ON APPEAL FROM THE ONTARIO ADMIRALTY DISTRICT

1938
March 21.
1939
Jan. 14.

BETWEEN:

THE TUG *CHAMPLAIN* (DEFENDANT) ..... } APPELLANT;

AND

CANADA STEAMSHIP LINES LIMITED (PLAINTIFF) ..... } RESPONDENT.

Shipping—Tug and tow—Tow damaged by coming in contact with a hidden obstruction unknown to exist to either party—No negligence on part of tug or its officers—Duty of tug—Canada Evidence Act, R.S.C., 1927, c. 59, s. 35 & s. 7—Canada Evidence Act determines number of expert witnesses that may be called in proceedings over which Parliament of Canada has legislative jurisdiction—Appeal allowed.

Respondent's ss. *Hamonic* had laid in her winter moorings up a narrow and uncharted channel leading from the St. Clair river. Appellant tug was engaged by the captain of the *Hamonic* to tow her from

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her winter berth to another berth in the Port of Sarnia, Ontario. During the towing operations the *Hamonic* encountered a submerged and unknown obstruction and sustained damage to her rudder.

Respondent brought action against the appellant. Judgment at trial was rendered in favour of respondent. On appeal the Court found that appellant tug was a "named" tug; that neither the appellant nor those in charge of her were negligent and that the accident was not due to any default of the tug.

Held: That the obligation to carry out a towage contract requires only that degree of caution and skill which prudent navigators usually employ in such services.

2. That it was the appellant that was hired and any complaint alleged against her must relate entirely to the question of the performance of her duty under the towage contract.

3. That the restriction of the number of expert witnesses that may be called in proceedings over which the Parliament of Canada has legislative jurisdiction is controlled by the Canada Evidence Act, R.S.C., 1927, c. 59, and s. 35 of that Act is applicable here.

APPEAL from the judgment of the District Judge in Admiralty for the Ontario Admiralty District allowing plaintiff's action.

The appeal was heard before the Honourable Mr. Justice Maclean, President of the Court, at Ottawa.

Francis King, K.C. for appellant.

F. Wilkinson, K.C. for respondent.

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

THE PRESIDENT, now (January 14, 1939) delivered the following judgment:

This is an appeal from a decision of His Honour Judge Field, District Judge in Admiralty for the Ontario Admiralty District, in an action for damages for alleged negligence on the part of the tug *Champlain* in towing, on April 10, 1933, the steamship *Hamonic* from her winter berth to another berth in the Port of Sarnia, Ontario, during which towing an injury occurred to the *Hamonic*. The trial judge found for the owners of the *Hamonic*, Canada Steamship Lines Ld., and the tug *Champlain* here appeals therefrom. The judgment of the learned trial judge is to be found in 1938 D.L.R., Vol. I, page 197. On the hearing of the appeal I was assisted by Capt. J. W. Kerr as nautical assessor.

The writ in this action did not issue until March, 1934, nearly one year after the cause of action arose. The state-

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ment of claim was not delivered till January 29, 1937, nearly three years after the issuance of the writ. In the meantime Captain Bolton Reid, the master of the tug *Champlain,* had died, and other witnesses who might have testified on behalf of the *Champlain* had scattered and were not available to her owners. Mr. King urged, as he did at the trial, that because of the laches of the plaintiff in bringing the action to trial the court should give the appellant the benefit of every presumption which might be fairly in its favour, and he referred to the cases of *The Kong Magnus* (1), and *The Mellona* (2). I agree fully with the submission of Mr. King in respect of this point, although I do not quite understand why he did not move, long before the trial, for the dismissal of the action. However, in my view of the case the point is not one of great importance.

