

ON APPEAL FROM THE TORONTO ADMIRALTY DISTRICT

THE SHIP *CHARLES DICK* (DEFENDANT) . APPELLANT;

AGAINST

THE PINE BAY STEAMSHIP COM- }
 PANY LIMITED (PLAINTIFF) } RESPONDENT.

Shipping—Collision—Canal Regulations—Moored ship—Canada Shipping Act

1926
March 2.

Held, (reversing the judgment appealed from), that nothing in sections 24 and 25 of Ch. 35, R.S.C. (1906), under the authority of which the Canal Regulations are made, authorizes the enactment of any by-law making a moving ship liable for damages to a moored ship in a canal, by reason of non-compliance with a canal regulation, and that that portion of the canal regulation No. 19 reading as follows:

“And they shall also be liable for any damage to moored vessels resulting from failure to comply with this regulation”
 is unauthorized by such statute and is void.

2. That sections 916 and 917 of Canada Shipping Act have been specially enacted to cover the principle of presumption of fault by reason of the violation of the regulations with respect to the sailing, etc., of ships, and any local regulations inconsistent therewith are void. The regulation in question though enacted by the Governor in Council is nevertheless a local regulation within the meaning and spirit of section 914, Ch. 35, R.S.C. 1906.
3. That although under regulation 19 of the canal regulations, a moving vessel, when passing a moored vessel, is directed to stop her engines, if, by reason of a current against her she would, with engines stopped, be unable to pass without the probability of a collision with the moored ship, she is justified, under rule 37 of the rules of the road for the Great Lakes and by the ordinary rules of seamanship, in not conforming to the said regulation.

APPEAL and cross-appeal from judgment rendered in the Toronto Admiralty District.

Ottawa, November 20, 1925.

Appeal now heard before the Honourable the President.

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

H. J. Scott, K.C. and *E. Languedoc, K.C.* for respondent.

The facts are stated in the reasons for judgment.

1926

THE SHIP
Charles
Dick

v.
PINE BAY
STEAMSHIP
Co., LTD.

Maclean J.

MACLEAN J., now this 2nd day of March, 1926, delivered judgment.

This is an appeal and cross-appeal from a judgment of the Honourable Mr. Justice Hodgins L.J.A., for the Admiralty District of Ontario, wherein he found the plaintiff's ship, and the defendant ship, equally to blame, and which appeal I heard with the assistance of a nautical assessor. The facts are sufficiently set forth in the reasons for judgment of the learned trial judge, and as reported in 1925 Exchequer Court Reports at page 203, and I need not here restate the same. While the amount here involved is probably very small, still the case is quite important, and not without very great difficulties.

It might be convenient first to deal with the case of the *Pine Bay*, the plaintiff's ship. After a careful review of the evidence, and a consideration of the arguments presented by counsel, I am of the opinion that the conclusion of the learned trial judge in so far as the *Pine Bay* is concerned, should be sustained and for the reasons which he gave. I say this, subject, however, to a later consideration of the legal effect of a portion of canal regulation No. 19. My assessor advises me that the *Pine Bay* is to blame in that her bow and stern lines, as well as the abreast lines were not tied at the appropriate angle to insure the utmost or the necessary protection against passing ships; that this ship and her lines were not properly watched; that the after-moorings were improperly fastened on the deck to a post, instead of the winch, which was defective and not ready for operation or prompt action; that she was moored at an unsuitable and unsafe place, while a safer and more suitable one was available to her. In all this I agree. I am satisfied she was not properly moored nor watched, and unless this was done there was always the imminence of danger to herself and others. Upon this phase of the case of the *Pine Bay*, I think I need say nothing further.

There was, however, another point raised by the *Pine Bay* which is important. Canal regulation No. 19 is as follows:—

Rule 19. The engines of vessels passing vessels moored to a wharf, pier or the bank of any canal shall be stopped while so passing. Any violation of this regulation shall subject the owner or person in charge of such vessel to a penalty of not less than two dollars and not exceeding

ten dollars and they shall also be liable for any damage to moored vessels resulting from failure to comply with this regulation.

