location of the collision and the description which was made of it by the learned trial judge. The most conclusive evidence on the location of the collision, in my opinion, is to be found on Exhibit P 8 which is an on-the-spot colored photograph taken from the *Whangaroa*. It indicates that the collision occurred at about a ship's length down-stream from a point

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located midway in a line drawn between buoy 201M and the Clock Tower. Earlier in his judgment the learned trial judge stated:

> The evidence shows that the collision occurred approximately in mid-channel in the vicinity of Buoy 201M, about in line with the Clock Tower.

Since he was speaking in terms of approximation, his use of the words "in midchannel in the vicinity of Buoy 201M, about in line with the Clock Tower," though not exactly accurate, is inconsequential.

I will now deal with the remaining instances in which the learned trial judge's finding of fact was in issue and to which counsel for the appellants took strong objection. The learned trial judge found, and the appellants admitted that the *Prins Frederik Willem* was negligent in failing as a precautionary measure, though not required to do so by harbour regulations, to sound a warning blast when leaving shed 24, but he excused the *Britamlube* for her failure to give the signal required when passing the Marine Tower, because in his opinion it did not contribute to the accident as the ships sighted each other when the *Britamlube* was abeam of the Marine Tower.

Counsel for the appellants, with considerable justification I think, urged that the weight of evidence clearly indicates that the *Britamlube* was midway between sheds 18 and 19 when she heard the two blast signals given by the *Prins Frederik Willem.* All those on board the *Britamlube* testified that the *Prins Frederik Willem* was sighted at a distance ranging from 900′ to 1,200′. In the Preliminary Act it is stated for the respondents that the distance between the ships on sighting each other was 900-1,200′. All those on board the *Prins Frederik Willem,* with the exception of the master, testified that when the *Britamlube* was first sighted she was not more than 1,100 to 1,500′ off, and the master's evidence on the subject was as follows:

> Q. How far off was the other ship when you sighted her for the first time?
>
> A. I estimated six or eight ship lengths.
>
> Q. You are speaking of your own ship's length?
>
> A. Yes, but the *Britamlube* would be about the same length, I think.
>
> Q. That would be how many feet?
>
> A. About 1500 feet, I think; maybe a little more. I don't know.

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The learned trial judge accepted the position of the *Prins Frederik Willem* when she reached the edge of the current as 500′ below Victoria Pier, and it is only the use of the outside figure of 2000′, i.e. eight ship lengths, that he could find that the *Britamlube* was "just about abeam of the Marine Tower" when she was sighted by the *Prins Frederik Willem;* and to say that "it is admitted by those on board the *Prins Frederik Willem* that the *Britamlube* was first sighted at a distance of from 1500 to 2000 feet" is hardly accurate. The word "about" is a term of approximation and possibly elastic enough to describe the position of the *Britamlube* when she heard the two blast signals of the *Prins Frederik Willem* even if, as seems to be the case, she was midway between sheds 18 and 19. In such event the *Britamlube* at the time in question would be some 700′ or 800′ below the Marine Tower (counsel for the respondents admits that she was "650′ east of Marine Tower Jetty"), and even this difference in distance, in my opinion, is an important factor which should not be overlooked. I think it is probable, but it cannot be said for certain, that, had the *Britamlube* in accordance with harbour regulation 43(*b*) given a prolonged blast when going past Marine Tower Jetty, it would have been heard from such close range. In the affirmative, the *Prins Frederik Willem* would not have reached the current and would have had advanced warning and additional reason for taking immediate hard-astern action instead of going boldly out into the current.