During the winter of 1922-23, the passenger ship *Hamonic* lay in her winter moorings up a narrow and uncharted channel leading from the St. Clair river, in the Port of Sarnia. She was moored on the northwesterly side of the dock belonging to the Dominion Salt Company, locally known as the Salt Dock. The *Hamonic* was heading in a northerly direction with her starboard side to the dock, and was made fast fore and aft to the dock and she also had her starboard anchor down. Tied upon her port side was the ss. *Huronic,* another passenger ship, also owned by the Canada Steamship Lines. The length of the *Hamonic* was 349 feet, her breadth 50 feet, and her depth 34 feet, her registered tonnage being 3,295 tons. The length of the *Huronic* was 321 feet, her breadth 43 feet, her depth 23 feet, her registered tonnage being 2,211 tons. The length of the tug *Champlain* was 120 feet, her breadth 30 feet, her depth 17 feet, and her registered tonnage 235 tons.

On or about April 8, 1933, the master of the *Hamonic,* Captain Johnston, acting on behalf of the Canada Steamship Lines, employed the tug *Champlain,* through its master, to shift the *Hamonic* from her winter berth to, I assume, the berth usually occupied by her in the shipping season in the Port of Sarnia. There appears to have been no contract, express or implied in regard to the liability of the tug for any damage that might be sustained to the *Hamonic* in towing her out from her winter berth. Abreast

(1) (1891) P. 223 at 230. (2) (1847) 3 W. Rob. 7 at 10.

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the Salt Dock, which appears to be at the end of the navigable channel, the channel is from 90 to 100 feet wide, and a very short distance down, where the accident here occurred the channel is about 75 feet wide, or something of that order, and there is a bend or jog in the channel, extending outwardly and westerly between the Salt Dock and the point where the accident occurred to the *Hamonic*. Both the master of the *Hamonic* and the master of the *Champlain* were familiar with the channel, and its hazards, the nature of which will later appear. It seems to be agreed that the western boundary of the channel, beyond which shoal water exists, is not clearly defined. A series of piles are visible above the water but it is not definitely established that these piles mark the top of the bank where shoal water exists, or the edge of the bank where deep water begins, or the edge of the channel shown on a plan made by the Department of Public Works of Canada in contemplation of dredging operations, and which appears as an exhibit in the proceedings. It was admitted that submerged piles were known to exist, or to have existed, on the western side of the channel but doubt existed as to how far these piles might be found off the bank of the western side of the channel. It seems to have been admitted that when ships, with drafts which would allow very little water under the keel in this channel, moved their engines, there was a possibility of stirring up sunken logs or piles which presumably would lay on the bottom in a water-logged condition.

At the time appointed the tug *Champlain* approached the dock where the *Huronic* and *Hamonic* were moored but on account of the confined waters of the channel, and the inability of the tug to turn, on account of her length, in the vicinity of that dock, this manoeuvre was performed at a distance off to allow the tug to back astern up to the *Huronic* on which a tow line was made fast. The *Huronic* was also to be towed out from her winter berth on the same occasion by the *Champlain,* and being on the outside of the *Hamonic* she was the first to be towed, and both stern first. No trouble was encountered in towing the *Huronic* out of the channel to her new berth. Lying, as she was, on the port side of the *Hamonic* the *Huronic* would from the start of the tow be in mid-channel or be

west of mid-channel, and her course from the start would be rather a straight one while proceeding down the channel, and the bend or jog in the channel would not ordinarily be embarrassing to the tow or tug. The fact that no difficulty or accident occurred in the towing of the *Huronic,* does not in my opinion raise any presumption of negligence against the tug in the towing of the *Hamonic,* when an accident did occur. The towing of the *Hamonic,* starting from the dock on the east side of mid-channel with the outward bend or jog in the channel just a short distance down the channel, and the existence of another factor yet to be mentioned, would present some possible difficulty.