The plaintiff contends by virtue of the latter part of this regulation, that if the *Charles Dick* passed the *Pine Bay* without stopping her engines, that she is liable for the damages occurring to the latter ship, regardless of whether the *Pine Bay* is guilty of the infraction of any regulation, improper seamanship, or contributory negligence, and whether or not non-observance of regulation 19 by the *Charles Dick* contributed to the accident. If this regulation in its entirety is valid, there is much to say in my opinion for this contention, although it is not necessary I think to decide the point, in the view I take of this portion of that regulation.

Canal regulations are made under the authority of sections 24 and 25, Chapter 35 R.S., 1906, Department of Railways and Canals Act, and which are as follows:—

24. The Governor in Council may, from time to time, make such regulations as he deems necessary for the management, maintenance, proper use and protection of all or any of the canals or for the ascertaining and collection of the tolls, dues, and revenues thereon.

25. (a) The Governor in Council may, by such regulations impose such penalties, not exceeding in any one case four hundred dollars, for any violation of any such regulation, as he deems necessary for ensuring the observance of the same and the payment of the tolls and dues imposed as aforesaid;

(b) Provide for the non-passing or detention and seizure at the risk of the owner, of any steamboat, vessel or other craft, timber or goods, on which tolls or dues have accrued and have not been paid or in respect of which any such regulations have been violated, or any injury done to such canals and not paid for, or for or on account of which any penalty has been incurred and remains unpaid, and for the sale thereof, if such tolls, dues, damages or penalty are not paid by the time fixed for the purpose, and for the payment of such tolls, dues, damages or penalty out of the proceeds of such sale: Provided that no such regulation shall impair the right of the Crown to recover such tolls, dues, penalty or damages in the ordinary course of law.

Section 24, therefore gives to the Governor in Council power to make regulations for the proper use of the canal by vessels and other craft. Sec. 25 (a) enables the Governor in Council to provide for penalties for the violation of such regulations, and it is to be observed that such penalties are restricted to money penalties, and nothing more. Sec. 25 (b) enables the enactment of regulations providing, *inter alia*, for the non-passing or detention and seizure of steamboats, vessels or other craft for violation of any of the regulations, or for damages to the canal, or unpaid pen-

1926

THE SHIP
Charles
Dick
v.
PINE BAY
STEAMSHIP
Co., LTD.
—
Maclean J.
—

1926

THE SHIP
*Charles
Dick*

v.

PINE BAY
STEAMSHIP
Co., LTD.

Maclean J.

alties, etc., but nothing whatever is said to indicate authority to enact a by-law, making one ship liable for any damages to another ship while using the canal, when contemporaneously with damage occurring to the latter there has been a violation of a regulation by the first ship.

I do not think that the latter portion of canal regulation 19, reading as follows:—

and they shall also be liable for any damage to moored vessels resulting from failure to comply with this regulation.

is authorized by the provisions of the Department of Railways and Canals Act, empowering the enactment of regulations. The portion of that regulation which I have quoted, in my opinion is unauthorized by the statute, and is void. It is improbable indeed, that the legislature intended the grant of power to the Governor in Council, to enact a regulation of such an important nature, and which would be out of harmony with many long established principles of Admiralty law, and with other statutory enactments of the Parliament of Canada. Sections 916 and 917 of the Canada Shipping Act, appear to have been specially enacted to cover the principle of the presumption of fault by reason of the violations of regulations with respect to sailing, etc., of ships, and any local regulations inconsistent therewith is I think void. The regulation in question though enacted by the Governor in Council, is nevertheless a local regulation within the meaning and spirit of sec. 914, chap. 35, R.S.C., 1906.

It now remains to be determined whether or not the *Charles Dick* is also to blame as found by the trial judge, and I find that a most difficult question to solve with entire satisfaction. The evidence establishes I think, that the *Charles Dick* could not with safety have passed the *Pine Bay* at the point where moored, with her engines stopped, owing to a current prevailing in the canal at this point. The learned trial judge finds, according to what he terms uncontradicted evidence, that the *Charles Dick*, if literally obeying canal rule 19, could not have successfully passed the moored ship. The evidence would indicate that while the *Charles Dick* might have attempted to pass with her engines stationary, she would before proceeding far, have stopped, and would have sheared into the *Pine Bay*, or, she would be obliged in order to avoid such a result, to put her