I am not unmindful that only in exceptional circumstances should an Appeal Court take upon itself to reverse the findings of fact made by a trial judge, particularly where credibility of witnesses is concerned. *Vide Landry v. Ray et al.*[1]; *Powell v. Streatham Manor Nursing Home*[2]; *Semanczuk v. Semanczuk*[3]; *The Steamship Giovanni Amendola v. Powell River Co. Ltd.*[4]. But in the present case it

[1] (1894) 4 (Can.), Ex. C.R. 280.
[2] [1935] A.C. 243, 250, 265.
[3] [1955] S.C.R. 658, 667.
[4] [1959] Ex. C.R. 1, 4.

is mainly a matter of drawing proper inferences from facts as found by the learned trial judge and, as Lord Wright observed in the *Powell* case (*supra*), p. 267—

> The problem in truth only arises in cases where the judge has found crucial facts on his impression of the witnesses: many, perhaps most cases, turn on inferences from facts which are not in doubt, or on documents: in all such cases the appellate Court is in as good a position to decide as the trial judge.

I will now direct my attention to the question of whether the learned trial judge erred in absolving the respondents of all blame and in concluding that their negligence in no way contributed to the collision.

In my opinion, which is fully shared by my advisers, the most significant finding against the master and pilot of the *Britamlube* is that they caused the vessel to enter the harbour and proceed down channel in violation of Montreal Harbour Regulation 42 which states:

> No vessel shall enter the harbour of Montreal from the Lachine Canal except at the time permitted by the Board.

The record shows that she arrived in lock No. 1 at about 11:45 a.m. and left at 12:03 p.m. and that a few minutes before leaving the pilot endeavoured unsuccessfully to communicate by radio-telephone with the Harbour Master's office in order to obtain the required permission, whereupon he and the master of the ship took it upon themselves to go down-stream on their own authority. Especially since, apart from a narrow channel, there were a treacherous current and blind spots to be encountered, such mode of action was by no means in keeping with good seamanship. When the pilot was asked in cross-examination if he did not know from his own experience that he could not leave lock No. 1 when another ship, upbound, was leaving shed 24 or 25, he answered affirmatively. He stated in evidence that they could not wait all day in the lock, but the master said that they could tie up at Bickerdike Pier and hold the basin all day if they so wanted. They apparently made no effort during more than a quarter of an hour to reach the Harbour Master's office by radio-telephone or, by making use of the city line which is in the Lock Master's office; and when during a few minutes they found the circuit engaged, their patience apparently became exhausted, and as already stated they could wait no longer. Instead of satisfying

themselves with the giving of a warning blast as required by regulation 43 and giving warning calls by radio, which are not required by the regulations, they should have waited until they had contacted the Harbour Master's office before entering the channel. The master of the *Britamlube* stated that, since the Lock Master opened the lock, he thought it was all right for him to proceed. The Lock Master was called by the respondents and testified that, although he did not so inform those in charge of the *Britamlube,* he himself had secured clearance for the ship. This statement which on its face is incredible, and which was categorically contradicted by the evidence of the captain who was Berthing Master for the harbour was inferentially discredited by the learned trial judge. The Harbour Master's office is the clearing house for ship movement in the harbour and, as might be expected, he testified that he would not have given permission to the *Britamlube* to come down-stream without informing each ship of the position of the other and giving appropriate instructions to both.

If, as the learned trial judge found, the *Britamlube* had maintained a mid-channel course, she was acting in contravention of harbour regulation 43(*a*) which states:

> At the harbour of Montreal, every downbound vessel shall, in order to warn upbound vessels, give one prolonged blast with its whistle or other aural warning device immediately upon leaving the entrance of the Lachine Canal and shall navigate to the right of the midchannel before rounding Alexandra Pier;

as well as in violation of rule 25(*a*) of the *International Rules of the Road* which states:

> In a narrow channel every power-driven vessel when proceeding along the course of the channel shall, when it is safe and practicable, keep to that side of the fairway or mid-channel which lies on the starboard side of such vessel.

To keep to mid-channel, particularly when two large ocean-going vessels were tied up at sheds 18 and 19 and the stem of one of them was protruding down-stream past the Clock Tower, was not only a violation of rules but an act of improper seamanship, because it left the *Prins Frederik Willem,* if she had wished to turn to starboard, little more than her own length within which to navigate. A glance at Exhibit P 8 bears this out.

