CASES

DETERMINED BY THE

EXCHEQUER COURT OF CANADA

AT FIRST INSTANCE

AND

IN THE EXERCISE OF ITS APPELLATE JURISDICTION

BETWEEN:

THE STEAMSHIP *GIOVANNI AMENDOLA* ..... APPELLANT,

AND

POWELL RIVER COMPANY LIMITED, owner of the Towboat *Teeshoe* ..... RESPONDENT.

1958

Apr.14,15

Nov. 4

Shipping—Collision—Assessment of damages—Hire of substituted ship an element in assessing value of loss.

In an action arising from the loss of a tug boat the District Judge in Admiralty found that the loss was occasioned solely by the negligent operation of appellant's ship and awarded respondent the full amount claimed as the tug's value plus a further amount claimed for loss of user. On an appeal from the amount of damages awarded:

Held: That the Exchequer Court sitting in an admiralty appeal from the judgment of a trial judge will not interfere in the matter of quantum of damages unless it concludes that the award was clearly erroneous. *The S.S. Ethel Q. v. Beaudette* 17 Can. Ex.C.R. 505 at 506. Here the value of the tug was established by a preponderance of evidence and in allowing the extra cost occasioned by the hire of a substituted tug, which was an element in assessing the value of the loss of value to the owners, the rule in *Owners of Dredger Liesbosch v. Owners of Steamship Edison* [1933] A.C. 449, was properly applied.

APPEAL from a decision of the District Judge in Admiralty for the British Columbia Admiralty District.

The appeal was heard before the Honourable Mr. Justice Cameron at Vancouver.

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J. R. Cunningham for appellant (defendant).

D. McK. Brown for respondent (plaintiff).

CAMERON J. now (November 4, 1958) delivered the following judgment:

This is an appeal from a judgment of Mr. Justice Sidney Smith, District Judge in Admiralty for the Admiralty District of British Columbia, dated March 19, 1958, whereby he affirmed the report of the Deputy Registrar for that district (dated January 10, 1958), awarding the respondent company the sum of $33,106 and interest. The respondent (plaintiff in the action) was the owner of the tugboat *Teeshoe* which was lost on December 4, 1954, and the learned Judge in Admiralty found that such loss was occasioned solely by the negligent operation of the appellant's ship; no appeal was taken from that finding. The sole question for determination on this appeal, therefore, is the amount of the damages awarded. In his report, the Deputy Registrar awarded the respondent the full amount of its claim, namely, $25,000 as the value of the tug and its gear (with interest at 5 per cent. thereon from December 4, 1954), and $8,106 for loss of user, together with interest from June 4, 1955, a date six months after the loss of the vessel.

The tug *Teeshoe* was built for the respondent in Vancouver in 1924; it was powered by a single Union Diesel engine also made in 1924, of 110 h.p. The tug was 48.5 feet long, 14.75 feet in beam and of 27.31 gross tons. It was used by its owner, the Powell River Co. Ltd., at Powell River and its vicinity for moving logs and scows, the company being engaged in the business of logging, towing and paper-making. Exhibit 11 is a photograph of the tug.

While the tug and its engine were thirty years old at the time of the loss, the Deputy Registrar found both on admissions made and on the evidence tendered before him that the tug was kept in first-class condition at all times and was in that condition when sunk.

I shall first consider the award of $25,000. It is common ground that in the case of a total loss such as occurred here, the owner, when acquitted of all negligence, is entitled to recover the full market value of the vessel and its gear.

The learned Registrar, on conflicting evidence, came to the conclusion that $25,000 was the fair market value. Having read the evidence and considered the argument by counsel for both the appellant and the respondent, I am of the opinion that his decision, affirmed as it was also by the learned District Judge in Admiralty, should not be disturbed. It is true that the evidence on this point was somewhat conflicting, but it is abundantly clear from the reasons given by the Registrar that he preferred the evidence of the witnesses for the respondent to that of the appellant, as of course, he was entitled to do.

