

Ottawa
1968
Nov. 12
Dec. 9

IN ADMIRALTY

BETWEEN:

SAINT JOHN TUG BOAT COMPANY }
LIMITED

PLAINTIFF;

AND

FLIPPER DRAGGERS LIMITED }
ET ALIOS¹

DEFENDANTS.

Admiralty—Practice—Damages resulting from ship collision—Limitation of liability—Proper procedure—Canada Shipping Act, R.S.C. 1952, c. 29, secs. 657 and 658.

Following a collision between a ship and a tug boat an action for \$460,000 damages was brought against the tug's owner and its captain by the ship's owner and wives and children of persons killed or injured. The tug's owner then brought action for a declaration limiting its total liability to \$66,318 under s. 657 of the *Canada Shipping Act* and applied for a stay of proceedings in the first action.

Held, the application could not be dealt with until such time as a plea was entered in both actions indicating whether the plea of defendant or defendants in the first action contained an admission of liability for the maximum amount it or they would be called upon to pay if held to be entitled to limit its or their liability or contained no such admission and a plea was entered in the second action either admitting plaintiff's right to a limitation of liability or denying such a right and the plaintiff on the other hand, in such action, clearly admitted liability in such action for the maximum amount it would be called upon to pay if it was held to be entitled to limit its liability.

¹ The other defendants are:

Florence Mary Boudreau, widow of Roderick Joseph Boudreau, for herself and as next friend of Charles D. Boudreau and Charlene T. Boudreau, Infants;

Julia Anne Boudreau, widow of Vernon Boudreau, for herself and as next friend of Julian V. Boudreau, Infant;

Charlotte Anne LeBlanc, widow of Camille LeBlanc for herself and as next friend of Guy LeBlanc and Michelle LeBlanc, Infants;

Martha Isabelle Boudreau, widow of Edgar J. Boudreau, for herself and as next friend of Billy Boudreau and Sharon Boudreau, Infants;

Margaret Frances LeBlanc, widow of Raymond C. LeBlanc, for herself and as next friend of Eric LeBlanc and Brenda LeBlanc, Infants;

Theresa Anne Bourque, widow of Stanley P. Bourque, for herself and as next friend of Cecille Bourque, Infant, and

All other persons having claims against the plaintiff by reason of the navigation of the Tug Boat "*Ocean Rockswift*" on the 22nd day of August A.D. 1967.

MOTION.

Donald M. Gillis, Q.C. and *J. H. Dickey, Q.C.* for plaintiff,
applicant.

Brian Flemming for defendants, *contra.*

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NOËL J.:—Around the 15th of March 1968 a writ of summons was issued and a statement of claim served on the defendants in action No. 606 of the central Admiralty registry of this court whereby Flipper Druggers Limited, the owners of the *M/V Silver King*, claim \$120,000 damages from the defendants, the owners of the tug boat *Ocean Rockswift*, and its captain, Arthur Hartford Ells, occasioned by a collision between the *M/V Silver King* and the *Ocean Rockswift* on the 22nd of August 1967.

A number of plaintiff individuals also claim damages for the loss of life or injury to their husbands and fathers in this collision in an amount of \$340,000.

On November 4, 1968, Saint John Tug Boat Company Limited, owners of the tug boat *Ocean Rockswift*, filed a statement of claim in action No. 622 of the central Admiralty registry of this court on all those plaintiffs in action No. 606, claiming:

- a) a declaration that it is entitled to limit its liability pursuant to the *Canada Shipping Act*, and that it is not answerable in damages to the defendants or any other person beyond the aggregate amount of \$221.0614 Canadian funds for each ton of the registered tonnage of the *Ocean Rockswift*;
- b) a declaration that the tonnage of the *Ocean Rockswift*, ascertained in accordance with the *Canada Shipping Act*, is 300 tons and that the amount for which the plaintiff is liable in respect of loss of life or personal injury either alone or together with any loss or damage to property is, \$66,318.42 (\$221.0614 × 300) and no more, and that the amount for which the plaintiff is liable in respect of any loss or damage to property is (Canadian equivalent of 1,000 gold francs) at 300 tons and no more;
- c) that the plaintiff be at liberty to pay into court the sum of \$66,318.42 together with interest thereon and that upon payment into court of the said sum all

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proceedings be stayed in the said action No. 606 except for the purpose of taxation and payment of costs;

- d) a declaration that the plaintiff is entitled to relief under the *Canada Shipping Act* against any other action or actions in respect of the said collision, and that the above named defendants and all and every person or persons interested in the motor ship *Silver King* or having any claim in respect of loss of life arising out of the said collision be restrained from bringing any action or actions against the plaintiff and/or the tug boat *Ocean Rockswift*;
- e) that all proper directions should be given by this court for assessing and determining the lawful amount of all such claims and distributing the limitation fund.

