

NOVA SCOTIA ADMIRALTY DISTRICT

1941

Feb. 26.
March 17.

BETWEEN:

GLADYS IRENE ROGERS..... PLAINTIFF;

AND

THE STEAMSHIP *BARON CARNEGIE*. DEFENDANT.*Shipping—Action in rem not maintainable against ship operated by the Crown—Personal injuries—“Damage done by a ship”.**Held:* That where a ship is under requisition by the Ministry of Shipping and is operated on behalf of His Majesty the King no action *in rem* can be maintained.

2. That where a pilot is injured through a defect in the equipment of a ship such injury is not damage done by a ship.

MOTION for an order to set aside a writ of summons and warrant and service thereof.

The motion was argued before the Honourable Mr. Justice Carroll, District Judge in Admiralty for the Nova Scotia Admiralty District, at Halifax.

F. D. Smith, K.C. for the plaintiff.*C. B. Smith, K.C.* for the owner of the ship *Baron Carnegie*.*J. E. Rutledge, K.C.* for His Majesty the King.

CARROLL D.J.A. now (March 17, 1941) delivered the following judgment:—

On February 20th, 1941, a writ was issued by the plaintiff addressed to The Owners and all others interested in the steamship *Baron Carnegie*, carrying the following endorsement as the Statement of Claim:The plaintiff, as widow of the late Malcolm Rogers, deceased, a pilot of the Port of St. John, New Brunswick, claims the sum of \$20,000 against the steamship *Baron Carnegie* for damages done by the said ship at or near the mouth of Saint John Harbour in the Bay of Fundy resulting in the death of the said Malcolm Rogers and for costs.

As there is no Executor or Administrator of the Estate of the said Malcolm Rogers, this action is brought by and in the name of the said Gladys Irene Rogers, plaintiff, for the benefit of herself and the infant children of the said Malcolm Rogers and the plaintiff, Shirley Rogers and Evelyn Rogers.

On the same day a warrant was issued for the arrest of said ship, and I believe the said ship was served with all necessary documents leading up to her arrest.

1941
 GLADYS
 IRENE
 ROGERS
 v
 THE
 STEAMSHIP
*Baron
 Carnegie.*
 ———
 Carroll J.

On the 21st of February an appearance under protest was entered by solicitor for Kelvin Shipping Company, Limited, owner of the steamship *Baron Carnegie*, and on February 22nd by solicitor for His Majesty the King, represented by the Honourable the Minister of Shipping of Great Britain and Ireland, the operator of the steamship *Baron Carnegie*.

Motions were then launched by the respective solicitors, who so appeared for an order or orders absolutely setting aside the writ of summons and warrant and the services thereof on the ground that the endorsement on the writ of summons discloses no cause of action over which the Admiralty Court has jurisdiction and on the further ground that the steamship is under requisition by the Honourable the Minister of Shipping of Great Britain and is being operated on behalf of His Majesty the King and therefore cannot be impleaded in this action.

The affidavit of E. Ernest Bryant filed herein satisfies me that the ship *Baron Carnegie* was requisitioned and remains requisitioned by the British Ministry of Shipping and is now, and at all times relevant to this matter was controlled and operated by the said Ministry, which is a Department of His Majesty's Government of Great Britain and Ireland. Control and operation necessitates possession, and I do not think that actual ownership of the property in this ship by the British Ministry of Shipping is necessary to make her a King's ship and so immune from an action *in rem*. She is, to all intents and purposes, the property of the Crown, and so this action cannot be maintained against her. The S.S. *Scotia* (1).

While this is fatal to the plaintiff in this action, I think I should make reference to the other aspects of the case.

This is an action for damages done by a ship. The facts as outlined in the affidavit of Capt. George S. Cumming, Master of the defendant ship, are that Malcolm Rogers boarded the ship *Baron Carnegie* as pilot at St. John, New Brunswick, on the 17th of February, 1941, to pilot the ship outward from the Port of St. John, New Brunswick. When finished with his pilot duties, he prepared to leave the ship and the watch officer gave orders to one of the crew to place a ladder over the side for the purpose of letting the Captain get down to the waiting tender. The pilot stepped on the ladder, it gave way and he was thrown

in the water. He was rescued by a pilot boat but died the same day, presumably as a result of the accident. This statement of fact is, I think, not disputed in the motion before me.

It is contended, first, that any damage suffered was not done by a ship within the meaning of the Admiralty Act. I think, under and by virtue of the authorities in which the words "damage done by a ship" have been interpreted, that this contention must prevail.

In the case of *The Theta* (1), the ship was arrested and damage claimed for personal injuries sustained. The circumstances resulting in the injuries were that the plaintiff was proceeding to his ship, moored outside another which was docked at a pier. In crossing the last-mentioned ship, he fell through a hatchway covered only with a tarpaulin. Notwithstanding that he had a legal right to cross the ship and that the hatchway so covered was in the nature of a trap, his claim against the ship was dismissed. The Court held that, while damage included personal injury, the damage was not done by the ship, because damage done by a ship is only applicable to those cases where the ship is the active cause of the damage, or in other words, damage done by those in charge of a ship with the ship as the noxious instrument.

The facts in the present action are somewhat different from those in *The Theta* because here the action is brought not by the person injured but by his representative on behalf of his wife and children. The right to bring any such action is given, I presume, by Chapter 81, Revised Statutes of New Brunswick 1927, the Lord Campbell's Act of that province.

