TORONTO ADMIRALTY DISTRICT

INTERLAKE NAVIGATION COMPANY, LIMITED ..... } PLAINTIFF;

1925
April 15.

AGAINST

THE STEAMSHIP *GLENFARN* ..... DEFENDANT.

Shipping—Accident—Damage—Negligence—Onus of Proof.

Held, that the owner of a ship wrongfully injured in a collision is entitled to have her fully and completely repaired, and that the increased value of a ship by reason of such repairs is not ground for deduction in the amount of damages recoverable.

2. That even if the ship were in a weak condition, and the damage is greater than would ordinarily be the case, the ship in fault for the collision is none the less liable for the entire loss, even where the repairs include the substitution of new work and material for what was previously injured, as well as new for old material. Repairs clearly not consequent upon a collision cannot be recovered.

3. That where a ship has been driven on shore as the result of a collision or other accident, and damages are claimed, as arising therefrom, it is incumbent on her to prove that such damage was occasioned by the stranding as a consequence of the collision or other accident; and that the stranding, collision or other accident was the result of the negligence of the other ship.

ACTION by the plaintiff against the SS. *Glenfarn* for damages caused to one of its vessels resulting from the breaking of the gates of a lock on the Welland Canal by the ship *Glenfarn.*

March 17th, 18th and 19th, 1925.

Action now tried before the Honourable Mr. Justice Hodgins at Toronto.

Francis King, K.C. for plaintiff;

R. I. Towers, K.C. and *F. Wilkinson* for defendant.

The facts are stated in the reasons for judgment.

HODGINS L.J.A., now this 15th April, 1925, delivered judgment.

1925

INTERLAKE NAVIGATION COMPANY LIMITED v. STEAMSHIP *Glenfarn*.

Hodgins, L.J.A.

This action is brought for damages caused to the plaintiff's SS. *Saskatono* through the breaking of the gates of lock 11 on the Welland Canal at about 2 a.m. on the 20th May, 1924, by the defendant's SS. *Glenfarn*. The *Saskatoon* is a steel vessel 256 feet long, 42 feet eight inches beam and drawing 14 feet.

It was, early in the course of the trial, admitted that this action of the *Glenfarn* caused a great rush of water into the stretch between Locks 10 and 11, which carried the *Saskatoon* forward through the Railway Bridge crossing the canal and resulted in injury to her.

The actions of the *Saskatoon* due to this rush of water and also the extent of the injury caused thereby were, however, subjects of dispute.

[His Lordship here discusses the evidence on this point and proceeds.]

While the *Glenfarn* must be held responsible for the damage, which immediately followed from her action in breaking through the gates, it is incumbent on the plaintiff to prove what that damage consisted of, either by direct evidence, or by evidence from which its character and extent could naturally be inferred. This I think they have done. The defendant insists however that the whole of the repairs were not due to this particular accident, and refers to entries in the log indicating that there were various incidents in 1923 and 1924 which might or could produce injury to some of the plates such as is now complained of. The defendant further contends that the damage suffered could not be caused by striking and rubbing along the banks, which are described by his witnesses as consisting of mud.

I am satisfied that the banks of this canal were reinforced by piles placed at short intervals, between which was sheeting extending down some distance but not to the bottom of the piles; that the stones or rip rap were placed on the sloping mud bank as a facing and when disturbed by the continual passing of vessels could and did slip down inside, and found its way outside the foot of the piles and sheeting. That being so, the damage alleged to have been suffered, could have been caused by these stones or by some similar obstruction such as old anchors or chains. The

force of the blow under the influence of the flood water would, in my judgment, in view of the evidence presented, fully account for the extent and nature of the injury suffered.

The fact that, in the seasons I have mentioned, the *Saskatoon* met with some mishaps, most of them usual in canal traffic, is urged as indicating that the plaintiff has, in the repairs effected, been able to make good the damage, whatever it was, which was caused by these incidents related in the log. But I think I am relieved from the necessity of going into the details of these suggested injuries or of estimating their value. The evidence regarding them is not sufficient in itself to enable me, or, as I venture to think, anyone, to draw the line with anything like precision, if it was my duty to analyse it fully.