The tug then returned to the Salt Dock for the *Hamonic,* when the tow line was made fast. The starboard anchor of the *Hamonic* which had been down all winter remained there, and the chain cable which had been flaked on the dock, was moved aboard until about 12 fathoms remained out. It was decided to use the anchor as a drag to assist in controlling the bow of the *Hamonic,* and in addition it was decided to keep a head line ashore to check the bow if necessary. It would appear from the evidence that no strain came on this bow line from the time the *Hamonic* left her berth until she struck some unknown object in the channel, which resulted in this litigation.

There appears to be no definite record of the draft of the *Hamonic* but it was agreed on both sides that it was about 16 feet aft. This is of some importance because on examining the depths of the channel as shown on the plan of the Department of Public Works—which draft should be reduced by ·8 to 1·0 feet as indicated on the plan—it will be seen that a ship drawing 16 feet might touch bottom in certain parts of the channel. The fact that the *Huronic* made the passage without mishap might be partially explained by the fact that her draft was admitted to be less than the *Hamonic,* though the precise draft was not clearly established.

When, upon an agreed signal, the tow began, the *Hamonic* moved astern, but there appears to be a divergence of opinion whether she moved her engines astern, or whether she kept them going slow or dead slow ahead until her stern came close to the Sarnia Yacht Club Dock when it was seen that the stern would have to be pulled

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over to the westward to clear a pile driver moored a very short distance to the south. The tug then pulled the stern of the *Hamonic* to the westward which was the proper thing to do, but as the stern came down towards the pile driver it was seen that the swing to the westward was going too far. The tug thereupon endeavoured to haul the *Hamonic* towards the eastern side of the channel but on account of the length of the tug, 120 feet, and the confined waters in which she had to operate, the angle of pull, my assessor advises me, which she could exert to the eastward of a line drawn from the stem to the stern of the *Hamonic* would not have the same effect as if she had been able to get wide off on the quarter and pull at right angles to the *Hamonic's* keel. This view of my assessor seems reasonable and I endorse it without hesitation. This is a matter of considerable importance.

When the stern of the *Hamonic* was about abreast of the pile driver a submerged and unknown obstruction was encountered which brought her to a stop, and she thereby sustained rudder damage. It was suggested that the obstruction was on the bank of the western edge of the channel but the evidence would indicate, I think, that the obstruction was encountered somewhere between the mid-channel line and the western bank of the channel, at least it does not appear that the stern of the *Hamonic* touched the western boundary of the navigable channel and that was the view of the learned trial judge. Referring to the conduct of the master and crew of the *Hamonic,* he said:

> But I find they were alert and did, by engine and rudder operations, endeavour to prevent the steamer contacting the westerly shore. In that endeavour their efforts were successful but a submerged pile was encountered with the disastrous results giving rise to this litigation.

The respondent's statement of claim alleges that the stern of the *Hamonic* was brought into contact with a submerged pile or object. After the accident the *Hamonic* moved over against some exposed upright piling and rested against them, which would indicate that at that particular point there was sufficient water to float the *Hamonic* on the extreme western edge of the channel, and that the hidden obstruction which the *Hamonic* struck was east of the edge of the western bank of the channel. It must therefore be accepted as a fact that the *Hamonic* did not strike the western edge of the channel, while under tow, and that

the injury to the *Hamonic* was caused by striking an unknown obstruction in the navigable channel. It is surmised that it was a submerged pile she struck, but it may have been the ground as the master of the *Hamonic* himself suggested as a possibility, or a rock, or something else. What it was she struck can never be definitely determined.

