BETWEEN:

THE CANADIAN FISHING COMPANY LIMITED ..... SUPPLIANT;

1958
Oct. 15, 16, 17, 20
1960
Feb. 25

AND

HER MAJESTY THE QUEEN .....RESPONDENT.

Shipping—Limitation of liability—Collision between fishing vessel and vessel owned by Crown—Actual fault or privity—Canada Shipping Act, R.S.C. 1952, c. 29, s. 657—Crown Liability Act, S. of C. 1952-53, c. 30, s. 3(4) and 25(3).

In an action in damages arising from a collision between the suppliant's fishing vessel, *Cape Russell* and the *Laurier,* a vessel owned by the Crown and under the control of the Department of Fisheries, the Crown disputed its liability for any of the damages sustained by the suppliant, and in the alternative, pleaded limitation of liability under s. 657 of the *Canada Shipping Act,* R.S.C. 1952, c. 29. It also counterclaimed for a declaration that the Crown was entitled to limit its liability in accordance with s. 657 of that Act as read with ss. 3(4) and 25(3) of the *Crown Liability Act,* S. of C. 1952-53, c. 30.

Held: That the excessive speed at which the *Laurier* was proceeding under the circumstances and her failure to keep a proper and adequate lookout caused the collision.

2. That the master of the *Cape Russell* should have acted more promptly than he did in putting his ship in reverse, when had he done so, it was highly probable the collision might have been avoided. Accordingly the Court found contributory fault on the part of the *Cape Russell* and held her responsible to the extent of 25 per cent of the loss.

3. That in the circumstances the Crown was therefore entitled to a declaration of limitation of liability as claimed. *Blackfriars Lighterage & Cartage Co. Ltd. v. R. L. Hobbs,* [1955] 2 Lloyd's L.L.R. 554 referred to.

PETITION OF RIGHT to recover damages from the Crown resulting from a collision at the entrance to the Strait of Juan de Fuca between the suppliant's fishing vessel *Cape Russell* and the Fisheries Protection vessel *Laurier,* owned by the Crown and under the control of the Department of Fisheries.

The action was tried before the Honourable Mr. Justice Thurlow at Vancouver.

J. I. Bird and *C. S. S. Clyne* for suppliant.

F. U. Collier and *R. W. McKimm* for respondent.

THURLOW J. now (February 25, 1960) delivered the following judgment:

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This action arises from a collision which occurred on September 4, 1957 at the entrance to the Strait of Juan de Fuca between the suppliant's fishing vessel *Cape Russell* and the Fisheries Protection Vessel *Laurier,* which was owned by the Crown and under the control of the Department of Fisheries. The amount of the damage sustained by the suppliant is agreed upon at $18,230.50, but the Crown disputes its liability for any of the suppliant's damages and pleads in the alternative the provisions for limitation of liability contained in s. 657 of the *Canada Shipping Act,* R.S.C. 1952, c. 29. There is also a counterclaim for a declaration that the Crown is entitled to limit its liability in accordance with these provisions as read with s. 3(4) and s. 25(3) of the *Crown Liability Act,* S. of C. 1952-53, c. 30.

The collision occurred at a point from three to four miles to the southward of Bonilla Point and on or near to a line between that point and Tatoosh Island Light on the southern side of the Strait. This line had been prescribed by order in council made pursuant to s. 34 of the *Fisheries Act* as the westerly limit of an area wherein seiners such as the *Cape Russell,* of which there were many in the area, were permitted to fish. The day was warm. There was dense fog and a long, low swell from the west but no wind or tide sufficient to affect navigation.

The *Cape Russell* was a single screw diesel-powered wooden ship, 72 feet long, with 20-foot beam. She was fitted with clutch and throttle controls, both inside and outside her pilot house, and could be put directly into reverse from either of these points. Her superstructure in the forward part of the ship was about fifteen feet above the water and, for the most part, was painted white and contrasted with lower portions of the ship, most of which were black or a dark colour alternating with white. She had one mast with a long boom, located approximately amidships. Further aft was a turntable on which her seine was carried, and at the time of the collision there was a 21-foot power skiff, used for towing the seine, moored at her stern, with its bow drawn up so that it was raised a foot or so higher than it would ordinarily float. The master of the *Cape Russell* wanted to set her seine as near as possible to the westerly