In *The Harmonides*[1], Gorrell Barnes J. said:

> There is no doubt that in this class of case the best evidence is that of those who know the ship, and the next best evidence that of those who have experience of the market, but who do not know the vessel except from the shipping records.

A perusal of the evidence clearly establishes that a number of the respondent's witnesses had a personal knowledge of the tug, its condition and capacity. Captain Dolmage, for example, who had wide experience in buying, selling and operating tugs, knew the ship from the time it was built. Mr. G. W. O'Brien, a vice-president of the plaintiff company, Mr. C. S. Cosulich, a tugboat manager, and Mr. J. W. McDonald, General Manager of the Burrard Shipping and Engineering Works, all knew the ship well. On the other hand, of the two witnesses called by the defendant, Captain C. H. Hudson had never seen the *Teeshoe* and Captain C. R. Brewster, while he had been on board (he did not state how frequently), was familiar with the type of work she did only as an "onlooker".

The Registrar also accepted the evidence of the respondent's witnesses as to the market value of the vessel. I do not find it necessary to review this evidence at any great length. There was evidence that it might have had a maximum value of about $30,000, but the weight of the evidence supported the value found by the Registrar. He found confirmation of the various estimates in an offer of $25,000 made by the witness Captain Dolmage some time in the spring of 1954 after the tug had undergone repairs. Mr. McDonald, Vice-President of the plaintiff company, considered the offer a *bona fide* one but was not then

[1] [1903] P. 1 at 5.

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desirous of selling for a variety of reasons. It was strongly suggested in argument before me that that offer could not be considered as a genuine offer, particularly as Dolmage was then in contractual relationship with the respondent for other towing services and later became an officer of the latter company, and as his offer was rejected without any finality being reached as to the precise terms of the offer.

If there were no evidence of market value other than this offer, this argument would perhaps have more merit. But as I have already stated, there was a substantial body of evidence to establish the actual value in the market and I consider, as no doubt the Registrar did, that the offer so made afforded substantial corroboration of that relating to market value. It was made by one fully conversant with the vessel itself and with market conditions at the time. There is strong evidence that in 1955 the logging and paper companies were working to capacity and that tugs were in very active demand.

The duty of a judge hearing an Admiralty appeal in relation to facts found in the court below was stated by Audette J. in *The S.S. Ethel Q. v. Beaudette*[1] as follows:

> Sitting as a single judge in an Admiralty Appeal from the judgment of a trial judge, while I might be advised to differ with great respect in matters of law and practice, yet as regards pure questions of fact or the quantum of damages, I would not be disposed to interfere with the judgment below, unless I came to the conclusion that it was clearly erroneous.

Reference on this point may also be made to *The Inchmaree Steamship Co. Ltd. v. The Steamship Astrid*[2], and to *Landry v. Ray et al*[3], the headnote to which is as follows:

> On appeal from a judgment of a local Judge in Admiralty under s. 14 of *The Admiralty Act*, 1891, the Court will not interfere with a finding of fact by the local judge unless it is satisfied beyond a reasonable doubt that the evidence does not warrant such finding.

The decision below on this point having been founded on what I consider to be the preponderance of evidence, I am unable to find that it was in any way erroneous. The award as to that item will not be disturbed.

[1] (1915) 17 Ex.C.R. 505 at 506. [2] (1899) 6 Ex.C.R. 218.
[3] (1894) 4 Ex.C.R. 280.

There remains, however, the award of $8,106 for "loss of user". In his reasons for assessing the damage, the Registrar stated:

> The evidence is that the plaintiff endeavoured to find a suitable boat for purchase after the sinking of the *Teeshoe* but was unable to find such a vesel. It was then necessary in order to keep the pulp plant moving to charter a vessel for the time required to build a vessel. The time required to build a tugboat for service is given as six months. While the plaintiff was required to wait for a longer period than six months for the delivery of its new vessel, the plaintiff makes claim only for the cost of the vessel chartered to do the work of the *Teeshoe* for six months after deducting the cost of the operation of the *Teeshoe* for a similar period.

