1918
April 27.

TORONTO ADMIRALTY DISTRICT.

FRED JOHNSON AND ADAM BROWN MACKAY,
PLAINTIFFS,

AGAINST

S.S. "CHARLES S. NEFF",
THE SHIP,

AND

QUEBEC ADMIRALTY DISTRICT.

FREDERICK H. JOHNSON, ET AL,
PLAINTIFFS,

AGAINST

THE SHIP "CHARLES S. NEFF",
DEFENDANT.

Salvage—Mode of estimating amount—Costs—Distribution.

In finding the value of salvage services, amongst other circumstances the Court must consider the degree of danger to which the salved vessel was exposed, and from which she was rescued by the salvors, and the risk incurred by the salvors in rendering their services and the mode in which the services were rendered. The value of the vessel salved, while important, is not decisive. There is a difference owing to conditions rendering disaster less probable in the amount to be allowed for salvage services on the Great Lakes and on the high seas.

CONSOLIDATED actions for salvage.

Tried before the Honourable Mr. Justice Hodgins on 27th and 28th days of March, 1918.

J. A. H. Cameron, K.C. (Montreal), and *R. S. Cassels,* K.C., for plaintiff Johnson and the crew of the ship "Sarnor."

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C. V. Langs, for plaintiff Mackay.

M. J. O'Reilly, K.C. (Hamilton), and *W. B. Scott,* (Montreal), for ship "C. S. Neff" and the underwriters.

HODGINS, Loc. J. (April 27th, 1918) delivered judgment.

Consolidated action for salvage tried before me at Toronto on the 27th and 28th days of March, 1918. The ship "Sarnor" on Nov. 29, 1916, about 10.15 a.m. went to the assistance of the ship "Neff," then at anchor six miles off the south shore of Lake Erie, near Dunkirk, N.Y. The ship had lost her propeller about 6 a.m. through striking some submerged obstacle. The "Neff" was taken in tow, and brought safely to Port Colborne. Just outside the harbour, the "Sarnor" cast off the tow line and tied up to the "Neff" in order to better make the harbour. The operation took about five hours and was performed without any untoward incident.

I have come to the conclusion that the plaintiffs are entitled to salvage. The "Neff" is a steel steamer, canal size, 225 feet long by 40 feet beam, the value of which I find to be $90,000 in her damaged condition when found by the salvors. She had a cargo of 1,293 tons of pig iron, worth about $32,000, and the freight being earned thereon from East Jordon, Mich., to Buffalo was stated to be $2,000. The loss of her propeller had injured the low pressure port column and the pump bracket was fractured. These injuries reduced her pumping capacity. She was off a shore said to be strewed with boulders and likely to become a lee shore if the wind should shift, as it did at 3 p.m. that day. Her mate, Lindeman, said

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that the weather glass showed that something might develop, and that if the sea got up there would be danger. Her captain, Doak, agrees as to the warning given by the barometer, which began to drop on the morning of November 28, and says that he went over to the south shore of Lake Erie to avoid a sea if the wind shifted and increased, as was indicated. He says that with her wheel gone there would be danger, but not otherwise. He, in fact, sounded distress signals to attract the attention of several ships which passed. His ship was, of course, helpless and had to depend on her anchors holding, if it came to blow. It was shown by the weather bureau records that on the morning of November 29th there was a fresh to strong westerly wind, cloudy at Port Colborne, and possibly raining on the south coast of Lake Erie, and that in the evening the wind shifted to the southwest. Its velocity near Dunkirk was between 20 and 32 miles an hour. Its effect may be deduced from the fact that after the ship "Neff" was in Port Colborne she had to be shifted by two tugs to the inner harbour on account of the freshening of the wind, which Captain Doak describes as "strong wind, squally," and that the "Sarnor," after leaving next morning, laid up all that day behind Long Point. On the other hand, the "Neff's" captain says he was in the usual line of travel to Buffalo. This is denied by Johnson, who puts the "Neff" eight or ten miles off the beaten track. But it appears that between 6 a.m. and 10 a.m. three vessels at least passed, but without responding to the signals. The probability of other assistance is an element in lessening the amount allowed for salvage. *The Werra.*[1]

[1] 12 P.D. 52.

