

EXCHEQUER COURT IN ADMIRALTY

1921

December 24.

ON APPEAL FROM THE BRITISH COLUMBIA ADMIRALTY
DISTRICT.

ROSS R. PEERS *et al* (PLAINTIFFS) . . APPELLANTS;

AND

THE SHIP *TYNDAREUS* (DEFEND- } RESPONDENT.
ANT) }

Shipping—Collision—Tow—Negligence.

The S.S. *Tyndareus* was on a course due west and the *Alcido*, with raft in tow, though apparently on a course due east magnetic undoubtedly deviated therefrom to take advantage of the tide and travelled south or possibly south-west at times, going across the course continually travelled east and west by other vessels, thus placing her crib across the fairway.

Held, on the facts, (affirming the decision of Martin, L. J. A.) that the *Alcido* by her movements created a risk of collision and must bear the damages suffered by her.

Observations on the inadequacy of the provisions of Article 32 of the International Rules of the Road.

APPEAL from the judgment of the Local Judge of the British Columbia Admiralty District rendered on the 26th April, 1921 (1) dismissing the plaintiff's action.

October 26th, 1921.

Appeal heard before the Honourable Mr. Justice AUDETTE at Vancouver.

(1) See page 93 ante.

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E. C. Mayers & R. L. Maitland, for appellants.

D. A. McDonald, K.C., for respondent.

The facts are stated in the reasons for judgment.

AUDETTE J. now (December 24th, 1921) delivered judgment.

This is an appeal from the judgment of the Local Judge of the British Columbia Admiralty District, pronounced on the 26th day of April, 1921, dismissing the plaintiffs' action.

The facts involved in this case are clearly stated in the learned trial judge's reasons for judgment and this will relieve me from entering into a detailed statement of them. (1)

The action is to recover damages, for the loss of a crib of shingle-bolts resulting from the collision which took place at about one o'clock on the morning of the 15th August, 1920, off Point Atkinson, B.C., between the S.S. *Tyndareus* (length, stated by chief officer, 520 feet over all; tonnage 14,000) and the crib in tow of the tug *Alcido* (length about 70 feet).

This crib is described by witness Seely as being 90 feet long, 40 feet wide and 13 feet deep and the top of the shingle-bolts being about 15 feet above the water. The crib has its poles on the sides and the shingle-bolts or logs are stowed inside of it.

Now on the night of the accident, the weather being dark but clear and overcast, as stated by witness Buller, the *Alcido* was proceeding from Scuttle Bay to Vancouver with this cumbersome crib in tow, at a speed of one knot an hour.

(1) See page 93 ante.

Captain Seely says the *Alcido* passed Point Atkinson at 12 o'clock, midnight, and contends that he steamed east (magnetic) towards False Creek and English Bay, to get the benefit of the first of the incoming tide. He remained on deck until 12.35 o'clock, when he went below.

On the other hand the steamer *Tyndareus* bound from Vancouver, on leaving the Narrows contends that from off Prospect Bluff, she steered a straight course, true west.

Both vessels had all their regulation lights.

The look-out on board the *Tyndareus* was as good and complete as could be asked. They had a man at the fore-castle head and three men on the bridge, with glasses, all intent on their work.

After she left Prospect Bluff a light was seen on her port bow. The look-out at the fore-castle-head reported it, the midshipman reported it and the second officer reported it to the pilot. That light was all the time taken by them to be the stern light of a vessel,—the stern light of the *Alcido*. However, proceeding on her course, the *Tyndareus* ran into this crib of shingle-bolts in the manner described by the trial judge.

The crew of the *Alcido* testify that there was a white light on the centre of the crib—the crew of the *Tyndareus* denying the same and saying they saw no light whatsoever on the crib.

Under the International Rules of the Road there is no obligation or provision requiring a light on a raft or crib in tow; while, however, under article 32 thereof a bright fire has to be kept burning on rafts at anchor or drifting. The wisdom of the article which requires a fire on a raft drifting or at anchor, and yet fails to provide for any light on a raft in tow at night—usually moving at very slow speed—seems difficult to appreciate. In view of this it would appear that the interests of navigation demand that the article should be amended.

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There was no obligation to place a light on the crib. However, having chosen to place a white light on it and to place it in the centre of the crib, it becomes very questionable whether or not the *Alcido* did not thereby do an unwise thing. A white light seen by itself might very reasonably be taken to be a stern light, as contended by the *Tyndareus*; and placed as it was in the centre of the crib, instead of at the stern, could it not deceive an approaching vessel, and thus become by itself the very cause of an accident? To place such a light at the stern might be useful to ships navigating in the vicinity of the raft, or indeed to have both a bow and stern light—but I cannot understand why it was placed in the centre.

