1959

Sept. 25, 28, 29, 30, Oct. 1, 2, 5, 6, 7, 8, 9, 12, 13, 14.

Nov. 6

BRITISH COLUMBIA ADMIRALTY DISTRICT

BETWEEN:

MARWELL EQUIPMENT LIMITED and BRITISH COLUMBIA BRIDGE & DREDGING COMPANY LIMITED ..... PLAINTIFFS;

AND

VANCOUVER TUG BOAT COMPANY LIMITED, OWNERS OF THE TUG *LA DENE* AND THE BARGE *V.T. 5* and GARYLORD MARRON LANE HARWOOD, MASTER OF THE TUG *LA DENE* ..... DEFENDANTS.

Shipping—Collision—Liability of defendants—Limitation of liability—Canada Shipping Act, R.S.C. 1952, c. 29, ss. 657-659, 662—No "fault and privity" of company to neglect of employee.

In an action for damages resulting from the collision of defendants' tug and barge with a dredge owned by plaintiffs the Court found both defendants liable. Defendant shipowner seeks to limit its liability under sections 657-659 and 662 of the *Canada Shipping Act*, R.S.C. 1952.

Held: That the defendant company cannot be held in "fault and privity" to the neglect of the senior despatcher of the company whose fault in not communicating to the Captain of defendants' tug the position of the dredge was the real cause of the accident, since the despatcher has no interest in defendant company as he is not a shareholder, being an employee, and defendant company is entitled to limit its liability.

ACTION for damages resulting from collision of two ships.

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

D. McK. Brown and *R. M. Hayman* for plaintiffs.

J. I. Bird and *F. Read* for defendant Vancouver Tug Boat Co.

C. C. I. Merritt and *W. O. Forbes* for defendant Garylord Marron Lane Harwood.

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

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SIDNEY SMITH D.J.A. now (November 6, 1959) delivered the following judgment:

The hearing of this case occupied twelve Court days, so I had ample time to consider the evidence during the progress of the trial. There are two main issues involved: (1) liability of defendants' for damage done by their tug and tow; (2) whether the shipowner, if found liable, is entitled to limitation of his liability under Secs. 657-659 and 662 of the *Canada Shipping Act*. After hearing defendants' arguments on liability I gave, on the morning of the thirteenth day, judgment for the plaintiffs on the first issue. I held that there was faulty navigation on the part of the tug, and directed written argument to be filed on the second issue. This has now been done.

The plaintiffs seek damages for the sinking of the dredge *Townsend* and consequent loss. The defendants are the owners and Master of the tug *La Dene* and the defendant company owns the barge *V.T. 5*. The accident occurred on the Fraser River on March 14, 1957, at about 10:00 p.m. Just before that time the tug was bound downstream, having in tow two barges loaded with sawdust. *V.T. 5* was the leading barge. In the wheelhouse of the tug were the Master and a deckhand who was steering. Visibility was good but it was dark. The tug and tow were bound for Duncan Bay in Johnstone Strait.

The dredge had taken up her position in the river on March 12 and during part of that day and the 13th and 14th had been occupied dredging a trial trench in connection with the laying of what became known as the Deas Island Tunnel. According to notices to shipping and to mariners sent out beforehand, the dredge was in a position 1,000 feet downstream from Canada Rice Mills and 1,000 feet from the north shore. At the time of the accident this turned out to be 600 feet. She had a pipe-line stretching across the river to the south shore, so in effect the river was blocked except for this passage of 600 feet towards the north shore. The pipe-line was depositing sand upstream from the Ladner Ferry Landing. At the time in question the dredge had shut down for the day and everything was quite normal. There was, however, a strong ebb tide and

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river current which together ran at the rate of approximately 3 to 4 knots. The speed of the tug was 4 knots or so through the water, giving her a speed over the ground of some 7½ knots. The dredge was headed upstream and anchored by her spuds.