The obligation to carry out a towage contract requires nothing more than that degree of caution and skill which prudent navigators usually employ in such services. The occurrence of an accident raises no presumption against the tug, and the burden is on the complaining party to prove a lack of ordinary care. A tug is not an insurer, and this is particularly true of a "named" tug, and I think the *Champlain* was a "named" tug, and though the question is not, I think, of any great significance here, yet I might briefly refer to the point because it is one that was raised at the trial and on the appeal. Counsel for the *Hamonic,* in his written argument following the trial, admitted that there was only one tug available at Sarnia, and the evidence supports this statement. There can be no doubt that it was the services of the *Champlain* that were hired by the master of the *Hamonic;* it could have been no other tug, and I see no room for debate upon this point. If the contract is for the hire of a "named" tug, or a tug selected by the tow, there is no implied obligation as to the fitness of the tug to perform the services required. In point of fact the tug here was one well equipped for towing and that is not questioned, but it might be said that she was not the most suitable sort of tug for the particular services here to be performed, on account of her length. The *Champlain* was longer than the width of the channel, and as I have already pointed out she could not pull the *Hamonic* at right angles to her keel in coming down the channel, if any situation developed which made such an operation desirable. Some witness, I think, described the *Champlain* as having been seen at right angles to the *Hamonic* at one stage, but it is obvious that this was not possible. The approximate length of the tug was known no doubt to the master of the *Hamonic* when hired, and if the *Champlain* were in this respect unsuitable for the purposes for which she was hired, that cannot now be made a ground of complaint against her. The respondent,

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having selected the *Champlain* for the tow, it cannot now be heard to say that the accident was due to the length of the *Champlain* and her inability to give a pull at right angles to the *Hamonic's* keel, when her stern came close to the western side of the channel. Otherwise it matters little, so far as I now see, whether the *Champlain* was a "named" tug or not. It was the *Champlain* that was hired and any complaint now alleged against her must relate entirely to the question of the performance of her duty under the towage contract.

In the American case of *The Margaret* (1), the Supreme Court of the United States, in the course of its judgment, said:

> The tug was not a common carrier, and the law of that relation has no application here. She was not an insurer. The highest possible degree of skill and care were not required of her. She was bound to bring to the performance of the duty she assumed reasonable skill and care, and to exercise them in every thing relating to the work until it was accomplished.

The same view of the law was expressed by the Supreme Court of Canada, in the case of *Sewell* v. *British Columbia Towing and Transportation Company* (2). In that case Strong J., in reviewing the authorities, said:

> In the face of the decisions in the cases of the *Julia*, 14 Moo. P.C. 210, and in that of *Spaight* v. *Tedcastle*, 6 A.C. 217, it is difficult to see how there can be any doubt as to the duties of a tug under circumstances like those in evidence here. In the former case Lord Kingsdown lays it down that:
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> "The law implies an engagement that each vessel would perform its duty in completing the contract, that proper skill and diligence would be used on board of each, and that neither vessel by neglect or misconduct would create unnecessary risk to the other, or increase any risk which would be incidental to the service undertaken."
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> In *Spaight* v. *Tedcastle*, Lord Blackburn refers to this case of the *Julia* with approval, saying that "it accurately and clearly states the law."
>
> The judgment of the Supreme Court of the United States in the case of the steamer *Webb* states the law as applicable to American waters in the same terms; it says:
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> "The contract requires no more than that he who undertakes to tow shall carry out his undertaking with that degree of caution and skill which prudent navigators usually employ in similar services."

Now, did the tug exercise that degree of caution and skill reasonably to be expected of her? Neither the tug nor the tow had knowledge of the submerged pile, or whatever was the obstruction that caused the accident. Infor-

(1) (1877) 94 U.S. 494, at 496. (2) (1883) 9 S.C.R. 527 at 543.

mation as to this hidden hazard was not accessible to the master of the tug, and he was under no obligation to ascertain before the tow began what water-logged piles, or obstructions, there were on the bottom of the channel; he was not an insurer against unknown hazards of that nature. The towage would have been carried out without any injury to the tow had it not been for this hidden obstruction. I do not think it can be said that a tug is responsible for an accident to a tow which strikes an unknown and submerged obstruction, not appearing on any chart, and where the depth of the water was known by its master, the hirer of the tug, to leave but a narrow margin of safety, and where it was known that water-logged piles might unexpectedly be encountered. I know of no principle which would sustain that proposition, and I find no authority for it. The master of the *Hamonic* gave as a reason for not putting his engines full speed ahead, when it appeared that the swing of her stern to the western edge of the channel was excessive, the possibility of stirring up submerged piles. He understood that this might happen at any time but neither he, nor the master of the tug, could inform himself as to whether any water-logged piles were located at any particular spot in the channel, or when or where they might be encountered. The master of a tug would probably render his tug liable for damages sustained by a tow on account of striking upon obstructions, or rocks, in a channel which ought to have been known to him, as one experienced in its navigation, but not for those which are unknown to him.

