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 Jan. 15

TORONTO ADMIRALTY DISTRICT.

CANADIAN SAND AND GRAVEL COMPANY, LTD.,
 PLAINTIFFS.

AND

THE "KEYWEST" DEFENDANTS.

Collision—Narrow Channel—Canal—Rules and Regulations—Negligence—Apportionment of damage—Costs—Discovery.

The captain of a ship must strictly obey the Regulations prescribed for the navigation of Canadian Waters and Canals.

The only exception to a rigid compliance with the Rules is when it appears with perfect clearness amounting almost to a certainty, that adhering to the rule would have brought on a collision and violating the rule would have avoided it.

When a ship is on the "wrong" side in a narrow channel, and has a current to deal with, she must proceed with more than the usual caution.

Principle affirmed that when a ship with ordinary care, doing the thing that under any circumstances she was bound to do, could have avoided the collision, she ought to be held alone to blame for it, even though another ship may have been guilty of some breach of the Rules, but which did not contribute to the collision.

The Rules of the Department of Railways and Canals, except where they indicate the contrary, govern vessels using the Canals, and are not intended merely for the preservation and safety of the Canals.

No costs can be allowed for examinations for discovery unless preceded by an order of the Judge.

ACTION by the plaintiffs against the ship "Keywest" to recover damages for injuries to the plaintiff's scow "Helena Battle," as the result of a collision which took place in the Welland Canal.

The trial of the case took place at St. Catharines, on January 15, 1917, before Hodgins, L. J., and judgment was delivered at the close of the argument dealing with the facts, but reserving for further consideration the effect of the signal given by the captain of the tug "Battle" as to which written arguments were submitted by counsel:

W. M. German, for plaintiffs: *R. H. Parmenter*, for defendants.

The following judgment was delivered at the close of the trial by HODGINS, L.J.:

The accident out of which this action arose occurred in the Welland Canal just below the lock that has been spoken of and in a reach or level which is known as the long level. The "Keywest" was a single screw steel built steamer, 250 feet long with a beam of 42 feet 6 inches, 1,300 tons register, with a speed of 10 miles an hour, and was going southward towards Lake Erie. She was light, in ballast. Seeing the tug "Battle" with a tow, "Helena Battle", coming down (northward) the "Keywest" tied up at a point which, according to the map put in as Exhibit "3", would be 800 feet north of the point of the pier which forms the west side of the lock, and just opposite the storehouse known as the cement storehouse. The tug and tow came through the lock, and the tug had got beyond the point of the pier going north and had turned towards the west bank, the object being to go down on the west side and straighten the tow after her for the purpose of passing the "Keywest".

Now, the situation at that point was that the "Keywest" was tied up fast to the eastern bank, and the tug and tow were moving towards her. It is said that the "Keywest" signalled to cast off her line by blowing a single blast just at that moment and that the captain of the tug on hearing it gave two blasts with his whistle, indicating that he was intending to pass on the starboard side, and that the "Keywest" answered with two signals accepting that notice and therefore intending herself to keep to the east side of the channel, which is apparently, according to the Regulations, the wrong side for her to have been on. I find as a matter of fact upon the evidence that no signal was given by the "Keywest" originally, so that the matter must be taken as if the first signal came from the tug. The result of what happened was the collision, a collision which the captain of the "Keywest" thinks might have been averted if he had remained tied up, and what I have to decide is whether the captain of the tug failed in his efforts within a reasonable distance to straighten up his tow so that it would clear the "Keywest" on her upward course, she going against the

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current, or whether the accident happened as a result of the "Keywest" moving from her position where she was tied up, contrary to the provisions of Rule 22 of the Rules which are put in as Exhibit "5". That rule is that "All vessels approaching a lock, while any other vessel going in the contrary direction is in or about to enter the same, shall be stopped and be made fast to the posts placed for that purpose, and shall be kept so tied up until the vessel going through the lock has passed. Any violation of this provision shall subject the owner or person in charge of any such vessel to a penalty of not less than 4 dollars and not exceeding 20 dollars". Counsel have agreed that the tug and tow are to be treated as one vessel, and I have so noted it, so that the tug and tow treated as one vessel were within the meaning of the rule in or about to enter the lock when sighted and the tow had not yet fully emerged beyond the point of the pier, when the tug sounded its 2 blasts. The "Keywest", recognizing her duty, was tied up, and under that rule should have remained tied up until the vessel going through the lock passed her. It is true she tied up on the wrong side of the canal, because her proper side was the other, but it is in evidence that there were no posts upon that side and that the posts, for that purpose, are placed on the east side. It is also said by one of the witnesses that that is the practice at all events over his experience of nine years.