limit of the fishing area and was waiting his turn to do so while another ship, the *Ellen K,* completed her set. The *Cape Russell* was moving forward very slowly in an easterly direction, with her engine idling and her clutch disengaged. Fog signals from other craft in the vicinity were being heard from time to time, and her master was on the outer bridge, keeping a lookout and operating an air whistle by blowing a single long blast at intervals of from one to two minutes. Similar signals were being made by other vessels, and still others were blowing three blasts, consisting of one long followed by two short, which indicated that the latter were towing their nets. The master of the *Cape Russell* knew the sound of the *Laurier's* whistle and had heard her some time earlier proceeding southward and, knowing that she was engaged in patrolling the Bonilla-Tatoosh line, could expect that she would soon be returning northward on or in the vicinity of the line. It was, accordingly, not a surprise to him to hear on his starboard side the whistle of the *Laurier* and a few seconds later to see her bow emerging from the fog. He estimated the distance at which he saw the *Laurier's* bow emerge at a "good 100 yards" and said that, if he had known at that moment that she was going to ram the *Cape Russell,* he could have avoided the collision by putting the *Cape Russell* in reverse. At that moment, however, though the *Laurier* was bearing down on him, he considered that "there was a lot of time for her to change course" and thought that she would alter her course to pass ahead of him and, accordingly, he took no action. The *Laurier* came on, however, without changing her course or speed, and when the master of the *Cape Russell* finally saw that a collision was imminent he went to warn his crew to stand clear and then put his ship in reverse. She was, however, not yet moving astern when the *Laurier* struck the *Cape Russell* at an angle of about 90° on her starboard side, about fifteen feet from her bow.

The *Laurier* is a twin screw diesel-powered steel vessel, 113 feet long, with a 21-foot beam and a cruising speed of 11 to 12 knots. Her engines were directly reversible, and she was equipped with radar and a radio telephone and was manned by a crew of 14 men, including the master. Her

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wheelhouse was 36 feet aft of her bow. Evidence given on discovery indicated that at six knots, by reversing her engine, she could be stopped in approximately 250 feet.

On the day in question, the *Laurier* was patrolling the Bonilla-Tatoosh line. Shortly before 2:25 o'clock in the afternoon, she proceeded southwardly and, after passing the locality of the fishing fleet, stopped for about 25 minutes while a radio telephone message from shore was being received. During this period, her radar and other electrical equipment, as well as her engines, were shut off. When the message had been received, her second officer, who was the officer on watch, was directed by the master to copy it, and he thereupon left the wheelhouse, and the master himself remained there with the helmsman. There was no lookout man stationed on the upper bridge or on the bow, nor was anyone but the master and helmsman keeping any lookout whatever. The master then switched on the radar and, after observing three ships about half a mile to the northeastward and satisfying himself from the radar that his ship was practically on the Bonilla-Tatoosh line, signalled the engine room for half speed ahead and ordered the helmsman to circle to port and put the ship on a course of 340° magnetic, that being the course of the line. At some point in the manoeuvre which followed, the master observed by radar that the Bonilla-Tatoosh line itself was clear of ships. Some fog signals were heard but appeared to come from the northeastward and from a distance of about half a mile. The master himself from time to time sounded the *Laurier's* fog whistle. The *Laurier* had been proceeding for about five minutes from the time when she started moving, had been steady on her course of 340° for less than a minute, and had reached a speed of about five knots when the helmsman suddenly saw the white portion of the superstructure of the *Cape Russell* through the fog, four to five degrees on his port bow. He could give no satisfactory estimate of its distance from him when he first saw it. On discovery, it had been stated that the *Cape Russell* was 25 feet ahead of the bow of the *Laurier* when first seen from her, but I am of the opinion that the distance must have been somewhat greater for, on seeing the *Cape Russell*, the helmsman warned the master, both the helmsman and the master

thereupon in succession signalled the engine room for full astern, and one of the engines was operating in reverse by the time the impact occurred. This, in my opinion, would take about eight seconds at least, in which the *Laurier* at five knots would move from 60 to 70 feet. No helm action was taken.

Following the collision, a conversation took place between the masters of the two ships in which, according to the version of the master of the *Laurier,* the master of the *Cape Russell* said he could have avoided the collision if his clutch had not been faulty. The master of the *Cape Russell,* however, stated that what he said was that, if his ship had had high speed engines like those in the *Ellen K,* he might have been able to avoid the collision. Regardless of what may have been said in the excitement following the collision, I accept the evidence of the master and engineer of the *Cape Russell* that there was nothing wrong with the clutch of the *Cape Russell* and find that there was nothing about its condition which caused or contributed to the collision.

