

QUEBEC ADMIRALTY DISTRICT.

BETWEEN
 WILLIAM FRASER, PLAINTIFF;
 V.
 S.S. AZTEC DEFENDANT.

1920

July 6

Statement
of Fact.

Admiralty Law—Nautical Assessors—Expert Evidence—Practice.

The case was appealed to the Exchequer Court from the decision of the Deputy Local Judge in Admiralty. On the application of plaintiff to have further witnesses heard, defendant consenting, the judgment was set aside and the case was sent back before the Deputy Local Judge in Admiralty to allow plaintiff to put in such evidence as he desired and as might be legal.

On the re-hearing before a Judge, assisted by a Nautical Assessor' photographs were filed to show the action of the water in the lock, but no steamer was in the lock at the time and they do not show what would have been the result had the *Aztec* or a similar steamer been in the lock.

Held: That the evidence of experiments with water in the lock without any steamer being in it is of the nature of expert evidence, and as the Court had the assistance of a Nautical Assessor to advise upon any matters requiring nautical or other professional knowledge, such expert evidence is inadmissible. "The Universe" (1) referred to.

2. That the new evidence, so far as it is expert evidence, being inadmissible, and being advised by the Nautical Assessor that the mooring of the steamer was sufficient, there was nothing in the evidence to make the court change its former judgment (2).

(1) 10 Can. Ex. E.R. 305; (2) See 19 Can. Ex. C.R. 454.

THE CASE was tried in the first instance by the Honourable Mr. Justice MacLennan and was dismissed, the Judge finding that the accident was caused by the gross negligence of the lockmen and not of the *Aztec* and her crew.

This case has been appealed to the Exchequer Court.

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The plaintiff then appealed from the Deputy Local Judge to the Exchequer Court. At the opening of the appeal, application was made by plaintiff to be permitted to examine further witnesses. The Honourable Mr. Justice Audette presiding, considered that such evidence should be given before the Judge who had heard the case in the first instance and therefore ordered that the case be remitted before the Local Judge in Admiralty, and that the case be there reheard and the evidence which the parties desired to adduce and which might be legal be there taken and that judgment be rendered by the said judge upon such new evidence as well as upon the evidence already of record.

The new trial was held on the 22nd of June, 1920, at Montreal, before the Honourable Mr. Justice MacLennan, assisted by a Nautical Assessor.

Mr. R. A. Pringle, K.C. and *Mr. Aubrey H. Elder*, counsel for plaintiff;

Mr. A. R. Holden, K.C., counsel for defendant.

The facts in connection with the re-hearing are stated in the reasons for judgment.

MacLennan, D. L. J. A., now (this 6th July, 1920) delivered judgment.

This case was tried before me some time ago and, on 16th March, 1920, (1) I dismissed the action with costs, having come to the conclusion that the accident was caused by the gross negligence of the lockmen, and that the *Aztec* and her crew were not to blame.

On a motion by plaintiff by way of appeal from that judgment Mr. Justice Audette, of the Exchequer

(1) See 19 Can. Ex. C.R. 454.

Court, on 26th May, 1920, ordered and adjudged that said judgment be set aside and the case be re-heard and thereafter determined by me upon the evidence already adduced and upon such further evidence as the parties might see fit to adduce, and that the costs of the first trial or hearing be reserved to be dealt with by me.

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The new trial was held on 22nd of June, 1920, when I had the assistance of Captain Grey as Nautical Assessor. The plaintiff adduced some new evidence including a number of photographs of the lock where the accident occurred. Among the photographs several purport to show the water in the lock, some with one, others with two valves in the upper gates open and all valves in the lower gates open. No steamer was in the lock at the time these photographs were taken and they do not show what the result would have been had the steamer *Aztec* or a ship of similar size been in the lock. The evidence of experiments made with the water in the lock without any steamer being in it is the nature of expert evidence, and as the Court had the assistance of a Nautical Assessor to advise upon any matters requiring nautical or other professional knowledge, such expert evidence is inadmissible.²

Two witnesses examined at the first trial, Albert Durocher and Joseph H. McDonald, the two lockmen in charge of the lock at the time of the accident, were recalled by plaintiff and testified that after the *Aztec* entered the lock her bow was tied up to the north wall of the lock and her stern was to the south wall. The *Aztec* had a right hand propeller and I am advised by my assessor that its action as the steamer came to a

(2) The Universe, 10 Exchequer Court Reports, 305.

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standstill when it was tied up to the north wall would be to cause the stern of the steamer to lie against the north wall of the lock, and I am also advised that the effect of water coming through one or more of the valves in the upper gates and striking against the lower gates would cause a back eddy, and the effect of such eddy would be to keep the stern of the steamer against the north wall. Neither Durocher nor McDonald, at the first trial, said anything about the stern of the steamer being against the south wall of the lock. They were both examined at considerable length at the first trial and neither of them suggested the steamer was in the position in which they said she was when examined at the new trial. I was not impressed at the first trial with their credibility and I am not disposed to accept their evidence at the new trial on this point. At the first trial Heppel, a lockman, swore that the steamer when it went astern hit the north gate. Lebeau, a witness called on behalf of the defendant, said it hit the south leaf of the west gate. McDonald said she went into the centre of the upper gates, and Durocher could not say if the steamer canted into the middle of the lock or went straight astern. In my opinion it is immaterial whether the steamer, when thrown astern, struck the centre, the north leaf or the south leaf of the upper gates.

The new evidence, so far as it is expert evidence, is inadmissible and I am advised by my Assessor that the mooring of the steamer was sufficient. At the first trial I came to the conclusion that the non-observance of canal Rule 27 regarding the number of lines to be used in making the steamer fast in the lock did not contribute to the accident in any manner whatsoever, and there is nothing in the evidence adduced

at the new trial to make me change my opinion on that question.

Having regard therefore to the evidence adduced at the first trial and the further evidence adduced by plaintiff at the new trial, I have come to the conclusion that plaintiff's action should be dismissed for the reasons given in support of the first judgment.

The costs of the first judgment were given against plaintiff and there is no reason why that order should not be followed. Plaintiff's action fails and there will be judgment dismissing it with costs of both trials against plaintiff.

Solicitors for plaintiff: *Messrs. Davidson, Wainwright, Alexander, Elder & Hackett.*

Solicitors for S.S. Aztec: *Messrs. Meredith, Holden, Hague, Shaughnessy & Howard.*

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