BRITISH COLUMBIA ADMIRALTY DISTRICT.

1945
Mar. 2, 3, 4
Mar. 15

BETWEEN:

FRANKLIN GALE ..... PLAINTIFF,

AND

THE SHIP *SONNY BOY* ..... DEFENDANT.

Shipping—Collision—Liability—Plea of limitation of liability may be raised by way of defence or counterclaim without the institution of a separate action—One of two or more joint owners of a ship not in default may plead limitation of liability—Canada Shipping Act 24-25, Geo. V., c. 44, s. 649.

In an action for damages arising from a collision between plaintiff's ship and defendant ship the Court found the defendant ship alone to blame for the collision. Defendant ship is owned by two persons who were registered as joint owners of all her shares. Defendants pleaded in the alternative that they were entitled to limit their liability under the provisions of the Canada Shipping Act, Statutes of Canada 1934, c. 44, s. 649. It was contended that defendants should have raised the issue of limitation of liability in a separate action after their liability had been determined or admitted.

Held: That a defendant in an action of damage who is entitled to institute a separate suit of limitation of liability may plead his right to limited liability by way of defence in the action of damage in which he is a defendant and may set up a counterclaim in the same action claiming a decree of limitation of liability such as he might have claimed as a plaintiff in a separate action of limitation of liability.

2. That a joint owner of a ship against whom no default is established is not precluded from the right of limited liability.

ACTION by the plaintiff to recover damages for loss suffered by plaintiff through a collision between plaintiff's ship and defendant ship.

The action was tried before the Honourable Mr. Justice Sidney Smith, District Judge in Admiralty for the British Columbia Admiralty District, at Vancouver, B.C.

R. W. Ginn, for Plaintiff.

J. V. Clyne and *V. Hill*, for Defendant.

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

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SIDNEY SMITH D.J.A. now (March 15, 1945) delivered the following judgment:

This suit involves a collision which occurred in Ogden Channel, B.C., at approximately 12.30 a.m. on Monday 21st August, 1944, between the motor vessels *Colnet* and *Sonny Boy*. The *Colnet* is owned by the plaintiff and is a fish packer, 54 feet long, 13 feet beam, 8 knots speed, and of 25 tons net register. She was in the course of a voyage from Prince Rupert to Queen Charlotte City, and was manned by a crew of three young men, the eldest of whom James Gale, a son of the plaintiff, was only 19 years of age. He had no certificate, but had had experience in boats from his youth, and had been in charge of the *Colnet* for a year and a half. Of the other two lads one, Roberts, 17 years of age, was the deckhand, and the other, Ross, 16 years of age, was the engineer. The *Sonny Boy* is a fishing vessel 38 feet long, 12 feet beam, 6 knots speed and with a net register tonnage of 13·76 tons. She was owned by Olav Knutson and Martin Gunstveit. They were the registered joint owners of all her sixty-four 64th shares. The former, also uncertificated, was her Master and Engineer. In addition, she had a crew of four fishermen. Both vessels were equipped with electric light.

Soon after midnight in question the vessels were approaching each other in the fairway of Ogden Channel about opposite Camrie Head. The night was clear and dark, with the water further shadowed by the mountains on either hand. The Master of the *Colnet* had been at the wheel till midnight when he was relieved by Roberts, who had only made four trips through the Channel. The Master accordingly stayed on look-out in the wheel-house until the vessel should get into open water. The third lad was below. The crew of the *Sonny Boy* at this time were all below except one fisherman, Halverson, who was at the wheel, and who, somewhere around midnight, had taken over charge of the vessel from the Master. About half past twelve the two ships collided, the stem of the *Sonny Boy* cutting into the port side of the *Colnet* just forward of midships, causing heavy damage. The Master and deckhand of the *Colnet* say their lights were burning while the *Sonny Boy* showed no lights. Halverson in charge of the *Sonny Boy* says the exact opposite. He says the *Sonny*

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Boy lights were burning while the *Colnet* lights were out. There is also evidence as to the lights from the other members of the crew of the *Sonny Boy,* who say generally that at various times during the earlier part of the night the lights of their vessel were burning. On behalf of the *Sonny Boy* there is also evidence from one, Jonson, who was in charge of a fishing vessel that passed the *Sonny Boy* earlier in the evening, just at dusk, and who said the *Sonny Boy's* lights were then burning. But this testimony was weakened by other evidence he gave which I thought unfounded and which I thought showed a bias against the *Colnet.* On the other hand, Engineer Ross of the *Colnet* said that the lights of his vessel were burning when he went below, and also when he came on deck again immediately after the collision. It should be noticed here also that the crews of both vessels say that the lights of the other ship became visible shortly after the collision, while the *Sonny Boy* was manoeuvring alongside preparatory to beaching the *Colnet.*

The defendants in their defence set up in the alternative contributory negligence on the part of the *Colnet* but this was not pressed in argument by either counsel. Both counsel submitted that it was merely a question of lights or no lights, which again was one of credibility. But I have not excluded from consideration that there may be a middle view, either that the lights of both vessels were out, or that the lights of both vessels were burning but that each kept a bad look-out.