The impossibility of arriving at any satisfactory conclusion with such conflicting evidence as was presented in this case is too obvious to need any comment. But it is possible that the variance in the evidence offered by the opposing parties might be accounted for by the light in question being tied as it was to a boat-hook, the handle of which, untied, was run down between the logs and so subject to displacement by slipping—did actually slip down on the starboard side of the raft while burning and so could not be seen by the *Tynderaus* coming on the port side, although visible to those on board the *Alcido*.

However, that may be, there was, I must repeat, no obligation on behalf of the *Alcido* to have a light on the crib and the want of such a light could not be invoked against her.

Under the evidence I am forced to find, and I do so find, that the *Tyndareus* on the night of the accident was proceeding on a course due west after leaving Prospect Bluff and that she was then following a proper course, the most advantageous course for her.

It is unconceivable that a large steamer like the *Tyndareus* could have gone north, in this hazy and smoky atmosphere, nearer the north shore, to get the small benefit of a weak tide, as contended by the plaintiffs, and that she would have afterwards come from the north shore almost due south to strike the crib travelling east. When the evidence is conflicting the court will be guided by the probabilities of the respective cases which are set up, and it is quite evident which of the two vessels, under the circumstances, would be the one that would change her usual course to take some advantage from the tide. Common sense and truth are near akin. *The Mary Stewart* (1); *The Ailsa* (2).

Reverting to the course of the *Alcido* I am of opinion that intent as she was on taking the full benefit of the sweep of the incoming tide—a very important consideration with such a clumsy and cumbersome tow—that while her course on the map might be stated as east magnetic, she took quite a different course on these waters, she deviated from such a course on the night in question and with advantage travelled south-east, towards the Spanish Bank to assure herself the benefit of the tide. Witness Forsyth, an expert mariner called on behalf of the plaintiff, testified as follows:—

“Q. The further you get towards the Spanish Bank the more benefit you would get from the tide coming in? A. Yes, that is right.

“Q. And if you had that crib in tow you would naturally make as much as possible towards the Spanish Bank in order to get the incoming tide coming into the Narrows? A. Yes.”

Here is an expert, called by the plaintiffs themselves, who puts the question quite clearly.

(1) [1844] 2 Wm. Rob. 244.

(2) [1860] 2 Stuart's Adm. 38.

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While the course of the *Alcido* should apparently have been east magnetic, she certainly deviated from it for the purpose of gaining the advantage derivable from the tide and travelled on to the south or perhaps even south-west at times and by thus deviating from her apparent course in these waters—by going across this course continually travelled east and west by other vessels, she thereby created the risk of collision—by showing her stern light on a course towards the Narrows—coupled with the placing of her crib across the travelled fairway. *Ambient v. Saragosa* (1).

Has the *Tyndaerus* become an overtaking vessel by thus travelling toward the *Alcido's* stern light? But is not deviation on the part of an overtaken vessel only excusable in special circumstances to avoid danger? Should she not follow her course when other vessels are seen in the neighbourhood? Or finding herself crossing a much travelled course with this long stretch of the tug, the tow line and the crib why could she not have attracted the attention of the other vessels by showing a flare up light as provided by Article 12? (See also articles 22 and 32). Since she was being supposed to travel east and since she was only showing her stern abaft the funnel, would it not be a proper case to show a flare up light—considering she had a tow which was dangerous to navigate and hard to be seen upon the waters? Could it be said she was a vessel following a course which might possibly appear unusual to other steamers, although justified by special reasons? Does she not then do so at her own risk and ought she not signal her intentions, for the others have a right to assume she will

(1) [1892] 7 Asp. M.C. (N.S.) 289.

conform her course to the ordinary rule? *The Richelieu & Ontario Nav. Co. v. The Cape Breton* (1); *The Lancashire* (2).

I do not think the *Tyndareus* became, under the circumstances, an overtaking vessel and had she become so, again without negligence on her behalf, she would have collided with the crib after having taken all necessary precautions according to nautical skill and care, and been thereby freed from any liability.

The *Tyndareus* had complete and numerous look-outs, all intent upon their duties on the night of the collision; and if she did not discover the crib in time to avoid the impact it was not through her neglect to keep proper look-out, or the neglect of any precautions which might be required by the ordinary practice of seamen (Art. 29).

It is not sufficient for the appellants to establish—even if they could do so—that their raft, on the night in question, might have been discovered by extraordinary care and skill. It is incumbent upon them to prove that a competent seamen exercising reasonable care and skill would have discovered it.

Having found that the *Tyndareus* kept a proper look-out and that she is free from the neglect of having taken any precaution which might be required by the ordinary practice of good seamanship, and being unable to find her at fault, the damages must be borne by the party on whom it happens to alight.

The appeal is dismissed with costs.

(1) [1904] 9 Ex.C.R. 67, at p. 116; (2) [1874] 2 Asp. M.C. (N.S.) 202.
[1905] 36 S.C.R. 564 at 579;
[1907] A.C. 112.

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