Vancouver 1966
Feb. 14, 15
Feb 22

BRITISH COLUMBIA ADMIRALTY DISTRICT

BETWEEN:

RALPH PERRIGOUE .....PLAINTIFF;

AND

BRITISH COLUMBIA FERRY AUTHORITY .....DEFENDANT.

Shipping—Ship causing excessive wash—Personal injury to fisherman—Excessive speed of ship—Fault—No contributory negligence.

On the morning of May 5th 1963 plaintiff tied his fishing vessel alongside another fishing vessel anchored in the Gulf of Georgia in the lee of Newcastle Island Defendant ferry came by inbound at low speed creating some wash which the fishing vessels countered by releasing the spring line joining them. Soon afterwards the ferry returned outbound at greater speed (15 knots) creating an excessive swell. The spring line was released again and in addition plaintiff attempted to hold apart the bows of the two vessels. He suffered severe injuries when the swell caused by the ferry hurled his vessel with great force against the other fishing vessel.

Held, the ferry was at fault in travelling at excessive speed within confined waters, and plaintiff was not guilty of contributory negligence (1) in tying his vessel to the other, this being a common practice amongst fishermen and the anchorage being clear of other traffic; (2) in not keeping a lookout, it being daylight and the weather clear; (3) in attempting to hold the vessels apart in the circumstances. *The Batavier* (1854) 9 Moo. P C. 286; *Luxford v Large* (1833) 5 C & P 421; *Nance v. The B.C. Elec. Ry. Co.* [1951] 2 W W.R. 665; *The Solace* (1936) 54 Ll L R 229 referred to.

J. I. Bird, Q.C. for plaintiff.

J. R. Cunningham for defendant.

SHEPPARD D.J.:—This action is for personal injuries of the plaintiff alleged to have been received aboard the *Tacora* through the negligent operation of the *Queen of Sidney*.

On the 4th May, 1963, the plaintiff and his wife, aboard the plaintiff's fishing vessel, the *Susie M*, length 39.5 feet, gross tonnage 18.60, with Harold R. Jones, aboard his fishing vessel, the *Tacora*, length 34.7 feet, gross tonnage 16.84, left Everett on a voyage to Alaska to engage in fishing. For the night they hove to at Provost Harbour, Stuart Island, Washington, and at 4:30 a.m. on the 5th May, 1963, continued the voyage. In the Gulf of Georgia they found the wind has freshened from the southeast to

30 m.p.h. with a quartering sea. At 11:15 A.M. they sought shelter in the lee of Newcastle Island, there intending to have lunch, to lower their trolling poles and to put out their stabilizers. There the *Tacora,* perhaps more fully equipped, though both vessels had fathometers, anchored just south of Tyne Point fairly close to the shore in 8 to 10 fathoms of water, and the *Susie M* tied alongside with a line from the bow, another from the stern and a spring line, and with two sets of fenders of rubber tires over the side of each vessel. Shortly thereafter the *Queen of Sidney* owned by the defendant, passed at a distance of about 600 feet in the channel north of Newcastle Island inbound from Horseshoe Bay to the terminal in Departure Bay. This vessel was travelling slowly, there was some wash but this raised no problem as Jones then cast off the spring line which permitted the vessels to drift apart and to be held by the fore and aft lines.

Shortly after 12:00 noon the *Queen of Sidney* proceeded outbound. The plaintiff and Jones were in the wheelhouse of the *Tacora* working out the courses to Alaska, and the plaintiff's wife, seeing the swell raised by the *Queen of Sidney,* shouted. The plaintiff and Jones rushed on deck to release the spring line as formerly. Jones went aft and attempted to hold the vessels apart at the stern by holding the rail of each vessel. The plaintiff went forward between the wheelhouse and the rail and attempted to hold the vessels apart with his left hand on the shroud of the *Susie M* and his right hand on the rail of the *Tacora.* The swell of the *Queen of Sidney* struck the *Susie M* amidships, raised her to the level of the top of the wheelhouse of the *Tacora,* and that threw Jones back against the skiff on the poop deck of the *Tacora.* The *Susie M* came down on the plaintiff, breaking his hip and also injuring his left knee. The plaintiff became faint, fell to the deck of the *Tacora* alongside the wheelhouse and came to on a stretcher when being carried to the ambulance. He was then taken to hospital in Nanaimo, B.C., put in a cast for seven weeks then allowed to go home where he remained in the cast for a further two weeks, and in August, 1963, was able to return to fishing.

The plaintiff's case is that the *Queen of Sidney* injured the plaintiff by excessive wash raised by her excessive

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speed, and therefore she was liable within the principles of *The Batavier*[1] and *Luxford v. Large*[2].