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The pilot of the *Britamlube* testified that he dared not steer his ship hard-to-port in response to a similar movement signalled by the *Prins Frederik Willem* because of the danger of being swept against the large vessel anchored alongside shed 19. I am advised that, once the *Prins Frederik Willem* had entered the current in the manner she did, for her to swing hard-to-starboard would have been a similarly dangerous manoeuvre. If the *Britamlube* had been far to the starboard side of the channel, she would have been visible to the pilot of the *Prins Frederik Willem* sooner than was the case and he would have plainly seen that he should immediately veer to starboard and would have had the necessary room within which to do it and would have been less taken by surprise.

I would attach more importance than did the learned trial judge to the violation by the *Britamlube* of harbour regulation 43(*b*) which reads as follows:

> Every vessel downbound from a point above Victoria Pier, to a point below Victoria Pier shall, in order to warn vessels leaving Market Basin, give one prolonged blast with its whistle or other aural warning device when opposite the Marine Tower Jetty at Elevator No. 2.

The pilot of the *Britamlube* gave as justification for his failure to blow a long warning blast that such action might have caused confusion and those in command of the *Barrie* and the *Britamoco* might have mistaken it for a signal to starboard. The nearer of the two ships was over half a mile away and their pilots who are no doubt as familiar with the harbour regulations as the pilot of the *Britamlube* would have recognized a prolonged blast as the warning which every downbound ship is required to give when opposite the Marine Tower, and not as a signal to starboard; and in my opinion this so-called justification merely constituted a lame excuse.

The pilot of the *Prins Frederik Willem,* because he had been given permission to enter the channel had some right to expect that any ship downbound, especially without permission, would give a signal warning at the Marine Tower of her approach. The pilot of the *Prins Frederik Willem* testified that, if the *Britamlube* had given such a signal, it would have been received while he was still behind Victoria Pier and he would have had time and opportunity to alter

his intention of crossing to the south side of the channel. A still earlier warning from the Harbour Master that a ship was bound down-stream would have given him correspondingly greater opportunity to avoid the course of action which he pursued. I think that on sighting the pilots of both ships were taken by surprise by the closeness of one ship to the other. The 65 foot beam of the *Whangaroa* cut off the view and the pilot of the *Britamlube,* at one point in his testimony, placed his ship about 900′ from the *Prins Frederik Willem* when he first sighted her. Indeed so close were the ships that the master testified as follows:

> Q. Now, Captain (master), when you saw the *Prins Frederick Willem* for the first time, I suppose you realized then and there that there was danger of a collision?
>
> A. As soon as he blew the whistle I knew there was going to be a collision.

Thereupon the master ordered a danger signal of five or six short blasts to be sounded, so that those on board who were in their cabins below would seek safety on deck.

In my opinion those in charge of the *Britamlube,* by their failure to obtain permission from the Harbour Master to enter what is a dangerous and busy channel, by steering a mid-channel course, particularly when two ocean-going vessels were tied up alongside sheds 18 and 19; and by their failure to sound a warning blast when opposite the Marine Tower, have been guilty of acts of negligence which, to borrow a phrase from Marsden's *Collisions at Sea* by Kenneth C. McGuffie (Tenth Edition, p. 15), "formed a link in the chain of causation ending in the collision, and thereby caused damage."

Having recovered from their initial shock and surprise, the pilots of the *Prins Frederik Willem* and the *Britamlube,* by giving a tardy full-astern order, and a hard-to-port order reversing a hard-to-starboard course, respectively, were attempting to act in the best interests of their ships and those aboard them and to minimize the effect of an inevitable collision; and I think it unnecessary to discuss these last minute efforts in further detail.

For the foregoing reasons, and with the benefit of expert advice from Captain Carl A. Bodensieck and Captain N. E. Rees-Potter, nautical assessors, I would vary the judgment

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appealed from and hold the appellants responsible for three quarters and the respondents for one quarter of the damages suffered by the *Britamlube* and the *Prins Frederik Willem*. I would consequently maintain the appeal and counter-claim with costs and I would refer the assessment of damages to the learned Registrar for the Admiralty District of Montreal in the event of the parties' failure to come to an agreement in respect thereto.

Judgment accordingly.