I am quite unable to find, as I was invited to find, that the three lads in the *Colnet* concocted their story in order to deceive the Court. On the contrary, I think they all dealt fairly with the Court. I was particularly impressed with the Master. He seemed to me to be a truthful witness and in my opinion any alleged inconsistencies between his evidence at the trial and his casualty report, or between his evidence and his previous statements, were not such as to throw any doubt upon his veracity. I therefore accept the evidence of those on board the *Colnet,* and find that at the time of the collision the *Colnet* was exhibiting the regulation lights, that the *Sonny Boy* was showing no lights, that such default was the cause of the disaster and that the *Sonny Boy* must be held alone to blame.

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There was much evidence and argument as to whether the crew of the *Sonny Boy* had been drinking while at Queen Charlotte City. The crew of the *Colnet* said that when taken on board the *Sonny Boy* they found certain members of her crew showing signs of a "hang-over", and two of them with face marks indicative of a fight. I accept this evidence. I think there can be no doubt that the Master, another fisherman named Murray (who acted as cook), and Halverson, had been drinking during Saturday night and into early Sunday morning, and that the first two named had been fighting. Halverson said that whiskey had been purchased on Saturday night, that he had paid $15.00 for his share and that he and others had been drinking in a hotel room. He gave no clear account of how much he had taken and contradictory accounts of the time when he returned on board his ship. All this is in striking contrast with the seemly conduct of the crew of the *Colnet* on the Saturday night and on the Sunday afternoon prior to leaving Prince Rupert.

The defendants in their defence pleaded, in the alternative, that they were entitled to limit their liability under the provisions of s.649 of the Canada Shipping Act, Statutes of Canada, 1934, c. 44. Counsel for the plaintiff contended that this was a wrong method of procedure, and that the defendants should have raised this issue in a separate action after their liability had been determined, or admitted. I am of opinion that, both in England and in Canada, a defendant in an action of damage who is entitled to institute a separate suit of limitation of liability may, if he chooses, plead his right to have his liability limited, by way of defence in the action of damage in which he is defendant, and set up a counterclaim in the same action, claiming a decree of limitation of liability such as he might have claimed as a plaintiff in a separate action of limitation of liability. Williams & Bruce's Admiralty Practice, 3rd ed. p. 349. *The Satanita* (1); *Waldie Bros.* v. *Fullum et al* (2). The defendants' pleadings are therefore not in order; but as the plaintiff clearly has not been prejudiced thereby, and in view of the point not having been settled in Canada, I now grant the defendants leave to file a counterclaim, claiming the right to limit their liability.

(1) [1895] P. 248 at 250; [1897] A.C. 59.

(2) [1909] 12 Ex. C.R. 325 at 372.

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It remains to consider whether Knutson and Gunstveit, as joint owners of the *Sonny Boy*, are in these circumstances entitled to such limitation. The onus of proving that the collision occurred without their actual fault or privity is upon them, and they are not entitled to limitation unless they discharge that onus. In my opinion, as regards Knutson, the onus has not been discharged. I am not satisfied either that the lights of *Sonny Boy* were burning when he, as Master, handed over charge of the vessel to Halverson some half-hour before the collision; or that Halverson was then in a fit condition to take charge. Either contingency would constitute a default on the part of the Master. I therefore find that Knutson is not entitled to limitation of his liability.

As regards Gunstveit the position is different. The evidence is clear that he was not on board the vessel at the material time, and there is nothing to indicate that he had anything to do with the events at Queen Charlotte City.

It has been decided that if the loss is occasioned by the actual fault of one of several part-owners, his co-owners are not thereby precluded from a right to the limited liability *The Spirit of the Ocean* (1). Neither counsel was able to furnish me with authority as to whether this principle held good in the case, as here, of joint ownership; nor have my own researches disclosed any. But from the reasoning of Dr. Lushington in the above decision I am prepared to hold, lacking authority to the contrary, that the principle is the same in both cases. I therefore find that Gunstveit is entitled to limit his liability as provided in s. 649 of the Canada Shipping Act.

There will be a reference to the Registrar to assess the damages.

There is one point as to costs to which reference must now be made. The trial was originally set for February 5th and the plaintiff, in setting it down, observed the provisions of Rules 115 and 119. But the defendants were unable to proceed on that day as their witnesses were at sea, fishing, and they were without means of communicating with them. I think the costs thereby incurred by the plaintiff, and which were thus thrown away, should be borne by both parties equally. The plaintiff had several witnesses from

(1) [1865] 167 E.R. 388.

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Queen Charlotte Islands. Transportation facilities are limited to and from these Islands. I think he should have made sure that the action would go on before bringing them down. On the other hand, the defendants knowing this action was pending, should not have allowed their witnesses to go to sea where they could not be reached, without some understanding with the plaintiff. There was unfortunately lack of co-operation on both sides and both should share the needless expense thereby incurred.

The plaintiff is entitled to his costs.

Judgment accordingly