

BRITISH COLUMBIA ADMIRALTY DISTRICT

Victoria
1965
Nov. 1
Nov. 3

BETWEEN:

ELLIE CHERNYSH PLAINTIFF;

AND

STRAITS TOWING LTD. DEFENDANT.

*Shipping—Fishing motor vessel swamped, caused by wrong manoeuvre—
Plaintiff's gross negligence—No basis in law for claim for damages
against defendant—Action dismissed.*

Plaintiff, an independent gill net fisherman, owner of the M.V. *Copperhead* claimed damages from defendant arising out of the sinking of his vessel alleged to have been caused by the defendant's tug *Johnstone Straits* and her tow barge *Water Skidder*, about 10.30 a.m., on the 17th of August, 1964, in the Fraser River waters of British Columbia.

It was the plaintiff's intention to run his vessel off the bar of the Port of Steveston to engage for a short time in gill net fishing. He proceeded with his vessel up river on the south side of the channel and saw not far away the defendant's tug towing on a tow line, about 250 feet in length, a laden log barge, and trailing astern of the barge was a polypropylene recovery line of 150 feet in length marked on the after end by a reddish colored plastic buoy of 14 inches in diameter.

Notwithstanding the position of the defendant's vessel, the plaintiff then caused his vessel to manoeuvre and subsequently to cross under the stern of the said log barge. And, in the process of doing so, the propeller of the plaintiff's vessel fouled the said polypropylene recovery line trailing astern the log barge, with the result that the *Copperhead* was swung around, towed upstream stern first for a short time and swamped.

At the time this incident occurred the weather conditions were excellent.

The findings in the evidence were that at the material time, the plaintiff saw the said red buoy first and then the emergency line and then

1965
 {
 CHERNYSH
 v.
 STRAITS
 TOWING
 LTD.
 —

when his vessel got close, an attempt was made by the plaintiff to lift the said emergency line and cause his vessel to pass over it in safety, but the said emergency line became entangled in his vessel's propeller. The plaintiff made the attempt to lift the emergency line before and not after it became entangled in his vessel's propeller.

Held: There was no basis in law for the plaintiff's claim in this action for damages against the defendant. The plaintiff was the author of his own misfortune.

2. It was therefore unnecessary to decide whether the maintenance of the trailing of this emergency line from the barge in these navigable waters, with similar conditions of traffic constituted an actionable nuisance, private or public, in favour of the plaintiff, or actionable negligence.
3. That this action is dismissed.

ACTION FOR DAMAGES arising out of the sinking of the plaintiff's vessel.

Timothy P. Cameron for plaintiff.

W. Forbes for defendant.

GIBSON J.:—In this action the plaintiff, an independent gill net fisherman, as owner of the M.V. *Copperhead*, claims damages from the defendant arising out of the sinking of his said vessel alleged to have been caused by the defendant's tug *Johnstone Straits* and her tow barge *Water Skidder* about 10.30 a.m. on the 17th day of August, 1964, in the Fraser River waters of British Columbia.

The plaintiff's M.V. *Copperhead* is a gill net vessel about 22 feet in length, 7 feet in beam, single screw, with a small wheelhouse about midships. It had left the port of Steveston about 8.00 a.m. on the 17th August, 1964, with only the plaintiff aboard and proceeded to the area in the Fraser River known as the Albion (marked blue on Exhibit 1, being a chart of the Fraser River area, filed) where the plaintiff engaged for a short time in gill net fishing. About 9.30 a.m., while he was picking up his second set, he was joined by another gill net fisherman, William Leonard Coulson, who had been netting in his own vessel prior thereto. At that time, the plaintiff said it was his intention to run his said vessel off the bar at Steveston to make a third set at about a point marked "D" on said Exhibit 1. To do so he proceeded with the *Copperhead* up river on the south side of the channel. On his port side then, and also bound upriver, was the defendant's tug *Johnstone Straits*

towing on a tow line, about 250 feet in length, a laden log barge *Water Skidder* and trailing astern of the barge *Water Skidder* was a polypropylene recovery line approximately 150 feet in length and about $1\frac{1}{4}$ inches in diameter, marked on the after end by a reddish colored plastic buoy approximately 14 inches in diameter. The plaintiff then caused the *Copperhead* to manoeuvre and subsequently to cross under the stern of the said log barge *Water Skidder* and in the process of doing so the propeller of the plaintiff's said vessel fouled the said polypropylene recovery line trailing astern the said log barge *Water Skidder*, with the result that the *Copperhead* was swung around, towed upstream stern first for a short time and swamped, causing damage to the plaintiff.