The statement of claim shows that the owner of the *Ocean Rockswift* is, for the purpose of the action, prepared to admit that the collision was contributed to by the improper navigation of the *Ocean Rockswift*.

The plaintiff in action 622 now moves that its action in limitation of liability proceed and that the proceedings pending in action No. 606 be stayed.

The relevant statutory provisions are sections 657 and 658 of the *Canada Shipping Act*, R.S.C. 1952, chapter 29, as amended by chapter 32 of 1960-61 and chapter 29 of 1964-65. Those provisions now read as follows:

657. (1) For the purpose of sections 657 to 663

- (a) "ship" includes any structure launched and intended for use in navigation as a ship or as a part of a ship; and
- (b) "gold franc" means a unit consisting of sixty-five and one half milligrams of gold of millesimal fineness 900.
- (2) The owner of a ship, whether registered in Canada or not, is not, where any of the following events occur without his actual fault or privity, namely:
- (a) where any loss of life or personal injury is caused to any person on board that ship;
- (b) where any damage or loss is caused to any goods, merchandise or other things whatsoever on board that ship;
- (c) where any loss of life or personal injury is caused to any person not on board that ship through
- (i) the act or omission of any person, whether on board the ship or not, in the navigation or management of the ship,

in the loading, carriage or discharge of its cargo or in the embarkation, carriage or disembarkation of its passengers, or

- (11) any other act or omission of any person on board that ship; or
- (d) where any loss or damage is caused to any property, other than property described in paragraph (b), or any rights are infringed through

(1) the act or omission of any person, whether on board that ship or not, in the navigation or management of the ship, in the loading, carriage or discharge of its cargo or in the embarkation, carriage or disembarkation of its passengers, or

(11) any other act or omission of any person on board that ship;

liable for damages beyond the following amounts namely:

- (e) in respect of any loss of life or personal injury, either alone or together with any loss or damage to property or any infringement of any rights mentioned in paragraph (d), an aggregate amount equivalent to 3,100 gold francs for each ton of that ship's tonnage; and
- (f) in respect of any loss or damage to property or any infringement of any rights mentioned in paragraph (d), an aggregate amount equivalent to 1,000 gold francs for each ton of that ship's tonnage.

(3) The limits on the liability of an owner of a ship set by this section apply in respect of each distinct occasion on which any of the events mentioned in paragraphs (a) to (d) of subsection (2) occur without that owner's actual fault or privity, and without regard to any liability incurred by that owner in respect of that ship on any other occasion.

(4) This section does not apply to limit the liability of an owner of a ship in respect of any loss of life or personal injury caused to, any loss of or damage to property or any infringement of any right of, a person who is employed on board or in connection with a ship under a contract of service if that contract is governed by the law of any country other than Canada and that law does not set any limit to that liability or sets a limit exceeding that set by this section.

658. (1) Where any liability is alleged to have been incurred by the owner of a ship in respect of any loss of life or personal injury, any loss of or damage to property or any infringement of any right in respect of which his liability is limited by section 657 and several claims are made or apprehended in respect of that liability a judge of the Exchequer Court may, on the application of that owner, determine the amount of his liability and distribute that amount rateably among the several claimants; such judge may stay any proceedings pending in any court in relation to the same matter, and he may proceed in such manner and subject to such regulations as to making persons interested parties to the proceedings, and as to the exclusion of any claimants who do not come in within a certain time, and as to requiring security from the owner, and as to payment of any costs, as the Court thinks just.

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(1a) A judge of the Court in making a distribution under subsection (1) where there are claims in respect of loss of life or personal injury, and of loss of or damage to property or the infringement of any right, shall distribute rateably among the several claimants the amount at which the liability has been determined as follows:

- (a) twenty-one thirty-firsts of the amount shall be applied in payment of claims in respect of loss of life and personal injury; and
- (b) ten thirty-firsts of the amount shall be applied in payment of claims in respect of loss of or damage to property or infringement of any right, and to the satisfaction of the balance of any claims in respect of loss of life and personal injury remaining unpaid after distribution of the amount applied pursuant to paragraph (a).

(2) The President or a Puisne Judge of such Court, instead of exercising in person the powers conferred upon him by subsection one of this section may, by order of his court, commit to any District Judge in Admiralty of such Court the power to determine as aforesaid, whereupon such District Judge may proceed as if he were, and with the powers of, the Judge to whom such application of such owner was made.

(3) In making a distribution under this section of the amount determined to be the liability of the owner of a ship the Court may, having regard to any claim that may subsequently be established before a court outside of Canada in respect of that liability, postpone the distribution of such part of the amount as it deems appropriate.