As events turned out, the weather did not become heavy until Port Colborne had been reached. But there was apprehension of danger, and, as I view it, some real danger if the "Neff" had been left where she was without any means of propulsion, depending wholly upon the anchors or other passing assistance and with a glass which had been falling for over 24 hours.

I am not impressed with the argument that the operation of salving was attended with any great danger or difficulty. The "Sarnor" is a single-screw wooden vessel of 1,152 tons, 237 feet long and 38 feet beam, with a carrying capacity of 1,000 to 1,100 tons. She was steaming light, going to Erie, Pa., for a cargo of coal. Her captain, Johnson, says he saw the "Neff" two miles off, the sea was not rough, the vessels came within ten to fifteen feet of one another and the tow line was passed without trouble, while the voyage across was uneventful. There is, however, always danger in the manœuvring of a wooden vessel when near a steel ship, both in getting the line, straightening up to tow and in going alongside to tie together, and there is some risk to the crew from the unusual operation.

While, therefore, I hold it to be a true salvage case within the authorities, I am unable to find that the element of danger or risk to the salving vessel was important enough to call for any exceptional compensation. The proper rule in fixing the amount is stated in *The Chetah*,[1] that in estimating the value of salvage services the circumstances, among others to be considered by the Court are the degree of danger to which the vessel was exposed and from which

[1] L.R. 2 P.C. 205.

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she was rescued by the salvors, the mode in which the services of the salvors were applied and the risk incurred by the salvors in rendering the services.

I think the excessive emphasis placed on the value of the salved vessel as an element is due to an imperfect appreciation of the various considerations to be weighed in fixing the amount of salvage, *The Amérique.*[1] Reference may also be made to *Halsbury's Laws of England,* vol. 26, secs. 880-883, and to the case of *The Berwindmoor,*[2] which is helpful in determining the quantum.

There is always to be borne in mind the difference between salvage on our Great Lakes and that at sea. While often the peril is as great and the skill as manifest, there are conditions that frequently render disaster less probable.

In a case which bears much resemblance to this in its details, this element is thus very lucidly stated.

In *The Spokane,*[3] a case decided in Wisconsin by a Judge, appropriately named Mr. Justice Seaman, he observes:

"*The Spokane* was found in the open waters of "Lake Michigan, entirely disabled in her motive "power, and helpless to reach any port for refuge "or repair, at the close of the season, when serious "storms were to be apprehended, and when a falling "barometer indicated a storm pending, she was flying the signal and sounding the whistle of distress. ". . . The delicate and difficult question remains to "determine an amount for this salvage which shall "not only recompense the service, but shall be a just "reward for it, and shall also serve as an encourage-

[1] L.R. 6 P.C. 468.
[2] 14 Can. Ex. 23.
[3] 67 Fed. Rep. 254 at 257.

"ment of others to like action. At the same time, "the Court ought not to impose more than should be "justly paid by the respondents in view of the extent "of peril from which the vessel and cargo were res- "cued, or an amount that would constitute a pre- "cedent discouraging vessels in distress or peril "from invoking and accepting necessary aid. . . . "Upon these Lakes commerce has assumed vast pro- "portions; vessels up and down pursue a regular and "well-defined course, often within sight of shore, "and in case of distress are not liable to remain long "out of sight of other vessels; the newspapers pub- "lish the fact of passing Detroit and other points, "so that the progress and position of all vessels are "approximately known; good harbours are fre- "quent; the towage of large vessels, barges and rafts "has become a feature of this navigation, and only "storms of the utmost severity are regarded as dan- "gerous to such undertaking. The allowance for "salvage must be made in conformity with these "modified conditions. There are few reported de- "cisions in reference to salvage service on the "Lakes; none has been cited justifying the allow- "ance claimed by the libelant. I am satisfied that "it would not subserve the public interest, and would "not be just between the parties to allow so large "an amount for salvage under the circumstances "shown."