Mr. O'Brien stated that it was essential that the work of the company should continue without interruption; that the company was unable to find a vessel of like quality and condition available for purchase and that consequently a substitute tug was immediately hired, replacements being made from time to time. Finally, some three or four months after the loss of the *Teeshoe,* it was decided to have a tug built, this operation taking in all some nine or ten months to complete. The normal time for construction would have been approximately six months, but extra time was taken due to changes in the plans. He stated that the amount paid for the first six months of charterhire was $22,278, and after deducting therefrom the estimated cost of operating the *Teeshoe* for a like period of $16,764 (which amount is exclusive of overhead, supervision and depreciation) the amount claimed was $8,106. These figures as such are not challenged and may therefore be accepted as accurate. Neither is it contended that the normal period for construction of a tug is other than six months.

The principle to be followed in assessing damages in matters of this sort is found in Marsden's *Collisions at Sea,* 10th Ed., p. 105:

> The general rule was thus stated by Dr. Lushington in *The Clarence* [1850] 3 W. Rob. 283, 285: "The party who has sustained a damage by collision is entitled to be put, as far as practicable, in the same condition as if the injury had not been suffered." This appears to be the meaning of the phrase used in some of the cases that the sufferer is entitled to *restitutio in integrum.* There is, in general, no difference between the Amiralty and common law rules as to what damages are recoverable.

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The same principle is stated in Roscoe's *Measure of Damages in Maritime Collisions* 3rd Ed., at p. 5, as follows:

> In a series of judgments in the Admiralty Court, this principle has been called that of *restitutio in integrum*—"the right to a full and complete indemnity"—and this is therefore the measure or standard of damages which are recoverable by the owner of a ship which has been injured in the collision by a wrongful act on the part of another person.

Counsel for the appellant submits, however, that the judgments below erred in law in allowing in this case a claim for loss of user. It is said that the general principle is that stated by Dr. Lushington—that when the full value of the vessel lost has been awarded with interest, no claim could be set up for compensation beyond the value of that vessel (*The Columbus*[1]). The only exceptions to that general rule, it is said, are those cases in which the vessel was earning freight (or was under a profitable contract), or when the vessel is of such peculiar construction that it is impossible to replace her.

Many cases were cited by counsel for both parties, but on this point I find it necessary to refer to one only. I refer to the well-known decision in the House of Lords in *Owners of Dredger Liesbosch v. Owners of Steamship Edison*[2]. The facts and findings are summarized in the headnote as follows:

> While the dredger *Liesbosch* was lying moored alongside the breakwater at Patras Harbour in the Hellenic Republic the steamship *Edison* fouled the dredger's moorings and carried her out to sea, where she sank and was lost. The owners of the *Edison* admitted sole liability for the loss. In proceedings before the Admiralty Registrar and a Merchant between the owners of the *Liesbosch* and the owners of the *Edison* to assess the damages it appeared that the *Liesbosch* had been bought in 1927 for 4000£ by her owners, who had spent a further 2000£ in bringing her to Patras. They were a syndicate of civil engineers. Under a contract with the Patras Harbour Commissioners they were engaged in constructive work in the harbour, for which a dredger was necessary and for which they were using the *Liesbosch*.
>
> The contract provided for completion of the work within a specified time. Delay in completion involved payment of heavy penalties and, if prolonged, cancellation of the contract. The owners of the *Liesbosch* had staked their capital and credit on the successful result of the contract. The loss of the *Liesbosch* stopped the work and, being unable from want of funds to purchase any suitable dredger which was for sale, on May 4, 1929, they hired a dredger, the *Adria*, which was lying in harbour at

[1] (1849) 3 W. Rob. 158 at 164. [2] [1933] A.C. 449.