The leading case in actions for damage done by a ship where the only right of any action is given under the provisions of Lord Campbell Act is *The Vera Cruz* (2). There the Captain of a ship was fatally injured owing to a collision between his ship and the *Vera Cruz*, for which collision the *Vera Cruz* was at least partly to blame. An action was brought *in rem* by the administratrix of the deceased under Lord Campbell's Act, and it was decided that an action *in rem* under Lord Campbell's Act is not within Section 7 of the Admiralty Act and that therefore

1941
GLADYS
IRENE
ROGERS
v
THE
STEAMSHIP
Baron
Carnegie.
Carroll J.

(1) (1894) P.D. 280.

(2) (1884) 9 P.D. 96.

1941
 GLADYS
 IRENE
 ROGERS
 v
 THE
 STEAMSHIP
 Baron
 Carnegie.
 Carroll J.

the Admiralty Division has not jurisdiction over such an action. Said 7th section gave jurisdiction to the Court of Admiralty over "any claim for damage done by a ship".

Brett M.R., said at p. 99:

The section indeed seems to me to intend by the words "jurisdiction over any claim" to give a jurisdiction over any claim in the nature of an action on the case for damage done by any ship, or in other words, over a case in which a ship was the active cause, the damage being physically caused by the ship. I do not say that damage need be confined to property, it may be damage to person, as if a man were injured by the bowsprit of a ship. But the section does not apply to a case where physical injury is not done by a ship. What, then, is the cause of action given by Lord Campbell's Act? That statute was passed to meet cases of injury caused to a man's person, because by law his right of action died with him. . . . But Lord Campbell's Act gave to a person who had no right before, a right of action as representative of other persons who had also no right before, the executor who may sue being a mere instrument who acts on behalf of such persons. The death of the man caused by the negligence of the defendant is only part of the cause of action. There must be actual injury to the person on whose account the action is brought. The real cause of action is in fact pecuniary loss caused to these persons, it is not a cause of action for anything done by a ship. . . .

Fry L.J., at p. 101 said:

Secondly, assuming injury to the person to be within the section, is an action under Lord Campbell's Act within it? Compare, by way of illustration, damage done to a barge by the bowsprit of a ship, and a person killed by the same thing. In the first instance, the cause of action is the injury actually caused by the ship. But in the second, the real ground of action is injury sustained by relatives resulting from the death of a person, which resulted from the damage done to him by the ship. It cannot be correctly said that it is an action for damage done (which are the words of the Act), though it is for damage resulting from or arising out of damage done.

On appeal to the House of Lords, *Seward v. Owner of The Vera Cruz* (1), that decision was affirmed.

In *McCull v. Canadian Pacific Ry. Co.* (2), Mr. Justice Duff (now Sir Lyman Duff, Chief Justice of Canada), who delivered the judgment of their Lordships, cited with approval the observations of Fry L.J. above set out and also those of Bowen L.J. in the same case. So the law in this respect is well settled.

However, by Section 6 of Chapter 126 R.S.C. 1927, (The Maritime Conventions Act), it is provided that "Any enactment which confers on any court Admiralty jurisdiction in respect of damages shall have effect as though

(1) (1884) 10 A.C. 59.

(2) (1923) A.C. 126 at 132.

reference to such damages included references to damages for loss of life or personal injury, and accordingly proceedings in respect of such damages may be brought *in rem* or *personam*." This Act was passed in 1914. Section 6 is an exact reproduction of Section 5 of the English Act passed in 1911.

This section was considered by Mr. Justice Maclean, President of the Exchequer Court of Canada, in the case of *Dagsland v. The Ship Catala* (3), in which it was decided that this section did not so enlarge the jurisdiction of the Admiralty Court as to give it jurisdiction over actions brought *in rem* under Lord Campbell's Act or similar enactments.

Chap. 31 of the Acts of the Parliament of Canada 1934, (The Admiralty Act) by Schedule A, which is made part and parcel of the Act, now confers on the Admiralty Court in Canada, jurisdiction to hear and determine "any claim for damages done by a ship", and Section 646 of Chapter 44, Acts Parliament of Canada 1934, is now what was Section 6 of the Maritime Conventions Act in exact words. I know of no other enactment which confers on any court Admiralty jurisdiction in respect of damages except the one above mentioned, and on the face of it, it certainly looks as if it were conferring jurisdiction on the court which it did not before have. In this connection I refer to 30 Halsbury 866, Note O and 1 Hals. 94, Note P (New Editions).

However, the decision of the President of the Exchequer Court in *The Ship Catala* is I think the law in Canada and is binding on Local Judges in Admiralty.

The application on behalf of the defendant will be granted.

May I, however, suggest that the law, as it now exists in Canada, cramps or limits the scope of Lord Campbell's Act and kindred legislation in the various provinces by rendering it well nigh impossible for dependents of one fatally injured by a ship to recover damages when the owners are foreign to the jurisdiction. The owners may be far beyond the limits of Canada and reaching them by writ *in personam* and obtaining a judgment is almost useless because of the difficulty of realizing on such judgment. In addition, the costs of such litigation is far beyond the financial capacity of people generally involved as plaintiffs.

1941
GLADYS
IRENE
ROGERS
v
THE
STEAMSHIP
Baron
Carnegie.
Carroll J.

1941
 GLADYS
 IRENE
 ROGERS
 v
 THE
 STEAMSHIP
*Baron
 Carnegie.*
 ———
 Carroll J.
 ———

May I, therefore, with the greatest deference, suggest that our law makers consider the advisability of amending the statute law so as to give Admiralty Courts jurisdiction to hear and determine actions *in rem* by dependents against any ship that has caused the death of their bread winner. That, I believe, was the intention in incorporating Section 6 in the Maritime Conventions Act, now Section 646 of the Shipping Act; but, unfortunately, that intention was not expressed in language sufficiently strong to override the existing law.

Judgment accordingly.