The amount finally awarded was $3,600, and the value of the salved vessel and cargo was $320,000, and that of the salvor $125,000.

The salving of the "Neff" delayed the business of the "Sarnor" some five days at a period of the year when maritime risks are greatest. The chance of be-

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ing frozen in between Montreal and Lake Erie is not inconsiderable. She was uninsured. The plaintiff Mackay claims 50 hours detention. The daily expenditure is put at $108.10 by the plaintiff Bonham, who says that he was delayed 4 or 5 days. At the utmost, then, the extra expense would be $540, and at the least, 50 hours, about $250. Towage, which according to the contention of the captain of the "Neff," is the correct description of what was done, would have cost, according to him, an amount which, having regard to the number of hours occupied in going and coming while towing, I should estimate at $250.

I come to the conclusion that, having regard to all the circumstances in evidence, the proper amount to allow as the value of the salvage service would be $2,600, to be distributed between the ship, the cargo and the freight. As the cargo has been discharged and is not before the Court, this will mean judgment in this action for $1,800 against the ship, distributable $1,350 to the owners and $450 to the master and crew. To the master I apportion $150, to the engineer $150, and to the remainder of the crew $150.[1] *The Raisby*,[2] *The Stephie*.[3]

Of this the sum of $1,650 will be paid into or left in Court pending further order. This is owing to the litigation arising out of the relations between the parties plaintiff. The amount allowed to the crew will be divided equally among its members.

The plaintiffs should have the costs of the action brought by Mackay throughout and of the action after the consolidated order, to be paid by the ship.

[1] See *Cox v. May*, 4 M. & S. 152, 105 E.R. 791; *Kennedy on the Law of Civil Salvage*, pp. 180, 186.
[2] 10 P.D. 114.
[3] 15 Can. Ex. 124.

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As to the Johnson action it was advisable, and in one sense necessary, in that it resulted in the arrest of the ship and the giving of security on her release. But as it was brought without leave (see rule 18, ss. 2), and was without doubt a most oppressive one so far as the amount claimed was concerned, I will only give the plaintiffs in it the costs of the action up to the consolidation order, but not including therein any costs of or concerning the bail or the release of the vessel or consequent upon the order made therefor other than what would have been incurred if the claim had been stated at a more reasonable sum, say $5,000. I follow in this the precedent set by Mr. Justice Drysdale in *The Uranium*,[1] and am not adopting the severe action of Butt, J., in *The Agamemnon*,[2] although there would be some justification if I did so. I do not, however, intend in disposing of the costs to interfere in any way with any orders made by Mr. Justice Maclennan in so far as they award costs to either party, unless by the terms of any order or orders they properly fall within my jurisdiction to dispose of. The counsel fees at the trial in the consolidated action will be divided by the Registrar when taxing costs, having regard to the fact that there turned out to be no real reason for separate representation of the master and crew, which I permitted because of the strained relations between Mackay and Johnson and Bonham. I do not see that I can do anything towards reimbursing the ship or the underwriters for their expenditure of $1,050 when giving bail to obtain the release of the vessel. The fixing of the amount was done in Montreal,

[1] 15 Can. Ex. 102.
[2] 5 Asp. 92.

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where that matter could have been dealt with if proper evidence had been adduced before Mr. Justice Maclennan.

I should perhaps call attention to the extraordinary method adopted in keeping the log on the "Sarnor." There are two logs produced, the official one having been written first and the scrap log last; and to the interpolation of the word "West" in the latter. The evidence of the mate of the "Sarnor" was very unsatisfactory on this point.

The testimony given on behalf of the plaintiffs as to the value of the services was quite worthless and may be measured by the difference between the original amount stated in Port Colborne to Mackay, *i.e.*, $10,000 to $15,000, and the amount for which the second writ was issued, *viz.*, $117,000.

Judgment accordingly.