(4) No lien or other right in respect of any ship or property shall affect the proportions in which any amount is distributed by the Court under this section amongst the several claimants.

There has been, in view of the language of section 658, a certain amount of confusion with regard to the procedure to be followed by the owner of a vessel who wishes to avail himself of the limitation of liability as contemplated by section 657 of the *Canada Shipping Act*.

A thorough and exhaustive examination of the following has made it possible to clarify somewhat the manner in which such a limitation of liability should be sought: *Merchant Shipping Act*, 1854 (U.K.) c. 104, secs. 502, 504, 505, 506 and 514; *Admiralty Court Act*, 1861 (U.K.) c. 10; *Merchant Shipping Act*, 1862 (U.K.) c. 63, s. 54; *Colonial Laws Validity Act*, 1865 (U.K.), c. 63, secs. 1 and 2; *Vice-Admiralty Courts Act*, 1863 (U.K.), c. 24; *British North America Act*, 1867 (U.K.) c. 3, secs. 91(10) and 129; *Navigational of Canadian Waters Act*, S. of C. 1868, c. 58, secs. 1, 12(1), (2), (3), (4a) and (4b); (S. of C. 1880, c. 29, secs. 13(1), (2), (3), (4a) and (4b); R.S.C. 1886, c. 79, s. 12);

Canada Shipping Act, R.S.C. 1906, c. 113, s. 921 (R.S.C. 1927, c. 186); *Judicature Acts*, 1873-74 (U.K.), c. 66; *Colonial Courts of Admiralty Act*, 1890 (U.K.) c. 27, s. 2(2); *Admiralty Act*, S. of C. 1891, c. 29; *Merchant Shipping Act*, 1894 (U.K.) c. 60, Part VIII, secs. 503-504 and 509; *Statute of Westminster* 1931 (U.K.), c. 47; *Admiralty Act*, S. of C. 1934, c. 31, secs. 3(1), (2), 4(1), 6, 32(1a), (1b) and 33; *Canada Shipping Act*, S. of C. 1934, c. 44, secs. 649, 650; R.S.C. 1952, c. 29, secs. 657 and 658 amended 1960-61, c. 32, s. 32; 1964-65, c. 39, s. 34(1a), (b), (3) and (4). The following decisions have also been considered: *M.S. Pacific Express v. The Tug Salvage Princess*¹; *The Sonny Boy*²; *Williams & Bruce's Admiralty Practice*, 3rd edition, page 349, footnote K; *The Satanita*³; *Waldie & Fullum*⁴; *The Clutha*⁵; *Wahlberg v. Young*⁶.

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Considered in the light of such an historical review, the following conclusions can be reached on a tentative basis:

- (a) section 657 limits the liability of the owner of a ship in the circumstances and to the amount set out therein;
- (b) where the owner anticipates a claim from only one person, and is not concerned about protecting himself against other possible claims, he can avail himself of the limitation of liability by merely pleading it as a defence to an action⁷;
- (c) where the owner anticipates claims from more than one source, some procedure is required to distribute the fund among the various claimants, and such procedure is supplied by section 658;
- (d) notwithstanding the express reference to the "judges" of the court, the "application" contemplated by section 658 may be made to the Exchequer Court of Canada but, in the absence of direction under subsection (2), the court can only act upon such an application when the President or one of the puisne judges of the court is sitting;

¹ [1949] Ex. C.R. 230.

² (1945) 61 B.C.R. 309.

³ [1897] A.C. 59.

⁴ (1909) 12 Ex. C.R. 325.

⁵ (1876) 45 L.J.P.D. and A. 108.

⁶ (1876) 45 L.J.C.L. 783.

⁷ See *The Queen v. Nisbet Shipping Co.* [1953] 1 S.C.R. 480 per Rand J. at p. 487.

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- (e) if the owner wishes to be protected as against claims by persons who have not been made a party to the proceedings the Exchequer Court can only properly provide such protection by making an order under which the owner will have to advertise for possible claimants and give them a stipulated time in which to put in their claims (compare Order 75 Rule 35 of the English Rules)⁸;
- (f) in a case where the owner is satisfied that all possible claimants are parties to the proceedings he may be satisfied to proceed without obtaining an order for advertising, in which case he will not have protection as against any claimant who might subsequently appear and put forward a claim;
- (g) where there is more than one possible claimant, but they have all joined as plaintiffs in an action commenced in the central registry of this court against the owner, it would seem to be appropriate procedure for the owner to counterclaim for an order under section 658 limiting his liability and distributing the amount of the fund among the plaintiffs;
- (h) where an action has been begun against the owner, either
- (i) in this court where all the claimants are not plaintiffs, or
 - (ii) in some other court (including an action in a district registry in Admiralty), the appropriate procedure would seem to be for the owner to make an application to this court by proceedings launched in the central registry for an order under section 658 of the Act—such an application can be made by way of an originating motion or an action commenced by writ or by statement of claim⁹;

⁸ The possibility of claims for damage by dependants (including infants) under sections 725 to 733 inclusive of the *Canada Shipping Act 1952* chapter 29 should also be considered as well as an appropriate procedure to cause infants to be properly represented.