engines full speed ahead, with consequences probably more serious than that which occurred while passing at dead slow speed, her minimum speed. Another alternative suggested by one of the witnesses, would be for the *Charles Dick* to approach the *Pine Bay* with considerable speed, and just prior to reaching her, to stop her engines, hoping to pass on the steerage way or momentum thus acquired. This course, though possibly constituting a technical compliance with the rule, would be as disastrous, or more so, than proceeding under dead slow engine speed, which course the *Charles Dick* in fact did adopt according to the evidence. It is the speed of the passing ship at the moment which determines the displacement wave, and not always the speed at which the engines are going. So here we have canal rule 19 requiring one thing, and the evidence and the findings of the learned trial judge to the effect that the *Charles Dick* could not pass if she obeyed that rule. And the trial judge also finds in the case of the *Pine Bay*, that standing by, which was necessary, was neglected. that she was not moored in a proper place, nor was she properly or securely fastened, and that had there been in use proper spring lines, what happened would not have occurred on the night in question.

In reaching the conclusion that the *Charles Dick* was also to blame, and what her course of action should have been, in the face of canal rule 19, the learned trial judge says:

As to the first point if literal obedience to the order which is quite clear, would in effect, according to the uncontradicted evidence here, forbid passing at all unless the engines were moving, or the risk of an accident was taken, then it must follow that a vessel essaying to break the regulation must assume responsibility for the consequences resulting from that step. The alternatives are to stop and wait, or to slow down and obtain permission or to warn in time to enable precautions to be taken. It is not shown by any evidence that the *Dick* could not tie up and wait till daylight so as to try to obtain consent or more favourable or less dangerous conditions.

I cannot agree that it was obligatory upon the *Charles Dick* to tie up, and await the negotiation of terms, upon which she might pass the *Pine Bay*, or to wait until the *Pine Bay* took special precautions against the consequences of the non-observance of a rule by the *Charles Dick*, or anything of that sort. I know of no rule, or practice which might reasonably require this, and in this my assessor

1926
 THE SHIP
*Charles
 Dick*
 v.
 PINE BAY
 STEAMSHIP
 Co., LTD.
 Maclean J.

1926
 THE SHIP
*Charles
 Dick*
 v.
 PINE BAY
 STEAMSHIP
 Co., LTD.
 Maclean J.

agrees. That was not apparently contemplated by the regulation itself. Rules of navigation are not intended to impede traffic, but rather to accelerate it with safety. I cannot satisfy myself that the observations of the learned trial judge which I have just quoted, afford the correct solution of the real question involved in this case.

The issue then resolves itself into this, is the *Charles Dick*, not being able to pass the *Pine Bay* with her engines stopped as required by rule 19, but proceeding with her engines moving though not at an excessive speed, liable for contributory negligence, in the event of an accident such as occurred in this case, and where the moored ship, the *Pine Bay*, is found to be improperly moored, and watched.

By section 916, Part 14, of the Canada Shipping Act, it is provided that:—

If, in any case of collision, it appears to the court before which the case is tried, that such collision was occasioned by the non-observance of any of such regulations, the vessel, or raft by which such regulations have been violated shall be deemed to be in fault, unless it can be shown to the satisfaction of the court that the circumstances of the case rendered a departure from the said regulations necessary.

I have no doubt as to the applicability of this enactment to the present case, nor was its applicability contested before me on the hearing of the appeal, and it is still in force so far as the Great Lakes and canals are concerned. Chap. 13, sec. 5, Statutes of Canada, 1914. It might be argued, though it was not, on the appeal, that here there was no collision, and that section 916, did not here apply. The trial judge found that there was no impact between the two ships in question, yet it is clear I think that the *Pine Bay* struck the opposite bank of the canal after parting her lines, but without that fact, I have no doubt this section of the Canada Shipping Act is applicable to the facts disclosed in this case.

Rule 37 of the Rules of the Road for the Great Lakes is as follows:—

Rule 37. In obeying and construing these rules due regard shall be had to all dangers of navigation and collision and to any special circumstances which may render a departure from the above rules necessary in order to avoid immediate danger.

It was not contended that these rules were not applicable to the canals. There is nothing inconsistent in adding to the canal rules, the Great Lakes rules, where the former are silent and where they are not excluded by express pro-

vision. Even if the Great Lakes Rule 37 did not exist the ordinary rules of seamanship would apply. Marsden 8th Ed., at page 7, states:—

Where the regulations are clearly inapplicable as where the ship cannot take the step required without going ashore, or endangering herself or other vessels, the question which ship is in fault is tried, without regard to the regulations, by the ordinary rules of seamanship.