On the facts outlined, I am of the opinion that no proper or adequate lookout was being kept on the *Laurier* and that, at five knots, she was proceeding at excessive speed under the circumstances and that her failure to keep a proper and adequate lookout and her excessive speed caused the collision. In my view, the lookout was bad in that there was no one on watch inside or outside the wheelhouse with no duty to perform but to watch and give warning or take necessary action. In a sense, both the master and the helmsman had the duty to watch, but such lookout as was being kept by them was not constant since the helmsman had the duty of steadying and keeping the ship on her course and the master had other matters on his mind and other duties to carry out, one of which was actually engaging his attention when the *Cape Russell* was sighted by the helmsman. Moreover, with many ships in the vicinity, in my opinion, it was not reasonable, when proceeding at five knots in fog which reduced visibility to about one hundred yards, to rely for lookout on radar which was not being constantly watched and upon such lookout as the helmsman might be able to keep in the course of steering the ship, rather than to have someone with no other duties to perform

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detailed either to watch the radar constantly or to keep a lookout from some vantage point, whether from the fore deck or from the upper bridge. The master of the *Cape Russell,* who was keeping a lookout, and several members of his crew who were not on duty in fact saw the bow of the *Laurier* at distances variously estimated at from 50 to 100 yards or more. Possibly the whistle of the *Laurier* had attracted their attention in that direction, but the bow of the *Laurier* was a much smaller object to see than the side of the *Cape Russell,* and the evidence, in my view, leaves no satisfactory inference as to why the *Cape Russell* should not have been seen from the *Laurier* at 80 to 100 yards, other than that no one on board the *Laurier* was keeping a constant lookout. There was nothing wrong with the *Laurier's* radar and, having regard to the distance which the two ships were apart just before the *Laurier* began moving, which must have been in excess of 100 yards and probably was much greater than that, I think it is fair to infer that the reason why the *Cape Russell* was not seen in the radar before she was otherwise visible was that the machine was not being constantly watched and interpreted. If the radar would not show or would not show clearly ships that were close at hand, there was all the more reason to have a lookout posted to watch out for ships that might be nearby. And when in fact the *Cape Russell* became visible, she was not seen immediately—again, in my view, because no one was keeping a constant watch. The master, having satisfied himself by looking in the radar—though, in my opinion, on insufficient observation—that the Bonilla-Tatoosh line was clear of ships and that there were no ships nearer than those half a mile away, turned to other duties. The only other person who might see a ship ahead was the helmsman, and his attention was at least partially occupied with putting and keeping the ship on the course directed by the master.

I am also of the opinion that, at five knots, the speed of the *Laurier* was excessive in the circumstances described, and particularly having regard to the presence of other ships and the nature of the lookout that was being kept.

I turn now to the question whether there was contributory fault on the part of the *Cape Russell*. This, in my view, raises the question whether the failure of her master, on hearing the *Laurier's* whistle on his starboard side, to answer by blowing the *Cape Russell's* fog signal or his failure to reverse promptly on seeing the *Laurier* were faults which contributed to the collision. The master's evidence is that he does not know if he blew or not after hearing the *Laurier's* whistle but that he had blown just before hearing it. That the whistle had been blown shortly before the collision is supported by the evidence of at least one other witness. Apparently, this signal was not heard or, if heard, was not correctly evaluated by those on board the *Laurier*. It is conceded on both sides that to blow a single blast after the *Laurier* hove into view would have meant an alteration of course and might well have caused confusion. In the absence of any more definite estimate than that of a "few seconds", given by the master of the *Cape Russell*, of the time involved between hearing the *Laurier* signal and sighting her, and in view of the evidence that he had signalled just before hearing the *Laurier* signal, I am not satisfied that failure to signal again immediately on hearing the *Laurier's* signal was a fault or that it was a cause of the collision.

Whether or not it was fault for the master of the *Cape Russell* not to put his ship in reverse and get out of the *Laurier's* way as soon as he saw her is a more difficult question. The master said that, by so doing, he could have avoided the collision if he had known that the *Laurier* was going to ram him. By this, I think he meant he could have gotten out of the way, had he expected that the *Laurier* would keep her course and speed. He expected, however, that the *Laurier* would alter to starboard and pass in front of him, and it apparently did not occur to him that those on board the *Laurier* had not seen him at the same time as he saw the *Laurier* or that, with the *Laurier* in sight on a crossing course on his starboard side, he was under the duty prescribed by Rule 19 of the Collision Regulations to keep out of her way and, for that purpose, under Rule 22 to avoid crossing ahead of her. It would, no doubt, take at least a few seconds for him to observe the course of the *Laurier* and

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ascertain that danger of collision existed if she did not alter her course, but in the circumstances prevailing at the time he first saw the *Laurier*, in my opinion, it was incumbent on the master of the *Cape Russell*, and particularly in view of his evidence that his ship was slow in getting moving in reverse, to act more promptly than he did act to put his ship in reverse and, having regard to the point of impact of the blow on his ship, had he put his ship in reverse promptly on seeing the *Laurier* and observing her course, I think it is highly probable that the collision would have been avoided. Accordingly, I find that there was contributory fault on the part of the *Cape Russell* and hold her responsible to the extent of 25 per cent of the loss.

