APPEAL FROM THE QUEBEC ADMIRALTY DISTRICT.

1915
Sept. 7.

THE S.S. TUG "ETHEL Q." CAPTAIN EMILE SEQUIN,

APPELLANT (*Defendant*);

AND

ADELARD BEAUDETTE, CAPTAIN AND OWNER OF THE SAILING BARGE "A. YERGEAU,"

RESPONDENT (*Plaintiff*).

Admiralty—Appeal—What reviewable—Collision—Damages.

The Exchequer Court, sitting in appeal in admiralty matters, will not interfere with the judgment of the lower Court as regards pure questions of fact or the quantum of damages, unless it appears clearly erroneous.

Held, that upon the evidence the judgment of the Court below was correct in finding a tug, having a dead tow, responsible for a collision with a barge properly moored.

APPEAL from the Quebec Admiralty District in a collision case.

Heard by the Honourable Mr. Justice Audette, at Montreal, Que., May 31, 1915.

A. R. Angers, K.C. and *A. E. de Lorimier,* K.C., for appellant.

T. Rinfret, K.C., and *A. R. W. Plimsoll,* for respondent.

AUDETTE, J. (September 7, 1915) delivered judgment.

This is an appeal from the Deputy Local Judge of the Quebec Admiralty District, sitting at Montreal, in a case of damages arising out of a collision which

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occurred in the Lachine Canal, between the barge "A. Yergeau", which was moored at a berth assigned to her, by the proper officer in that behalf, on the north side of the Lachine Canal for the purposes of unloading, and the dead tow of the tug "Ethel Q", as set forth in the reasons for judgment of the learned judge.

Sitting as a single judge in an Admiralty Appeal from the judgment of a trial judge, while I might feel obliged to differ with great respect in matters of law and practice, yet as regards pure questions of fact or the quantum of damages, I would not be disposed to interfere with the judgment below, unless I came to the conclusion that it was clearly erroneous. *The Queen v. Armour*,[1] *Montreal Gas Co. v. St. Laurent*,[2] *Weller v. McDonald-McMillan Co.*,[3] *McGreevy v. The Queen*,[4] *Arpin v. The Queen*.[5]

The Supreme Court of Canada also held that when a disputed fact involving nautical questions, as the one raised in this case, with respect to what action should have been taken immediately before the collision, is raised by an appeal, that the decree of the Court below should not be reversed merely upon a balance of testimony. *The Picton*.[6] Indeed, it may be said that the hearing upon the appeal is a rehearing, and there is no presumption that the judgment in the court below is right; but it cannot be overlooked that the learned judge of the first instance has had an opportunity of hearing and seeing the witnesses and testing their credit by their

[1] 31 Can. S.C.R. 499.
[2] 26 Can. S.C.R. 176.
[3] 43 Can. S.C.R. 85.
[4] 14 Can. S.C.R. 735.
[5] 14 Can. S.C.R. 736, *Coutlée's Digest*, S.C., Vol. 1, p. 93 *et seq.*
[6] 4 Can. S.C.R. 648.

demeanour under examination. *Riekmann v. Thierry.*[1]

I have carefully read the whole of the evidence, given it serious consideration, and in the result, without again reviewing all the facts leading to the collision, but taking them all in consideration, I must without hesitation arrive at the conclusion that the tug is responsible for the collision. There was no false or wrong manœuvre on behalf of the plaintiff, his barge being moored at the pier, or at the bank of the canal, at the proper place. The tug was towing a scow that had no rudder, and no mode whatsoever of propelling or of moving by itself.

The point upon which most of the argument, on behalf of both parties, is addressed is as to the quantum of the damages allowed. Both sides apply to vary the same; the plaintiff, by his cross-appeal, asks that the amount of damages be increased, and the defendant claims that it should be reduced. On this question the evidence is very conflicting. On behalf of the defendant it is claimed that repairs were made which were not necessary or not flowing from or occasioned by the collision in question. And in support of that contention witnesses are brought to establish that fact upon what they have seen of the barge at the time of the accident, when the barge was still loaded, and when it was absolutely impossible to ascertain with any accuracy the extent of the damages. And there is this other evidence on behalf of the defendant by their employees who examined the barge after she had been repaired. While it may be said this class of evidence may in some degree help in arriving at a just conclusion, after the con-

[1] 14 R.P.C. 105.

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sideration of the evidence on behalf of both parties, it is not of itself conclusive.

On behalf of the plaintiff we have the evidence of the parties who made the repairs, the cost of all the materials bought for such purpose and which are claimed to have gone into the barge; but it is challenged that more repairs were made than were necessary and that the barge is now better than it was on July 26th, 1914, before the accident.

However, as one of the witnesses so wisely said, it is impossible, in a case of this kind, after the collision to properly ascertain the amount of the damages, what should be repaired, taken out or replaced, until, and only until, you begin to undo the damaged part of the vessel.

There appears to have, perhaps, been placed upon the damaged barge more repairs than were absolutely necessary, with some slight additions to the state in which she stood before the accident. But the plaintiff himself seems to have taken that into consideration, because while, by his statement of claim, he seeks to recover $2,586.93, by his general account filed as Exhibit No. 7, he only claims the sum of $2,151.67.

Obviously the learned judge has also taken that into consideration when by his judgment he only allows the sum of $1,500. And it must not be lost sight of the further fact that out of this $1,500, the sum of $315 appears to have been allowed for demurrage and towage, leaving the sum of $1,185 for the repairs.

Bilodeau, a witness heard on behalf of the defendants, claims that repairs to the extent of $904 were unnecessary. Taking these figures and deducting $904 from the amount of $2,151.67 claimed, there

remains the sum of $1,247. And witness Leamy, who states at the beginning of his evidence that the damages amount to $200, further on states, at page 15, that if the plaintiff claims $1,800 he should judge there might be $900 or $1,000 too much on that, leaving, then, the cost of repairs at $850. In face of the repairs actually made and their cost ascertained, no reliance should be placed upon a mere random statement of this kind.

Under the evidence considered in its *ensemble*, weighing its conflict in the best manner available, I am of opinion that the learned trial judge has come to the proper conclusion, and I hereby affirm the judgment of the Court below and dismiss the appeal with costs.

The plaintiff's motion by way of cross-appeal is dismissed without costs to either party—the same having occasioned no additional costs in the consideration of this appeal.

Appeal dismissed.

Solicitors for appellant: *Perron, Taschereau & Co.*

Solicitors for respondent: *Angers, de Lorimier & Co.*