⁹ It may well be that when there is an action on the central registry of this Court in which all possible claimants are not plaintiffs, it is permissible to proceed by counterclaim. Compare *The Queen v. Nisbet Shipping (supra)* per Rand J. at p. 487. Even in that case, however, it would seem preferable to proceed by way of a separate application.

(i) upon such an application, the court should be asked for directions and an order should be made setting out the course the matter is to take, which should be adjusted to the circumstances of the particular case; this might follow the English rules (O.75 r. 35) or might be worked out to suit the circumstances of the particular case having regard to the above conclusions. (None of the cases examined contain any helpful discussion of the procedure to be followed under either the English or the Canadian provisions and the matter can therefore be dealt with as though there were no authority).

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In this case, as far as I can tell from the papers on the two files, there are two possibilities, namely:

- (a) the owner of the *Ocean Rockswift* may be satisfied that all possible claimants are plaintiffs in action No. 606 or
- (b) the owner of the *Ocean Rockswift* may consider it necessary to take the steps necessary to protect it against possible claimants other than the plaintiffs in that action.

In the first event, that is, that the owner is satisfied to be protected under section 658 against the plaintiffs in action No. 606, it would seem to have been sufficient for it to counterclaim in that action for an order limiting its liability and distributing the amount of the fund among the plaintiffs as provided by section 658. In such event, no good reason for proceeding by a second action which may increase costs, is apparent. In the second event, that is, that the owner considers it necessary to protect itself against possible claimants other than the plaintiffs in action No. 606, the second action is an appropriate method of proceeding.

The owner of the *Ocean Rockswift*, as plaintiff in this action, has therefore one of two choices: pursue the present action or take the appropriate steps under the rules to proceed by way of counterclaim in action No. 606 as suggested above.

If the owner of the tug boat *Ocean Rockswift* decides to continue this action, it should make an application as to

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the further conduct of this action including directions for advertising for other claimants, and such application should be supported by material establishing at least a *prima facie* case for limiting its liability. Upon the return of such an application, the application for a stay of action No. 606 may be renewed on supporting evidence of the plaintiffs' readiness to pay the limited amount and interest thereon into court and any other facts it may wish to argue bearing on the question whether or not in the circumstances action 606 should be stayed.

No action can, however, be taken on the present motion to proceed in the present action or to stay the proceedings in the first action (No. 606) until such time as a plea is entered in both actions indicating whether the plea of the defendant or defendants in the first action contains an admission of liability for the maximum amount it or they would be called upon to pay if held to be entitled to limit its or their liability or contains no such admission and a plea is entered in the second action either admitting plaintiff's right to a limitation of liability or denying such a right and the plaintiff on the other hand, in such action, clearly admits liability in such action for the maximum amount it would be called upon to pay if it was held to be entitled to limit its liability¹⁰. In either case, however, the plaintiff may still have to proceed in the first action if there is a possibility of common fault and if the determination of the proportion of liability of both ships for the damages caused is required to set off one against the other. What I have in mind is that the claimants other than the owner of the other ship may be entitled to a larger fund to satisfy their claims if the rules of set-off operate between the owners of the two ships insofar as their respective claims are concerned as they would in the case of a matter arising in the province of Quebec (cf. article 1188 C.C.).

There is also considerable doubt in my mind in the event the plaintiff is authorized to proceed with the present action whether I can stay the action taken against the second

¹⁰ Compare the *A. L. Smith & Chinook v. Ontario Gravel Freighting Co.* (51 S.C.R. 39 at 44) where Fitzpatrick C.J. stated that "It is not necessary of course, in this country, that the owner should admit liability before beginning the limiting proceedings, but liability must be admitted before a decree can be obtained (26 Halsbury p. 616, No. 971 and the cases there cited.

defendant in the first case (No. 606), Captain Arthur Hartford Ells, as he is in no way involved in the limitation action, and there is even some question as to whether his fund would be the same fund as that of the ship he was in charge of. Before any further application is made, some consideration should be given to the question whether under Admiralty practice a person may be sued as the next friend of an infant as the plaintiff purports to do in this action.

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It therefore follows that the present motion is premature and will be dismissed with costs.

¹ R.S.C. 1952, c. 58, s. 62.