It follows from the foregoing and from the *Crown Liability Act* (*vide* s. 3(1) and s. 3(5), as substituted by s. 25) that the Crown is liable for 75 per cent of the suppliant's damages unless on the facts the Crown is entitled to limit its liability pursuant to s. 3(4), as substituted by s. 25, of that Act, which enables the Crown to take the benefit of the provisions of s. 657 of the *Canada Shipping Act*. Sections 3(1), 4(2), and 3(4) of the *Crown Liability Act* are as follows:

3. (1) The Crown is liable in tort for the damages for which, if it were a private person of full age and capacity, it would be liable

(*a*) in respect of a tort committed by a servant of the Crown, or

(*b*) in respect of a breach of duty attaching to the ownership, occupation, possession or control of property.

* * *

4. (2) No proceedings lie against the Crown by virtue of paragraph (*a*) of subsection (i) of section 3 in respect of any act or omission of a servant of the Crown unless the act or omission would apart from the provisions of this Act have given rise to a cause of action in tort against that servant or his personal representative.

* * *

3. (4), as substituted by s. 25(3):

(4) Sections 655 and 657 to 663 of the *Canada Shipping Act* apply for the purpose of limiting the liability of the Crown in respect of Crown ships; and where, for the purposes of any proceedings under this Act, it is necessary to ascertain the tonnage of a ship that has no register tonnage within the meaning of the *Canada Shipping Act*, the tonnage of the ship shall be ascertained in accordance with section 94 of that Act.

Section 657(1) of the *Canada Shipping Act* provides:

657.(1) The owners of a ship, whether registered in Canada or not, are not, in cases where all or any of the following events occur without their actual fault or privity, that is to say,

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(*d*) where any loss or damage is, by reason of the improper navigation of the ship, caused to any other vessel, or to any goods, merchandise, or other things whatsoever on board any other vessel;

liable to damages . . . in respect of loss or damage to vessels, goods, merchandise, or other things, . . . to an aggregate amount exceeding thirty-eight dollars and ninety-two cents for each ton of the ship's tonnage.

In proceedings for limitation of liability under s. 657, the burden rests on the shipowner to prove that the loss occurred without his "actual fault or privity." *Lennard's Carrying Co. Ltd. v. Asiatic Petroleum Co. Ltd.*[1] In *Paterson Steamships Ltd. v. Robin Hood Mills Ltd.*[2] Lord Roche said at p. 39:

> The burden of showing that no such fault or privity subsisted was said in Lennard's case to rest upon the shipowners, and the respondents here did not seek to question that proposition as applying to the present case. But another and very important principle is to be derived from a consideration of the section, namely, that the fault or privity of the owners must be fault or privity in respect of *that which causes the loss* or damage in question, a proposition which was acted upon and illustrated in Lennard's case.

It was argued on behalf of the Crown that, as the Crown is not liable either at common law or under any statute for its own fault as owner of the ship, but only under the *Crown Liability Act* as the employer of the crew, for tortious conduct on the part of the crew, there could be no case for recovery against the Crown except to the extent that recovery could be had for the conduct of the crew and that, accordingly, *ipso facto,* the Crown would be entitled to limitation of liability under s. 657.

I do not agree with this submission, but in the view I take of the case it is not necessary to deal with it. While the burden resting on a shipowner seeking to have his liability limited is a broad and heavy one (*vide The Norman*[3]), in the present case counsel for the appellant, in the course of the argument, limited his contentions on this part of the case to one particular matter. It was said on behalf of the suppliant that senior officials of the Department of Fisheries, whose acts were those of the Department itself, were aware that no lookout was ordinarily stationed on the bow of the *Laurier* and that it was known to them that there would

[1] [1915] A.C. 705.

[2] (1937) 58 Lloyd's L.L.R. 33.

[3] [1959] 1 Lloyd's L.L.R. 1.