On the evidence the *Queen of Sidney* was at fault in travelling at excessive speed within the confined waters of Departure Bay which resulted in the excessive wash which caused the injuries complained of by the plaintiff. Jones estimated the speed of the *Queen of Sidney* when outbound at 15 knots and that estimate is borne out by that vessel's log (Ex. 9) and her chart (Ex. 8). The speed of the *Queen of Sidney* should have been kept slow in the early part of this trip until she had passed the fishing vessels. This was not done. According to the log (Ex. 9) she left the terminal at 12:00, at 12:04 was abeam Nares Point, at 12:07 was abeam Horswell Buoy. The distances made by the vessel according to the chart (Ex. 8) at the times in the log, indicate the following speeds: to F (chart, Ex. 8) at slow from the terminal would take 2½ minutes, hence she made from F to abeam Nares Point, 3,150 feet, in 1½ minutes, and even if her time be taken at 2 minutes, she was travelling at 15 knots; that speed is confirmed by her speed from abeam Nares Point to abeam Horswell Buoy, a distance of 4,700 feet, which she made in 3 minutes, which is 15 knots. Further, inbound from Horswell Buoy to the terminal she averaged 8.6 knots and outward bound over the same distance she averaged 13.6 knots, therefore during the crucial part of this trip from F to Nares Point she was making 15 knots. That speed was not required. Inbound she had reduced speed and outbound she could have proceeded in the same manner, whereas 15 knots was excessive within those confined waters as bound to produce an excessive wash beyond that which could reasonably have been anticipated by those aboard the *Susie M* and the *Tacora*. That the wash was excessive is indicated by the fact that the first wave raised the *Susie M* to the level of the top of the wheelhouse of the *Tacora* by the fact that the paint from the *Susie M* was found on the trolling pole of the *Tacora* above her rail, and by the further fact that the cross-trees were broken and her trolling pole snapped through a diameter of 4 inches. Under these circumstances the defendant was at fault in travelling at an excessive speed.

[1] (1854) Moo. P C. 286.

[2] (1833) 5 C. & P. 421.

The defendant contends that the plaintiff was guilty of contributory negligence in tying the *Susie M* alongside the *Tacora* rather than in anchoring her at a distance to prevent the vessels coming into contact. Whether the plaintiff was guilty of contributory negligence depends upon whether he used reasonable care for his own safety: *Nance v. The British Columbia Electric Railway Company*[1]. That is essentially a question of fact depending upon all the circumstances of the case. For example, the upsetting of a stove has been held to have been caused by excessive wash: *The Solace*[2] and has been held not so caused: *Perry v. Car Barge and Towing Co. Ltd.*, an unreported judgment of Ruttan J. (B.C. Supreme Court).

The *Susie M* in tying alongside the *Tacora* was following a quite common practice of fishing vessels and also of yachts being secured to one at anchor. The vessels were anchored in the lee of Tyne Point well clear of other traffic, and a considerable number of small vessels do from time to time use that area as a shelter for tying up or anchoring. Under the circumstances there was no contributory negligence in mooring at that place or in that manner.

It was also contended that the plaintiff was guilty of contributory negligence in not having a lookout. On the other hand, good seamanship did not require a lookout beyond that being maintained. It was daylight in clear weather and there was good visibility. Moreover the vessels so anchored were seen by those on watch on the *Queen of Sidney*.

It is also contended that the plaintiff was, by his conduct, guilty of contributory negligence in attempting to use his physical strength to hold the vessels apart. That contention should not succeed. It was reasonable for the plaintiff and Jones to have released the spring line and to have attempted to hold their vessels apart. That method had been successful when the *Queen of Sidney* was inbound and they had no other choice than to attempt to hold the vessels apart as they had previously succeeded in doing.

In any event, they could not have anticipated that the violence of the wash would raise the *Susie M.* as subsequently occurred.

[1] (1951) 2 W.W.R. 665.

[2] (1936) 54 Ll. L.R. 229.

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It was also contended that the plaintiff was guilty of negligence in being outside the rail of the *Tacora* whereby he received his injuries. That is not the evidence. The plaintiff has testified that he was standing on the deck of the *Tacora* between the wheelhouse and the rail when he received his broken hip. He then attempted to hold himself up by holding on to the wheelhouse when he received the blow which injured his left knee. Then presumably he fell to the deck of the *Tacora* because he was there found by Jones.

It follows, therefore, that the excessive wash was produced by the excessive speed of the *Queen of Sidney* and that caused the injuries complained of by the plaintiff.

These findings are concurred in by the Assessors, Captain E. B. Caldwell, and Captain W. A. Dobie, for whose competent advice and assistance I am greatly indebted.

The findings in these reasons involve no criticism of Captain Shives, the Master of the *Queen of Sidney*. The difficulty is that the engine changes are ordered from the bridge by telegraph and the engine room kept no bell book of the engine changes, hence the Master could know he ordered slow or full ahead but could not know the number of revolutions that the engineer had turned on, or that the orders for slow or full ahead were correctly carried out.

There will be judgment for the plaintiff accordingly with a reference to the Registrar to determine the amount of the damages. The costs will follow the event.