Carlo Forte, Sardinia, to take the place of the *Liesbosch*. The *Adria* was more expensive in working than the *Liesbosch*, and required the attendance of a tug and two hopper barges.

The *Liesbosch* was sunk on November 26, 1928. The *Adria* got to work on the harbour on June 17, 1929. On June 30, 1930, the Harbour Commissioners bought the *Adria* from her Italian owners for 9177£ and on September 5, 1930, they resold her to the owners of the *Liesbosch* for the same sum payable in instalments:

Held, that the measure of damages was the value of the *Liesbosch* to her owners as a profit-earning dredger at the time and place of her loss.

The factors to be considered in computing the capital sum representing the value to the owners are stated later herein.

In that case Lord Wright, in delivering judgment for the Court, pointed out that the simple but arbitrary rule enunciated by Dr. Lushington in the *Columbus* (*supra*) had not prevailed, at least as regards ships under profitable engagement. At p. 463 he stated that the dominant rule of law is the principle of *restitutio in integrum* and that subsidiary rules can only be justified if they give effect to that rule. On the same page he said:

> The true rule seems to be that the measure of damages in such cases is the value of the ship to her owner as a going concern at the time and place of the loss. In assessing that value regard must naturally be had to her pending engagements, either profitable or the reverse.

Then at p. 464 he said:

> The assessment of the value of such a vessel at the time of loss, with her engagements, may seem to present an extremely complicated and speculative problem. But different considerations apply to the simple case of a ship sunk by collision when free of all engagements, either being laid up in port or being as seeking ship in ballast, though intended for employment, if it can be obtained, under charter or otherwise. In such a case the fair measure of damage will be simply the market value, on which will be calculated interest at and from the date of loss, to compensate for delay in paying for the loss. But the contrasted cases of a tramp under charter or a seeking tramp do not exhaust all the possible problems in which must be sought an answer to the question what is involved in the principle of *restitutio in integrum*. I have only here mentioned such cases as a step to considering the problem in the present case. Many, varied and complex are the types of vessels and the modes of employment in which their owners may use them. Hence the difficulties constantly felt in defining rules as to the measure of damages. I think it impossible to lay down any universal formula. A ship of war, a supply ship, a lightship, a dredger employed by a public authority, a passenger liner, a trawler, a cable ship, a tug boat (to take a few instances), all may raise quite different questions before their true value can be ascertained.

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The question here under consideration is again different; the *Liesbosch* was not under charter nor intended to be chartered, but in fact was being employed by the owners in the normal course of their business as civil engineers, as an essential part of the plant they were using in performance of their contract at Patras. Just as in the other cases considered, so in this, what the Court has to ascertain is the real value to the owner as part of his working plant, ignoring remote considerations at the time of loss. If it had been possible without delay to replace a comparable dredger exactly as and where the *Liesbosch* was, at the market price, the appellants would have suffered no damage save the cost of doing so, that is in such an assumed case the market price, the position being analogous to that of the loss of goods for which there is a presently available market. But that is in this case a merely fanciful idea. Apart from any consideration of the appellants' lack of means, some substantial period was necessary to procure at Patras a substituted dredger; hence, I think, the appellants cannot be restored to their position before the accident unless they are compensated (if I may apply the words of Lord Herschell in *The Greta Holme* [1897] A.C. 596,605) "in respect of the delay and prejudice caused to them in carrying out the works entrusted to them." He adds: "It is true these damages cannot be measured by any scale." Lord Herschell was there dealing with damages in the case of a dredger which was out of use during repairs, but in the present case I do not think the Court are any the more entitled to refuse, on the ground that there is difficulty in calculation, to consider as an element in the value to the appellants of the dredger the delay and prejudice in which its loss involved them; nor is it enough to take the market value, that is, the purchase price (say, in Holland), even increased by the cost of transport, and add to that 5 per cent. interest as an arbitrary measure. It is true that the dredger was not named in the contract with the Patras Harbour authority, nor appropriated to it; but it was actually being used, and was intended to be used, by the appellants for the contract work.