Proceeding down the river, the Master of the tug followed the usual course, namely, slightly to starboard of mid-channel. As he entered Gravesend Reach, or shortly thereafter, he saw what he took to be the Ladner Ferry approach lights but these in fact were the lights of the dredge. He was then about 2 miles upstream from the dredge. The tug and barges were carrying the usual navigation lights. This was not questioned. The dredge was carrying forward two red lights. Together with these, however, she was showing quite a number of other lights about her deck, two or three 1,000-watt flood lights and a number of 100-watt deck lights and reflections from inside lights. There was considerable contest as to whether the two red lights were visible. The present rule requires that these lights indicating a vessel not under command should have a white light between them. This practice was not universally followed and it was the custom to show two red lights only. This is quite wrong: No custom can override any rule of the Collision Regulations.

I am satisfied that the two red lights were in their proper position but I am not so sure that they were 6 feet apart, as they should have been under Rule 4 (*c*) of the present regulations. I find, however, that this contributed in no way to the collision; nor do I think that the absence of a white light between the red lights made any difference. It may be that as the tug proceeded downstream, the one or other of the red lights was occasionally blocked by the "A frame" or other part of the superstructure of the dredge; but such would be only momentarily, and I think they could and should have been seen by the Master of the tug at least a mile and a half away. He admits noticing them just before or just after the collision.

I have great difficulty in seeing how, if an intelligent lookout was kept on the tug, her Master failed to make out the existence of the dredge until he was within 400 feet of her. His was the only lookout on board. He gave me the

impression of being an able tug master and one who had all his wits about him despite his 72 years. There was some evidence that he was chatting with his deckhand at the wheel from time to time which is quite understandable, but may have led to inattention. It seems to me the lookout he kept was one that assumed that everything was in order and that there was a clear channel before him, when as a matter of fact the dredge and pipe-line were in his way. It is true that he received no information whatever by way of writing or by word of mouth of the presence of the dredge. Nevertheless on the bridge or in the wheelhouse of a ship a keen lookout should be kept for the unexpected not less than for the expected; all the more so in contracted waters, as here. The lights of the dredge, described by at least one witness as being tantamount in appearance to the lights of a small city should, in my view, have been sufficient to put the Master on the alert.

There was a great deal of evidence given in the case but to my mind it resolves itself into one simple question: Was the Master of the ship keeping a proper and understanding lookout at the appropriate time? He saw the lights of the dredge as he entered Gravesend Reach but failed to appreciate their significance. He thought they were the lights of the Ladner Ferry approach on the Ladner side. This is unacceptable. The lights are different in number and in kind and while the Ladner Ferry lights would be slightly on his port hand, the lights of the dredge would be slightly on his starboard. Moreover the chart shows that the Ladner Ferry approach runs substantially parallel to the channel while the pipe-line, with a light at every 50 feet, runs across the channel. He failed to see the red lights when he should have done so. Furthermore he failed to hear or see Mr. Griffiths, the Master of the tender *Jarl*, when Griffiths went upstream past the Deas Island Buoy on his tender to warn the Master and help with the barges. Griffiths received no response whatever from the tug. I think the Master was not alive to the speed at which he was covering the ground; nor could he have realized, when he first saw the lights of the dredge, that in a quarter of an hour or less he would have reached them.

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Griffiths was an impressive witness and I accept his evidence fully. In particular I agree with him when he testified that the Master should have recognized that there was an obstruction in the channel on first entering Gravesend Reach, that is to say when he was two miles away. Had he done so his duty was to reduce speed and proceed with the utmost caution until the type and extent of the obstruction became manifest. He should have had in mind Rule 29 of the *Collision Regulations*. But as I have said, he proceeded at full speed strangely unconscious of the glaring danger ahead. Much was said about his neglect in not using the radio-telephone and in not watching the radar screen. Certainly he should have sought information from every source available. But had an intelligent lookout been kept, such would not have been necessary. I do not recall that he even used binoculars.