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be no lookout stationed on the bow of the *Laurier* when she was proceeding in fog under circumstances such as have been described and that they approved of the ship being so navigated. That Mr. Whitmore, the Director of Fisheries for the Pacific Area, knew and approved of the navigation of the *Laurier* in fog without a lookout being stationed on the bow is supported by his evidence, and it has not been shown that his seniors, consisting of the Deputy Minister of Fisheries and the Minister of Fisheries, whose acts could, I think, be regarded in this instance as those of the Crown itself within the principles applied in *Lennard's Carrying Co. Ltd. v. Asiatic Petroleum Co. Ltd.* (*supra*) and *The Truculent*[1], did not also know and approve of it. But, in my opinion, failure to have a lookout posted on the bow was not *what caused the loss.* The need for lookout of one kind or another depends on the circumstances prevailing at the material time and must, of necessity, be a matter left (as, indeed, the evidence shows was done in this case) largely to the master of the ship. In broad daylight, with nothing to hinder visibility and with plenty of room to manoeuvre, there would be no occasion to have a lookout on the *Laurier's* bow, while in narrow, congested waters at night, such a lookout might well be required. The opinions of experienced seamen given at the trial on the desirability of having a lookout stationed on the *Laurier's* bow when proceeding through fog were in sharp conflict. In the circumstances that prevailed, with the *Laurier* proceeding at five knots, a lookout on the bow might have been expected to see an object ahead about four seconds earlier than it would become visible from the wheelhouse, and, on the whole, I prefer the view that, by the time a lookout on the bow had appreciated an object ahead and had transmitted a message to the wheelhouse, the advantage of such warning, if in fact it should be earlier than the moment when the object would be visible from the wheelhouse, would be slight and would be offset by the disadvantage of the lookout man on the bow interfering with visibility from the wheelhouse.

[1] [1951] 2 Lloyd's L.L.R. 308.

In my opinion, the collision was not due to the lack of three or even four seconds' earlier warning of the presence of the *Cape Russell* but to the failure to have a constant lookout maintained somewhere, whether on the bow, on the outer bridge, or even in the wheelhouse. Had such a lookout been maintained from any of these places by a man with no other duties to perform, in my opinion, the presence and position of the *Cape Russell* would have been detected much earlier and in time to take necessary action to avoid collision with her. The maintaining of a lookout suitable to the occasion was, in my view, a responsibility of the master of the ship, and the failure to maintain it was a fault in the course of navigation in a matter the responsibility for which was properly left to him. In this situation I see no reason to impute fault in this connection to her owner or to anyone in authority over the master. In *Blackfriars Lighterage & Cartage Co. Ltd. v. R. L. Hobbs*[1] Willmer J. at p. 561 summed up a situation similar in principle to the present one as follows:

> The facts lie within a very small compass: the lighterman in charge of the *Landeer* was not keeping a good look-out, and most unfortunately did not see that his barge was about to come into contact with this other barge.
>
> That, I think, is the beginning and the end of the case. As such it is purely a fault in navigation, and not one which can in any sense be laid at the owners' door.
>
> Although I have found that the accident was caused by the negligence of the lighterman, it should, I think, be made quite clear that no objection was, or could be, taken to the man concerned in so far as his competence was concerned. He was, in fact, a lighterman of considerable experience and had the usual qualifications required for his work. No blame can, therefore, be imputed to the owners for entrusting their barge to such a man. Unhappily, the best qualified and most competent people are sometimes negligent, and this, I am afraid, is one of those cases.
>
> For those reasons I do not think there is any answer to the plaintiffs' claim for the declaration of limitation of liability which they seek.

In the present case, Captain Earnshaw was a qualified and competent master mariner of long experience and one to whom one would expect that an owner would entrust such a matter as the maintaining of a lookout suitable to

[1] [1955] 2 Lloyd's L.J.R. 554.

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the occasion, and the evidence shows that this responsibility was in fact left to the masters of vessels under the control of the Department. That the officer on watch should be detailed temporarily to another duty at such a time, leaving the immediate responsibility for lookout on the master himself, and that the master would in this exigency allow his attention to be on another duty were matters of which I do not see how Mr. Whitmore or the Deputy Minister or the Minister could have knowledge, and I am accordingly satisfied that there was no "actual fault or privity" in connection with the bad lookout which can properly be attributed to the Crown. It follows that the Crown is entitled to the declaration claimed.

There will be judgment declaring that the suppliant has sustained damages to the extent of $18,230.50, of which 75 per cent are attributable to fault on the part of servants of the Crown, that the suppliant is entitled to recover 75 per cent of such damages subject to the limitation provided by s. 25(3) of the *Crown Liability Act* and s. 657 of the *Canada Shipping Act* and that the liability of the Crown for damages arising from the collision is limited pursuant to s. 25(3) of the *Crown Liability Act* and s. 657 of the *Canada Shipping Act* to $38.92 for each ton of the *Laurier's* tonnage, or $5,683.48.

The suppliant is entitled to the costs of the petition of right and the proceedings thereon, and the Crown will have the costs of the issue on its counterclaim.

Judgment accordingly.