Then at p. 466, after referring to *Clyde Navigation Trustees v. Bowring Steamship Co.*[1] as parallel to the *Liesbosch* case, Lord Wright noted that the Court had allowed compensation for loss of user in addition to the cost of procuring a comparable dredger and adapting it to their requirements and had rejected the contention that there was any definite rule fixing the compensation at the market value with interest from the date of the collision. Then at p. 467 he continued:

The late Mr. Registrar Roscoe, in his valuable work on "Measure of Damages in Maritime Collisions," cites at p. 42 of the 3rd Ed. the case of *The Pacaure,* (1912) Shipping Gazette, (Dec. 1912) a lightship which was sunk in collision; the owners, the Mersey Docks and Harbour Board, were allowed, in addition to the value of the sunken vessel, the cost of a substituted vessel for 366 days. I should prefer to state that such extra cost was an element in assessing the loss of value to the owners of the lightship, though it may be no different result would follow from the difference in statement.

[1] (1928) 32 Ll. L. Rep. 35.

In my judgment similar principles are applicable to the present case; . . . It might seem to follow that Scrutton L. J. is intending to give some compensation, beyond the actual cost of replacing the *Liesbosch,* for delay and prejudice in the contract work; if not, I do not see how he is giving the value of the dredger to the owners at Patras as a factor in their business as a going concern.

In conclusion he said at p. 468:

From these (the principles which he had stated) it follows that the value of the *Liesbosch* to the appellants, capitalized as at the date of the loss, must be assessed by taking into account: (1.) the market price of a comparable dredger in substitution; (2.) costs of adaptation, transport, insurance, etc., to Patras; (3.) compensation for disturbance and loss in carrying out their contract over the period of delay between the loss of the *Liesbosch* and the time at which the substituted dredger could reasonably have been available for use in Patras, including in that loss such items as overhead charges, expenses of staff and equipment, and so forth thrown away, but neglecting any special loss due to the appellants financial position. On the capitalized sum so assessed, interest will run from the date of the loss.

The principle so stated seems to me to be directly applicable to the instant case. The *Teeshoe* had been in constant use by its owners as a necessary and integral part of its day to day business. The owners had no available substitute tug and without a substitute a substantial and necessary part of its operations would have been stopped and loss occasioned. If operations were to be continued, another tug had to be secured immediately and at least one of the appellant's witnesses agreed that the action of the owners in hiring a tug at once was proper in the circumstances. The Registrar's finding on this point was stated as follows:

To put the Plaintiff in the same position as if the loss had not occurred would require, in addition to the value of the vessel lost, compensation for loss of user. This loss of user, in my opinion, is the difference between the cost of chartered vessels and the cost of the operation of the "Teeshoe" for the period required to build another vessel in six months, there being no vessels on the market at that time available for purchase.

It is clear, therefore, that the Registrar found that there were no tugs of a suitable type available for purchase and while there was conflicting evidence on this point also, there was evidence which the Registrar was entitled to accept that no such tug was available for purchase. It was therefore necessary for the owners to hire a tug for the period which it would normally take to construct a new tug and it is not denied that such a period is six months.

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In my opinion, it follows that the extra cost occasioned by the hire of a substituted tug—namely, $8,106—was "an element in assessing the loss of value to the owners" of the *Teeshoe*. There is no element of profit contained in that amount which, as I have said, represents only the difference between the charges actually paid by the owners for the use of the substituted tugs and what would have been the out-of-pocket cost of operation of the *Teeshoe* for six months.

I am therefore in substantial agreement with the results reached below. While there the sum awarded was made up of two items, the latter of which was designated as "loss of user", the result would have been the same had the award been one of $33,106 as representing the value of the *Teeshoe* to the owners at the time of the loss.

Accordingly, the appeal will be dismissed and the judgment of the learned District Judge in Admiralty affirmed, the whole with costs.

Judgment accordingly.