Now, I have to find in the first place where this collision occurred. The "Keywest" tied up 800 feet from the point of the pier and is said by her captain to have moved some 200 feet. That, of course, like all other figures in these cases is approximate. Nobody measured it, and it is always a difficult question to decide as to the exact distance. The length of the "Keywest" is 250 feet, and she is said to have gone her length, which would make the distance 250 feet. That would leave 550 feet from the point where she was tied up, but one must remember that if she was tied up at 800 feet outside the cement dock or cement warehouse, that that after all is to a certain extent approximate. The assumption is made that she was tied up exactly opposite the middle of it, and her bow would be nearer than 800 feet and that would reduce the distance of 550

feet somewhat. Roughly speaking, however, 500 feet is about the distance from the end of the pier to where the "Keywest" says she was when the collision occurred.

The result of the other evidence is, roughly speaking, that the collision occurred 300 feet south of the point of the pier. I might mention that the tug is 70 feet long with a tow line of 20 feet, said to be taut and straightened out as she came along, and the tow is 125 feet long. That makes a total length of 215 feet, so that if the collision occurred 300 feet south of the point it must have occurred after the tug and tow had got clear of the end and were proceeding down the canal.

I cannot help thinking and I find upon the evidence that the "Keywest" must have gone farther than 200 feet. The evidence that has been given as to her speed is that she went about a mile an hour. If that were exactly accurate both as to time and speed it would make her progress about 186 feet. That is said to have been done in a minute. The engineer who was called speaks of giving her full speed ahead, that she got her speed gradually during half a minute and then ran for half a minute at full speed, traversing the ship's length, and then he got a signal to go full speed astern which he gave the vessel, but he cannot tell how far she ran after he reversed. The captain of the "Keywest" said that she was moving when the impact occurred, and this would carry her in my judgment a good deal nearer to the end of the pier than 500 feet. It is said that as soon as the captain of the "Keywest" realized that there might be a collision he reversed his propeller and that while that would have thrown his bow to starboard under ordinary circumstances he thinks the current affected him there so that what was usual did not as a matter of fact occur. Two of the witnesses for the plaintiff say that the reversal of the propeller would and did throw the bow to starboard and in that was caused the collision. I think there is little doubt, as I have said, that the "Keywest" was moving. The effect of the evidence as to the damage convinces me that the collision must have been between two moving objects because the effect of it upon the tow was such as to open the seams to a very large extent, something that would not have happened

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had the blow been a mere glancing blow between a vessel coming down stream and brushing against another one that was stationary. So far as the "Keywest" is concerned, and apart from the question of invitation which I will deal with in a moment, the captain of the "Keywest" admits that it is always difficult in going north to deal with the current which is there found. That he was aware of the current is clear and I think it must be taken that when he cast off his line and moved up he did so with the consciousness that the tug and tow coming down were in a difficult position owing to the current, and particularly so because the channel here is extremely narrow, being only, from 100 to 125 feet. The beam of the "Keywest" is 42 feet 6 inches. There is said to be a boom or float along the east side of the canal extending out about 5 feet, so that if the vessel had been tied up and remained there she would have occupied very nearly 50 feet, leaving from 50 to 75 feet for the manoeuvring of this tug and tow coming down and straightening up.

I think under those circumstances and as the "Keywest" was upon the wrong side the captain knowing he was on the wrong side, although as I have pointed out he probably had very little option as to where he would tie up, that with such an extremely narrow channel and the current to deal with he should have proceeded with perhaps more than the usual caution, especially as he himself admits that he knew nothing of towing.

Apart then from the question of the effect of the signal I should hold that the "Keywest" was negligently navigated in casting off at that time contrary to Rule 22 and in proceeding towards the lock while the tug and tow were in the act of passing out of it and were affected by the current, and had not yet reached a position where the captain of the "Keywest" ought to have seen they had reached, namely of being straightened out to pass on the proper side. But that does not wholly dispose of the case because it is quite possible that the tug and tow may have been guilty of negligent navigation or negligence of some sort which would require me to apportion part of the blame to them and if Mr. Parmenter's point is well taken it may be that what was done in giving the signal which he

spoke of entirely absolved the "Keywest," or at all events it may result in my having to find that the tug and tow were partly responsible and in that way I would have to apportion the blame between the two. I propose, however, to reserve judgment upon the point as to the effect of giving the signal so that either party may put in any authorities they may have, but I will deal with it so far as I can subject to that.