The question then to be considered is, whether or not the non-observance of canal rule 19 occasioned or contributed to the collision. In the case of a collision occurring in Canadian waters, a breach of the regulations creates no presumption of fault, as provided by sec. 916 Canada Shipping Act, so that the ordinary rules as to negligence apply, and the complaining vessel must prove that the non-observance of the rule contributed to the accident. The ship *Cuba* (1). In view of the evidence, and of the findings of the trial judge, I cannot conclude that the breach of canal rule 19 caused, or contributed to the collision.

The water displacement made by the *Charles Dick* I am advised, was not any greater by reason of her engines being in motion, than if they had been stopped, and she was moving at the speed of two miles over the ground. Against the current the speed of the *Charles Dick* could not well have been less. The circumstances would also in my opinion, and according to the evidence, justify non-observance of canal rule No. 19, and in fact at this point of the Welland Canal at least, it appears, that rule is never observed by ships. This canal rule does not say that ships shall not pass at all, but merely that they shall pass with their engines stopped. By reason of the current, a situation existed, which was not provided for by the canal regulations. Rule 37 of the Great Lakes Rules of the Road, authorizes departure from a regulation, in special circumstances. The special circumstances here urged as justification for non-observance of the rule is, that there was a current in the canal at this point and the *Charles Dick* could not pass with her engines stopped, and no other canal regulation made provision for this circumstance, and therefore rule 37 of the Great Lakes Rules became operative. The fact that the rule is never observed by ships operating in the Welland Canal, where this current prevails, is a cir-

1926
 THE SHIP
*Charles
 Dick*
 v.
 PINE BAY
 STEAMSHIP
 Co., LTD.
 Maclean J.

(1) [1896] 26 S.C.R. 651 at pp. 661, 662.

1926
 THE SHIP
*Charles
 Dick*
 v.
 PINE BAY
 STEAMSHIP
 Co., LTD.
 Maclean J.

cumstance of importance. The evidence, supporting the contention that the mere motion of the engines did not of itself cause or contribute to the accident, and I do not think it did; the learned trial judge having found that the *Charles Dick* could not pass the *Pine Bay* with her engines stopped, and the evidence supports this finding; there being no evidence of excessive speed or the lack of reasonable care on the part of the *Charles Dick*, or any suggestion of the same by the trial judge; and the *Pine Bay* having been improperly moored and watched while in a dangerous place, I cannot, upon such a set of facts reach the conclusion that the *Charles Dick* should be held to blame by reason of her engines being in motion, while passing the *Pine Bay*.

My assessor advises me that the collision was not occasioned or contributed to by the fact that the engines of the *Charles Dick* were not stopped, that had the *Pine Bay* been properly moored the passage of the *Charles Dick* at the rate of two miles over the ground would not have caused the *Pine Bay* to break from her moorings, that the speed of the *Charles Dick* as established by the evidence was not excessive and could not have been less, and that had the *Charles Dick* attempted to pass with her engines stopped she might reasonably have been expected to shear into the *Pine Bay*.

I am not exercised by the decision of the late Mr. Justice MacLennan L.J.A., in the case of *The Pine Bay Steamship Co. v. Motor Ship Steelmotor* (1), a collision case in which the same ship *Pine Bay* was involved, and which collision occurred only a few hours after the accident involved in this appeal, and at the same place. The learned trial judge discusses this decision in his reasons for judgment. In this cited case, the trial judge found that the *Steelmotor* passed the *Pine Bay* at an excessive speed, that she violated canal regulation 16, and did not exercise reasonable care. Were these elements present in the case before me, and they are not, I should perhaps reach a different conclusion. The findings of the trial judge and the evidence, in this appeal present a different set of facts altogether.

It is only after the most careful consideration of a very difficult case, that I respectfully venture to differ from the

(1) [1925] Ex. C.R. p. 147.

trial judge as to the liability of the *Charles Dick*, when I conclude, as I do, that the *Charles Dick* was not to blame. The appellant's appeal is therefore allowed with costs, the cross appeal is dismissed, and the action below is dismissed with costs. The cause is remitted to the court below to be dealt with in conformity with this judgment.

1926
 THE SHIP
*Charles
 Dick*
 v.
 PINE BAY
 STEAMSHIP
 Co., LTD.

Maclelan J.

Judgment accordingly.