The general rule is stated in Marsden (1), as follows:—

> The owner of a ship wrongfully injured in a collision is entitled to have her fully and completely repaired; and if the necessary consequence of this is, that the value of the ship is increased, so that the owner receives more than an indemnity for his loss, he is entitled to that benefit. No deduction is made from the damages recoverable on account of the increased value of the ship, or the substitution of the new for old materials. If the damage received in a collision is greater than would ordinarily be the case, because the injured ship was in a weak condition, the other is not the less liable for the entire loss, if she is in fault for the collision. The principle is, that if a part of the damage was clearly attributable to the wrongdoer so that it is impossible to draw the line with precision, and to say how much, the wrongdoer must make good the whole loss.

The principle covers, I think, the substitution of new work and material for what was previously injured, as well as new for old materials. *The Gazelle* (2), *The Alfred* (3), *The Pactolus* (4), *The Bernina* (5), *Re Halley* (6).

It is quite true that if repairs clearly not consequent upon the collision are done, the amount of these cannot be recovered. *The Princess* (7), *J. T. Easton* (8).

If positive evidence had been called, if such was possible, of earlier damage, this would have afforded no defense, unless it was shewn to be so unconnected with the damage resulting from or consequent on the accident and so completely different in position and character as to indicate that its origin lay outside the cause implicating

(1) 8th Ed. pp. 115 & 123.
(2) [1844] 2 Wm. Rob. 279.
(3) [1850] 3 Wm. Rob. 232.
(4) [1856] Swabey 173.
(5) [1886] 6 Asp. 65.
(6) [1867] L.R. 2 A. & E. 3.
(7) [1885] 5 Asp. 451.
(8) [1885] 24 Fed. Rep. 95.

1925

INTERLAKE COMPANY LIMITED v. STEAMSHIP *Glenfarn.*

Hodgins L.J.A.

the plaintiff's ship, and which received no further injury therefrom. In that case the rule which I have mentioned with regard to wrongdoers would not apply. But if what was established merely indicated the likelihood of similar damage and not its actual happening, or that what was repaired might have been earlier damaged as is the case suggested here, the rule would govern.

I have carefully read the entries in the log relating to the course of the *Saskatoon* during the years 1923-24, and considered the evidence given with relation to damage which it is argued might have been incurred during those years.

Having regard to what is laid down in the cases I have mentioned both as to the right of recovery for all the damage shown on a proper survey, the importance of the evidence of competent surveyors, and the onus as to displacing it, I hold that the evidence given in this case on behalf of the plaintiff fully meets the requirements which those decisions involve. Two independent and capable surveyors were called who testified that in their opinion all the repairs done were needed to make good recent injury of a character referable to the alleged accident. Opposed to them was an employee of the defendant, with much less experience in this particular department of knowledge. His testimony, while rather positive, failed to convince me that the others were mistaken in their conclusions, nor did those witnesses who professed to know of the absence of stones or similar obstructions in the canal, successfully maintain their positions under cross examination.

The cases which show that it is incumbent on the plaintiff to prove that the damages he claims directly have actually resulted from the collision with the defendant's ship, are applicable where the damages follow from the ship being driven on shore as a consequence of the collision or other accident. I refer to *The Pensher* (1); *The Govino* (2); *The Waalstroom* (3), and to a recent case, *The Paludina* (4). While the judgment in that case somewhat narrows the rule laid down by Dr. Lushington in the first mentioned report, it is upheld where the damage is due to stranding

(1) [1857] Swabey 211.
(2) [1880] 6 Que. L.R. 57.
(3) [1923] 17 Ll. L. Rep. 53.
(4) [1925] P. 40.

immediately following the accident. Bankes L.J., after stating,

> that the plaintiff must always show, in a case in which he complains of damage resulting from negligence, that the negligence was the direct cause of the damage. In some cases a considerable interval may elapse between the time when the negligence is said to have occurred and the time when the damage is said to have resulted. In those cases I think the onus lies upon the plaintiff to show that the chain of causation connecting the damage with the negligence is complete. He may give evidence which, if not challenged and in reference to which no suggestion is made that it is not complete, will discharge the burden, or which is such that in the absence of any such challenge there is only one inference which could be drawn.

refers with approval to the language of Hill J. in the *Waalstroom*, which is as follows:

> In my view, in the circumstances of this case, the burden of proving that the consequential damage was a consequence of the negligence is upon the plaintiffs. In my view it is always upon the plaintiffs; but the facts may speak for themselves, and in themselves shift the burden upon the defendants, as, for instance, in a case where stranding immediately follows the collision, and so follows that it speaks for itself and is *prima facie* a consequence of the collision.

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Judgment for plaintiff.