The Master was in a difficult position. He was called from his vacation to do this job. The practice was to move Masters and crew from ship to ship, so that while he had sailed in the *La Dene* before, she was not his permanent command. The Mate he did not know—not even whether he held a certificate. The helmsman (unfortunately now deceased) he had sailed with before. His mind may have been preoccupied or he may have been chatting with the helmsman. However that may be, I must find him negligent in failing to keep a proper lookout and when he saw the lights, in failing to appreciate their significance. Seeing without understanding is of no avail. This failure in my view was the sole cause of the collision.

After having seen the dredge he then did all he could do by going hard-a-starboard. By then it was too late; she was only 400 feet away; his forward barge struck the dredge which sank within half an hour. Something was made in the pleadings of the contention that he did not go to the aid of those on the dredge. In my opinion there is nothing whatever in this. As I have said he had his own difficulties and they were great. The tender *Jarl,* took the dredge crew on board. There was no danger to life. Something was also said about his eyesight and hearing. I saw nothing wrong with either, though as a precautionary measure he was using a hearing-aid for the first time when giving his

evidence. There was a good deal of evidence about the exact position of the dredge. Her exact position in my opinion makes little difference. She was at the time in the main channel under proper authority.

On the question of liability I therefore found both defendants liable.

I turn now to the question of limitation of liability in favour of the shipowner under the *Canada Shipping Act*. I think the principles so far as they may affect the present case are well settled. It is said here that the Notice to Shipping advising of the placing of the dredge should have been conveyed to the tug Master and that this not having been done, the shipowner is not entitled to limit its liability.

The Act allows shipowners to limit their liability when "without their actual fault or privity" their ship causes loss or damage by reason of her improper navigation. The substantial point here then is whether the ship-owning company can establish that it was free of "fault or privity". If this is established the Act protects the shipowner against the legal consequences of negligence of his servants, whether on board, in his office or elsewhere. But should the shipowner be a company (as here) it must be shown that any fault there may be is of somebody who is merely a servant of the company; not of someone who represents the very "heart" of the company itself—for example, that of a managing director or other officer.

Perhaps I may be allowed to quote from my own judgment in the *City of Alberni*[1], I said this:

> Mr. H. A. Stevenson was the directing will and mind, the *alter ego* of the plaintiff company. He is a man of very considerable experience and ability. It must be shown that he personally was without fault and privity, for parties who plead the section must bring themselves within its terms.

This is, of course, drawn from numerous cases and perhaps most clearly from the leading case of *Asiatic Petroleum Company Limited v. Lennard's Carrying Company Limited*[2]. This authority has been referred to in almost all the limitation cases since the decision in the Lords.

[1] [1947] Ex. C.R. 83 at 94.

[2] [1914] 1 K.B. 419; [1915] A.C. 705.

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I may mention in particular the Canadian case of *Robin Hood Mills Ltd. v. Paterson Steamships Ltd.*[1]

I think it is conceded here that the *alter ego* of this company consisted of Mr. Arthur Lindsay, the President, or Mr. James Stewart, the Vice President and General Manager. Mr. Lindsay may be dismissed from consideration. This is one of the "big three" towing companies on the west coast of Canada. It has numerous tugs, scows, and barges in operation. One would not expect the President to attend to the minutiae of a company such as this. I have examined closely the company's papers, orders and other documents and with the evidence before me, I feel bound to say, speaking at large, that this is a well-organized company operated by experienced and capable men.

It seems to me that just as Mr. Stevenson was the pertinent "heart" in the *City of Alberni* case, so I think is Mr. Stewart in the same position here. There was some argument that the system on the whole was not entirely proof against every contingency, and there may be something in this. Few systems are. But I have for consideration the circumstances of the present case and not some other contingency that might or might not arise.

