

BRITISH COLUMBIA ADMIRALTY DISTRICT.

1919

August 22.

PATTERSON, CHANDLER AND STEPHEN
LIMITED,

PLAINTIFF;

v.

THE "SENATOR JANSEN,"

DEFENDANT.

Towage—Responsibility of tug—Negligence—Contributory negligence.

The tug "Senator Jansen", with a scow in tow, lashed diagonally to her port bow, was floating down Fraser River with the tide and while going through a drawbridge (85 feet in width) the scow struck a projecting boom stick, tearing off a stern plank. Scow and cargo were lost. The "Senator Jansen" was properly navigated.

Held.—That the master of the "Senator Jansen", being thoroughly familiar with the situation, and the set of the tides and currents, and knowing that these would inevitably bring his port side against the bridge, creating a dangerous, if not a necessarily fatal situation, was guilty of negligence in not lashing the tow to the starboard side and thus avoiding the possibility of accident.

2. Where, even if the scow in such a case had been wholly sound, the direct consequences of the accident could not have been avoided, the fact of the scow being unseaworthy, will not constitute contributory negligence on her part, and will not relieve the tug of any responsibility—for damage due to her own negligence.

THIS is an action by the plaintiffs, owners of the tow, to recover from the defendant the value of the scow and cargo, alleged to have been lost by reason of the negligence of the master and crew of the tug defendant; (1) because she was unskillfully navigated—and (2) because she took the risk of lashing the tow to her port side, when the other side would have offered no risks whatever.

The case was heard, at Vancouver, on June 21 and 22, 1919.

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The facts of the case are stated in the reasons for judgment.

W. E. Burns, and H. B. Robinson, for plaintiff.

C. B. Macneill, K.C., for defendant.

MARTIN, L. J. A. (August 22, 1919), delivered judgment.

In this action the plaintiff company sues to recover the value of a scow, \$2,000, and the loss of certain granite blocks laden thereon, and the cost of salving other blocks from the bed of the Fraser River. The claim arises out of the fact that on July 9, 1918, about 6.30 p.m., the said scow, laden with 225 tons of granite blocks, was being taken by the stern wheel steam tug "Senator Jansen" (reg. tons 93.27; length 125 ft.; R. B. Tipping, Master), through the north passage of the drawbridge across the Fraser River, connecting the City of Westminster with Lulu Island, and in so doing the scow, (length 66 ft. 8 in., width 26 ft., depth 6-7 ft.) which was lashed diagonally across the port bow of the tug, struck a corner boom stick of the west approach to the drawbridge and one of her stern planks was knocked out, which caused her to quickly fill with water and take such a list that the cargo slid overboard and the scow was with some difficulty beached, and eventually became a total loss.

The said northern passage of the drawbridge is 85 ft. in width and there was formerly along the whole of the south side of it a permanent approach structure of piles with planks, along which tugs with scows would slide with the drift of the tide, which method of going through the passage in the state of tide in question, 2½ to 3 knots, is clearly

open to no objection and no fault could be found with that course in ordinary circumstances. It appears, however, that at some time in the month preceding the accident, the downstream, i.e., western portion of the said approach had been carried away and a temporary arrangement provided of four boom sticks and three groups of piles as shown, Ex. 10, which gives a fair representation of the situation. Of these boom sticks only two need be considered, one of them—the long sheer-boom marked “A” on Ex. 10 being 40 to 50 ft. long and running out to the pile marked “X” and a shorter one marked “B” fastened to the end of “A” and connecting at an angle with the second group of piles at the apex of the boom structure. This short corner boom “B” which the bridge-keeper described as being from 14 to 16 ft. long and about the thickness of a telephone pole, (though the defendant’s witness, the tug-master, described it as heavier), projected out an appreciable distance beyond the line of sheer-boom “A”, as well shown on Ex. 10, and the effect of this was that when the scow, after scraping along the sheer boom, came to the projecting corner boom, the end of it, (which the master of the tug described as being square) struck a stern plank (which I have reason to doubt was a sound one) in the scow at its spiked end and knocked it out, causing the scow to quickly fill as aforesaid.

Two grounds of complaint are set forward against the tug; the first being that she was badly navigated, but in the true sense of that expression I have no difficulty in finding that such was not the case, for no fault can be found in the matter in which she ap-

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proached the bridge or took advantage of the tide to stop her engines and drift through the passage, and in ordinary circumstances all would have gone well. But the second ground of complaint is that it was negligent, in the circumstances of the projecting corner boom stick and set of the tide thereupon, for the master to have gone through the passage with the scow on the port bow of the tug which was next to that corner boom which, it is submitted, obviously created a dangerous situation. It is clear from the evidence of the defence that at the season of the year, with freshets, tugs drifting as here with said tide would expect to hit the sheer-boom, and also that since the solid approach had been broken the tide sets more strongly towards and under the boom sticks; the tug's master says he knows the locality very well, having taken scows through it (the bridge) "a couple of hundred times," and he knew of the change since the damage to the approach "sometime before that" and, "weeks anyway" (as he expresses it), and the position of the temporary booms at the time as set out in Ex. 10, so he was, as he admits, "quite familiar" with the situation and the boom sticks, and their being fastened together by a five-eighths wire.