The defendant's *Johnstone Straits* is a 1400 h.p. diesel tug of 126 feet in length and 27 feet in beam, and its tow barge *Water Skidder* is approximately 280 feet in length and 60 feet in beam; and the latter was carrying at the material time about one million board feet of cedar logs. The polypropylene recovery line trailing astern the *Water Skidder* was about 150 feet in length, and, as stated, at its after end was a reddish plastic buoy about 14 inches in diameter.

At the time this incident occurred the weather conditions were excellent. There was no rain or fog and the water in the river was calm.

In the evidence two diametrically opposed versions were given by the plaintiff's and the defendant's witnesses as to how the propeller of the vessel *Copperhead* fouled the said polypropylene recovery line which at the material time was trailing astern the said log barge *Water Skidder*.

The plaintiff gave evidence himself, and also called as a witness the said William Leonard Coulson.

William Leonard Coulson who, as stated, had come aboard the *Copperhead* at about 9.30 a.m. said that the plaintiff at the material time swung the *Copperhead* to port to go around astern the log barge towed by the tug in order to make a set in the north part of the river. He said that he was in the wheelhouse when the plaintiff, steering from the stern, manoeuvred the *Copperhead* to port by swinging the said vessel around, going down river first and then around the said tow barge at the stern; and that he started to run

1965
 CHERNYSE
 v.
 STRAITS
 TOWING
 LTD.
 Gibson J.

1965
 CHEENYSH
 v.
 STRAITS
 TOWING
 LTD.
 Gibson J.

up behind the tow barge when the motor in the *Copperhead* quit. At that moment he looked down and saw the said recovery line trailing from the log barge, and he called to the plaintiff who threw him a knife and he tried to cut the recovery line, but it had already fouled the propeller. The *Copperhead* he said was then about 125 feet astern the barge *Water Skidder*. He said the propeller became entangled in the said recovery line before he saw the recovery line or the red buoy which was attached to the end of it. He said when he attempted to cut the recovery line the *Copperhead* swung around and was pulled upstream astern and then it swamped. Just prior to it swamping he jumped into the river while the plaintiff put on a life ring and stayed with the *Copperhead* until it did swamp. In cross-examination he admitted that there was nothing which would have prevented him at the material time from seeing the recovery line and the buoy attached to it. He denied that he made any attempt to pick up by way of pike pole, or any other type of pole, this red buoy attached to the recovery line prior to the time the propeller of the *Copperhead* became fouled in it.

The plaintiff stated that at the material time he was steering the *Copperhead* from the stern of the vessel and that Coulson was in the wheelhouse, and when he first saw the recovery line from the barge it had already fouled the propeller of his vessel. He said that prior thereto he had caused the *Copperhead*, which had been running upriver starboard of the tow barge, to reverse itself and to go down river and then cross astern about 175 feet from the barge and then run up river when its engine quit and thereafter its propeller fouled the said emergency line. He stated he threw the knife to Coulson for the purpose of permitting him to attempt to cut the recovery line and that he started up his motor again and attempted, by opening the throttle, to disentangle his propeller from the said recovery line, but was unsuccessful. At that time he said his vessel was being pulled astern and shortly thereafter it swamped. He marked on the chart, Exhibit 1, with the letter "E" the place where his vessel's propeller was fouled, being near R.24, one of the markers marking the starboard side of the channel up river.

On discovery the plaintiff marked a chart of the said waters in red, showing the course which the *Copperhead*

made going up river and turning to port and reversing to go back and astern the barge *Water Skidder*, and this course so marked and his answers on discovery describing same differed materially from the answers given at the trial concerning this same matter. The chart marked on discovery was filed as Exhibit 2 at this trial.

1965
 CHERNYSH
 v.
 STRAITS
 TOWING
 LTD.
 Gibson J.

The plaintiff also said that he told the R.C.M.P. investigating constable, Douglas Gerald Doige, that he first saw the recovery line from the barge only after it had fouled the propeller of his vessel.