The captain of the tug, whether a signal to cast off was made or was not made, was the one who first made the signal that he intended to pass upon the starboard side, and that in itself was something which I think he had in his own hands to determine. In coming out of the lock with a vessel 800 feet away he had I think a right to signal which side he would pass on, whether he would go to his own side or not. That is assuming that the "Keywest" were afloat. If the "Keywest" were tied up and came within Rule 22 then his signal might be an indication to that vessel to untie and proceed, and it is on that point I am somewhat doubtful. All I can say about it now is the signal is the only means of communication between two vessels and is a very important fact in dealing with the rights and wrongs of this case. It is the only way one vessel can speak to another, and it was given at a time when the captain of the tug had not yet got his tow clear of the lock, or of the pier, and therefore was given at a time when there still remained something for him to do before the channel would be left clear for the "Keywest" to use. He admits that he knew the scow would swing to the east, and he said that he thought the scow would straighten up and he did not expect the "Keywest" so quick. He also says that he would expect to straighten his tow out about halfway down. Now, halfway between himself and the "Keywest" would be about 400 feet, probably just about where the collision occurred, and he therefore, it seems to me, took chances in a case where he need not have taken any chances, and gave a signal which might possibly mislead. Of course the signal he gave is one primarily intended for two vessels afloat and approaching one another, and whether those two blasts would indicate, to a captain who was fast to the side of the canal under Rule 22—when he

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knew he must wait till the vessel passed—anything more at that time than that as the “Keywest” was tied up on the wrong side of the canal the captain of the tug intended to pass him on the starboard side, in other words assuring the captain of the “Keywest” that the captain of the tug was satisfied with the situation and would continue down upon what would otherwise be his wrong side is a question which I shall have yet to decide upon. I must satisfy myself as to the effect of the giving of a signal which under those circumstances is not appropriate to the situation and which is somewhat calculated to mislead.

Therefore my findings will be that the “Keywest” was, subject to the effect of that signal, negligently navigated and I will reserve the other question as to whether the effect of the signal given in the way and at the time when it was, is such as to either entirely absolve the tug and tow, or whether it leaves the matter so that both parties are to blame, in which case I have to apportion the damages.

As to the damages, the \$674.78 will be reduced to \$670. I have not heard any objection to any item except the one of about \$5 which I disallow. As to the profits lost on the 4 or 5 trips I do not think I can allow more for that than the amount claimed originally, \$200. While I think those lost profits are properly recoverable they are always indefinite and indeterminate, they are what might have been made, and in this case the contract in fact was ultimately completed without loss, so that these damages are based upon the idea that if he had had the vessel and had completed his contract at an earlier date he would have made out of other possible trips the sum he has stated. The \$90 which is claimed will also be allowed, so that I fix the damages at \$960. How this is to be borne is subject to the determination of the question I have mentioned, and the costs will probably follow in accordance with my finding upon that point.

Mr. Parmenter: Might I direct your Lordship’s attention to one fact in connection with the width of the canal. Mr. Smith said it was 130 feet, and I understand he measured it. If your Lordship will scale it on the map, you will find it is more than 100 feet.

HIS LORDSHIP: I think I have to go upon the evidence, but if I take the scale it is in one place 130 feet, or about 125 feet as nearly as one can gather. Even if I am wrong in assuming there was only 50 or 52 feet, I do not know that that affects the position. It is understood that this map which has been put in is drawn to scale of 100 feet to 1 inch, and anybody can have the benefit of the scale.

The learned Judge (January 27, 1917), delivered judgment upon the point reserved for further consideration.

At the close of the case I gave judgment finding that the "Keywest" had been negligently navigated and had caused damage to the extent of \$960. I reserved for consideration the effect upon that finding of the signal given by the tug "Battle", which it was argued was misleading to such an extent that the "Keywest" should be absolved in whole or in part from the consequences resulting from her action thereafter. I did not find that apart from that signal and the time of its being given the navigation of the tug and tow was faulty. I do not see that there is, in the canal regulations, anything requiring the "Keywest" to tie up upon the west side, and what I have said about being on the wrong side must be understood as in relation merely to navigation in the canal when one vessel is meeting another. The tying up on the east side was not considered by me when giving judgment at the trial as in any sense a negligent act. It produced a situation which would require the tug "Battle" to take the west side if the "Keywest" remained where she was.

The signal given was two blasts which, under the regulations in force, as published in the Canada Gazette of March 25, 1916, is defined in Rule 21 as follows:

"In all weathers every steam vessel under way in taking any course authorized or required by these rules shall indicate that course by the following signals on her whistle, to be accompanied, whenever required, by corresponding alteration of her helm; and every steam vessel receiving a signal from another shall promptly respond with the same signal or sound the danger signal as provided in Rule 22:—

"Two blasts mean, 'I am directing my course to port.'"

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In Rule 25 there is a provision that in all narrow channels where there is a current, the descending steamer shall when two steamers are meeting have the right of way, and shall before the vessels have arrived within the distance of one half mile of each other give the necessary signal to indicate which side she elects to take.

Rule 29 which deals with all channels less than 500 feet in width requires vessels meeting each other to slow down to a moderate speed according to the circumstances.