From time to time "Notices to Mariners" were issued from Ottawa directly to the ships and also "Notices to Shipping" issued by the Federal Agent in Victoria. These went to the shipowner. They had the same force and must equally be obeyed. They are both Government directives. Notice to Shipping No. 31 (Ex. 47) advised that:

> The hydraulic dredge "Townsend" will be operating in the *main channel of the Fraser River, B.C.* for approximately two weeks. The dredge will be anchored on the centre line of the Deas Island tunnel project approximately 1,000 feet downstream from the Canada Rice Mills and approximately 600 feet North of the Deas Island Dykes. A floating pipe line will extend from the dredge to Deas Island. Mariners are warned to pass to the North of the dredge and to exercise the necessary caution in this area while these operations are in progress.

The events in the office of the company on March 14 I take from the argument of its counsel. They conform to the evidence:

> Capt. Taylor had received a copy of Notice to Shipping No. 31, either on March 13th or March 14th, 1957, which he had initialled (Exhibit 69), and which he had kept on his desk in the Despatch Office with the intention of conveying it to the tugs.

[1] [1937] 3 D.L.R. 1.

Capt. Taylor and the other Despatchers were reliable, competent and certificated men. They had undergone a training period of six months prior to taking over their duties and had, in fact, performed these duties for several years. Capt. Taylor was the Senior Despatcher who was in charge of the ship movement and had been performing this job for at least eight years.

Mr. Stewart saw and initialled Notice to Shipping No. 31 (Exhibit 47) on the morning of March 14, 1957. He put it in his basket and when he went upstairs at about 3:30 p.m. to the Despatch Office to discuss the day's work with the Duty Despatcher, he took his copy of the Notice with him, with the intention of ascertaining whether the fleet had been informed about the "Townsend".

Mr. Stewart asked Capt. Taylor if he had seen the Notice. Capt. Taylor reported that he was aware of the Notice but that he had not informed the tugs. He assured Mr. Stewart that he would do so on the next broadcast which was to take place in about half an hour.

With the assurance received from Capt. Taylor that he would inform all the tugs, Mr. Stewart left the Despatch Office and had no knowledge that the information had not in fact been conveyed, until after the accident.

It should be observed that when Mr. Stewart had his discussion with Capt. Taylor at 3:30 p.m., on March 14, 1957, neither of them had the "La Dene" particularly in mind, because she was at that time, scheduled to go to Bellingham via the North Arm of the Fraser River with two Universal Box scows. It was not until after the broadcast at 1600 that Capt. Taylor received information to the effect that the scows which were originally to be taken by the "La Dene" were not ready. Accordingly, he got in touch with Island Tug & Barge and received instructions from that Company to take scow "V.T.5", which was then under charter to Island Tug and scow "I.T. 41", to Duncan Bay, B.C.

Capt. Taylor thereupon called Capt. Harwood by land telephone and gave him his new orders, but on that occasion, he failed to inform Capt. Harwood that the "Townsend" was operating off Deas Island.

The fault lay with Capt. Taylor, the senior despatcher of the company, and a man of very considerable experience both ashore and afloat. But he has no interest in the company. He is not a shareholder; he is an employee, albeit an important one.

In view of the principles I have referred to above, it seems impossible for me to say that the company must be held in "fault and privity" to his neglect and thereby barred from the indulgence provided by the relevant sections of the *Canada Shipping Act*. I was specially referred to the case of *The Norman*[1], but I can find nothing therein that trenches upon the foregoing principles. I am fortified in this respect by the judgment of Mr. Justice Maclean

[1] [1958] 1 Ll. L. R. 141; [1959] 1 Ll. L. R. 1.

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in the Supreme Court where in a case similar to the present one he reached the same conclusion—*North Western Dredging Coy. Ltd. v. Pioneer Towing Coy. Ltd. et al.*[1]. I hold therefore that the company is entitled to limit its liability.

One minor point was left open. This concerns the expense of removing the dredge from the river bed and whether such expenditure comes within the limitation provisions. Counsel may provide me with written argument on the question. They might also deal with the matter of costs.

Judgment accordingly.