Further, here, the channel was only about 75 feet wide where the accident occurred and this would leave but little water on either the port or starboard side of the *Hamonic,* and I cannot think there was any obligation on the part of the tug to keep the tow at all times precisely in mid-channel to avoid the possibility of unknown obstructions on the western side of mid-channel. The bend in the channel, and the presence of the pile driver, made the operation a very difficult one. I know of no principle upon which the tug *Champlain* should be held liable because of the fact that the *Hamonic* struck some unknown obstruction while in the navigable channel down which she was being towed, and during which time she did not come in

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contact with the western limit of that channel. Nor do I think the master of the tug was in any way negligent, or failed to show that degree of caution or skill that should be expected of him. In all the circumstances here, I do not think that any negligence can be attached to the tug on account of the fact that at one stage the stern of the *Hamonic* got close to the western bank. The tug promptly proceeded to correct that situation and between her and the tow, the learned trial judge states, they succeeded. The *Hamonic* did rest against exposed piling on the western bank for a short time, but that was subsequent to the accident. The towage would have been performed without accident had it not been for the hidden obstruction of which the tug had no knowledge. I do not think that the tug, or those in charge of her, can be said to have been negligent, or that the accident was due to the default of the tug, and I do not think she should be held liable for the injury caused the *Hamonic*. Upon this ground I am of the opinion that the appeal should be allowed.

It was argued by Mr. King that if the tug were in fault in any way, there was contributory negligence on the part of the *Hamonic* in (1) having her starboard anchor down close to the dock at the starting of the tow, instead of having her port anchor down, and (2) in not putting her engines full speed ahead in order to bring her to a full stop, when it appeared that her stern was getting too close to the western side of the channel; and it was contended that this would be a bar to the respondent's success having regard to the law as it stood at the time of the accident, 1933, and in respect of the waters wherein it occurred. In view of the conclusion which I have already expressed regarding the liability of the *Champlain* it is not now necessary to discuss the two points just mentioned.

There is just one further point upon which I feel I should express briefly my opinion. At the trial, the appellant called a fourth expert witness when the objection was raised by counsel for the respondent that it was the law of Ontario which applied in determining the number of expert witnesses which might be called, and which law limited the number to three. This objection was sustained by the learned trial judge. Sec. 35 of the Canada Evi-

dence Act, R.S.C., 1927, c. 59, provides that in all proceedings over which the Parliament of Canada has legislative authority, the laws of evidence in force in the province in which such proceedings are taken shall, subject to the provisions of the Canada Evidence Act, and other Acts of the Parliament of Canada, apply to such proceedings, and s. 7 of the Act limits the number of expert witnesses which may be called by either party to five. Neither the Exchequer Court Act, nor the Admiralty Act of 1934, make any provision in respect of the number of expert witnesses that may be called by either of the parties. The restriction of the number of expert witnesses that may be called in proceedings over which the Parliament of Canada has legislative jurisdiction is, I think, a matter controlled by s. 35 of the Canada Evidence Act, and it was applicable here. I think therefore that the appellant was entitled at the trial to call and examine five expert witnesses, without leave of the court. In my view of the case this point is not now of importance, and it becomes unnecessary to direct that the evidence of the one or two expert witnesses which the appellant proposed to call, should still be heard.

With great respect therefore I must disagree with the conclusion reached by the learned trial judge, and I allow the appeal with costs, both here and below.

Appeal allowed.