Rule 31 is as follows:

“When two steam vessels are meeting end on, or nearly end on, so as to involve risk each shall alter her course to starboard, so that each shall pass on the port side of the other.”

Rule 37 requires that in obeying these rules attention is to be paid to the dangers of navigation and collision and to any special circumstances which may render a departure from them necessary in order to avoid immediate danger. The case was argued on the assumption that the Navigation Rules of April 20, 1905, were applicable, but they were superseded on March 1, 1916, by those I have mentioned.

I have already noted the Canal Rule No. 22 (b). The signal given being, as defined, “I am directing my course to port” was properly answered by a like signal. Read literally it was a reasonable signal to give, and it is a mistake to read it as an invitation to cast off. It in no way suggested that. If it did, then under Rule 23, if the master of the “Keywest” deemed it injudicious to comply with it, he should have sounded the danger signal.

The “Keywest” was directly in the way of the tug and tow, if Rule 31 applies to the case of a stationary vessel. If it does not, then the usual rule is that the moving vessel must keep out of the way of one that is tied up. Hence the tug was bound or entitled to give and indicate its course (see Rule 24), a thing that could do no harm and might be of assistance to the “Keywest” by stating exactly what the tug and tow intended to do, *i.e.*, to cross to and come down alongside the west bank of the canal.

After giving the situation the best consideration that I can, I am unable to see anything in what was done by the

tug master in signalling as he did that would afford a reason for the master of the "Keywest" disobeying the explicit terms of Canal Rule 22 (b) which required him to remain fast till the tug and tow had passed. I should add to what appears in the judgment given at the close of the case that in the "Keywest's" preliminary act it is stated that the collision occurred some 300 feet below the lock and that there is a strong current running from a waste weir on the west side of the lock.

In the "*Heather Belle*,"¹ a learned local judge expresses the opinion that signals such as used here applied when the vessels were in sight of each other, and that, if inapplicable to the circumstances, the master of the "Fastnet" was not bound to govern himself by them. This last is putting it, I think, a little more strongly than is warranted. But in this case the signal, if applicable, did not cast any duty on the "Keywest". That was already determined by the rule.

The principle laid down in *Porter and Heminger*,² is reasonable and should be followed. It is that where a ship with ordinary care, doing the thing that under any circumstances she was bound to do, could have avoided the collision, she ought to be held alone to blame for it, although the other ship may have been guilty of some breach of the rules, but which did not contribute to the collision. I am unable to conclude, under the circumstances of this case, that even if the master of the tug may have expected the "Keywest" to move, his view is of any importance, if the signal given was, in itself, a proper one.

Adherence to the rules is insisted on in every case unless it appears with perfect clearness "amounting almost to certainty that adhering to the rule would have brought on a collision, and violating the rule would have avoided it." *Boanerges v. "The Anglo-Indian,"*³ *S.S. "Cape Breton" and Rich. & Ont. Nav. Co.*⁴

It was objected that the Rules of the Department of Railways and Canals were not binding upon these vessels in the sense that violation of them was not equivalent to disobeying navigation rules, and that these canal rules were

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¹ (1892), 3 Can. Ex. 40 at 48.

² 2 Asp. Mar. L. Cas. 239.

³ (1898) 6 Can. Ex. 208.

⁴ 36 Can. S.C.R. 564 at 574, [1907] A.C. 112.

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only intended for the preservation and safety of the canal and its works.

I think these rules govern those using the canals except where they indicate the contrary, and are within the competence of the Department to pass as dealing with the proper use of the canal. They have been so treated in the recent case in the Supreme Court of Canada, of *Bonham v. The "Honoreva,"*¹ where Mr. Justice Anglin points out that Rule 22 (b) clearly governs vessels using the canal. The violation of this rule 22 (b) is unlawful and is subject to a penalty. Even if there were no Rule 22 (b), and the "Keywest" under the circumstances detailed cast off and became therefore a vessel under way (see Preliminary Definitions and Rule 27), and subject to the passing rules, my opinion would be that the tug and tow having the right of way, the navigation of the "Keywest" was negligent in not remaining where she was instead of forging ahead, in view of the obvious position of the tow and the current which was then slewing it round.

For these reasons I cannot find that the tug and tow were to blame. Judgment must therefore be entered for the plaintiffs for \$960 and costs. I should point out that no costs for examinations for discovery can be allowed in Admiralty cases unless preceded by an order of the Judge. Indeed it is doubtful if there is any warrant for this procedure.

Judgment for plaintiff.

Solicitors for plaintiff: *German and Marwood.*

Solicitors for defendant: *Thomson, Tilley and Johnston.*

¹ (1916), 54 Can. S.C.R. 51, 32 D.L.R. 196.