The plaintiff also said there were a lot of gill netters in the channel at the material time who had put out floats from their gill nets, which floats were similar to the float on the end of the said emergency line, and that he had no difficulty seeing these gill net floats.

The defendant, among other witnesses, called Captain William James Gilmour, the Master in charge of Federal Public Works Department Dredge No. 322, who has held a Master's Unlimited Home Trade Certificate No. 1616 since 1946, Captain Herman George Knudson, Assistant Dredge Master on said Federal Public Works Dredge No. 322, who had been employed for 44 years in these waters, and Constable Douglas Gerald Doige of the R.C.M.P.

These three defence witnesses are clearly independent witnesses in the true legal sense and their evidence as to what happened I accept as true. Captain Gilmour and Captain Knudson both said that from the said Dredge No. 322, which was stationed opposite No. 23 port buoy going up river, as shown on the chart, Exhibit 1, they clearly observed the ship *Copperhead* when about half a mile away until it completed its manoeuvre and its propeller became fouled in the said emergency line trailed from the log barge *Water Skidder*. They both stated that the *Copperhead* manoeuvred across stream on two occasions, when some distance down river from the *Water Skidder* and from the red buoy attached to the said emergency line. Then Captain Gilmour said the *Copperhead* made three "passes" across stream close to the said red buoy on the last of which occasions its propeller became fouled by the emergency line. Captain Knudson corroborated these three "passes" made by the *Copperhead* but differs in one respect in that he states the *Copperhead* made the three passes by running up stream to the red buoy attached to the said emergency

1965
 CHERNYSH
 v.
 STRAITS
 TOWING
 LTD.
 Gibson J.

line, and falling back on the first two occasions, but becoming fouled on the third occasion. In this connection this would seem to tie in with the plaintiff's story that his engine stopped just before or at about the same time as the propeller of his vessel became fouled. Both Captain Gil-mour and Captain Knudson said that they saw a person on top of the wheelhouse of the *Copperhead* with a pike pole or some other type of pole attempting on these three occasions when "passes" were made to snare the buoy. This person obviously was William Leonard Coulson. Both these witnesses then explained how, after the *Copperhead* got into difficulty, they signalled the wheelhouse of the tug *Johnstone Straits* informing them of the swamping of the *Copperhead* and its plight, and the action they took within a few minutes in going to rescue the *Copperhead* and disengaging it from the said emergency line and towing it to the dock at Steveston.

Constable Douglas Gerald Doige of the R.C.M.P. stated he interviewed the plaintiff on the 19th August, 1965, at the dock at Steveston where the plaintiff was doing certain remedial work to his vessel. He interviewed the plaintiff in connection with an investigation made of a complaint that there was, at the material time this incident occurred, an attempted theft of this red buoy attached to this said emergency line. Constable Doige said that the plaintiff told him that at the material time the plaintiff saw the said red buoy first and then the emergency line and then when his vessel got close an attempt was made to lift the said emergency line and cause his vessel *Copperhead* to pass over it in safety, but the said emergency line became entangled in his propeller. On cross-examination Constable Doige was invited to and confirmed unequivocally that the plaintiff told him that the attempt made to lift the emergency line was made before and not after it became entangled in his vessel's propeller; and he was then asked and he told that he recorded this conversation in his notebook within ten or fifteen minutes of the time the plaintiff related it to him.

On this evidence adduced by the defendant, which as stated I accept as true, it is patent that there is no basis in law for the plaintiff's claim in this action for damages against the defendant. He was the author of his own misfortune.

It is unnecessary, therefore, to consider whether, in other circumstances, the maintenance of the trailing of this emergency line from the barge *Water Skidder* in these navigable waters, with similar conditions of traffic, when the trailing of such emergency line was unnecessary, resulted in constituting an actionable nuisance, private or public, in favour of the plaintiff; or whether it was in law negligent of the defendant, among other things, not to have caused this emergency line to have been pulled in, in these navigable waters on which there was heavy traffic, when, on the evidence, it served no useful purpose in these waters, or whether it was negligent of the defendant not to have more adequately warned third parties of the presence of this emergency line if the same were not pulled in.

The action is dismissed with costs.

1965
 CHERNYSH
 v.
 STRAITS
 TOWING
 LTD.
 Gibson J.