He thus describes the accident:—

"A. As I was passing through, the corner of the scow hooked on to his boom stick that was sticking out there.

"Q. Now which boom stick. Look at Exhibit 10, that photograph, and state which boom stick?

"A. That there one.

"Q. That is the one marked B? A. Yes.

“Q. Well, what part of the scow? A. This point
“there.

“Q. Yes. What part of the scow hit the end of
“that boom stick? A. The side of her touched it and
“went along it as she got to the stern of it, and she
“pulled a plank out of the stern, to the boom stick
“B. which did the damage.

“Q. Have you looked at it since? A. Yes.

“Q. What kind of end is there on it? A. Square
“end, cut off square.

“Q. Cut off square? A. Yes.

“Q. It is not tapered like? A. No.

“Q. Like ordinary piles? A. No.”

And again:—

“Q. This boom stick that is marked B always
“stuck out like that, did it? A. Sometimes it did and
“sometimes it didn't.

“Q. You knew that? A. Yes.

“So that you knew that sometimes—at some times
“the end of the boom stick was sticking out like
“that? A. Yes.

“Q. Sometimes not much, I suppose, all depending
“upon the current? A. Depending upon the way
“the current hit it.

“Q. Dependent on what? Speak up. A. Depend-
“ing the way the current hit it.

“Q. It might change one way or the other? A.
“Yes.

“Q. But at any rate you knew it was quite possible
“and probable for that to be out like that? A. Yes.”

And

“Q. You could see the boom stick perfectly plain
“could you not? A. Yes.

“Q. You saw it? A. Yes sir.

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"Q. Saw how it projected out? A. Well, I couldn't say that it just projected out then. The current might have dragged it out.

"Q. Well, but you saw at the time? A. Yes.

"Q. How it projected out? A. Yes, it projected out.

"Q. Did it not strike you at all that if you struck it on edge it might do you some damage? A. Well, it might have struck me that way, but I couldn't very well help touching it.

"Q. You couldn't very well help touching it? A. Not very well, no, the tide pulls that way.

"Q. And what happened, take this as the stern board, what happened as I understand you is that that boom stick B hit that just about there? A. Yes sir.

"Q. Just where it was nailed on or spiked on to the sides? A. Yes.

"Q. And the whole weight of the scow and its cargo and that boat was centred or concentrated at that point? A. Yes."

He thus describes the corner boom stick B:—

"Q. Yes, but that is a small pile,—a small boom stick. A. I don't know it is so small, it is anywhere between—

"Q. Well, the evidence is to that effect. A. Well, I say it is anywhere between 16 and 22 inches.

"Q. In depth? A. Yes.

"Q. Do you swear to that? A. Yes.

"Q. Did you measure it? A. No, I never measured it, but I seen it was floating there, it was floating 8 inches out of the water at that time, and there would be over half of it in the water, that would make it 16 inches, then you have got to al-

“low for what you lose—the balance that was in the water, would be about 22 inches.

“Q. Well, the evidence here, by Gregory, I think it was, that it was a small boom stick. A. Well—

“Q. About like a telephone pole? A. Yes, well a telephone pole wouldn't hold nothing there.

“Q. Well, but that is the evidence. A. Yes, but I seen—

“Q. And the only reason you would have for denying that would be your inference. He has sworn it. A. I have seen it, seen the end of it where it was swung in, and I figured it was altogether between 16 to 22 inches.

“Q. 16 to 22 inches? A. Yes.

“Q. Half of it is above the water? A. No, not half of it is above the water.

“Q. Well, how much was above the water? A. Well, it is just according to how much it was waterlogged. It might have been three inches.

“Q. Well I mean at the time you saw it. A. Well, “about six inches.”

And he admits that he knew of the opening between the ends of the two boom sticks and gives that as a reason why a fender could not have been used to protect the scow from contact with the projecting stick B. So it really comes to this, that from his own evidence the master of the tug knew of the set of the tide which would inevitably bring the scow against the corner of the boom stick obviously creating a situation of danger, because though he might be fortunate enough to slide by yet the probability of a contact between the end of it and the end of a plank in the scow could not prudently be left out of consideration, despite which he continued on his

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course thereby courting danger which might easily have been avoided by the simple expedient of lashing the scow to the other, starboard, side away from the boom where it would be in a perfectly safe position. I am quite unable to see, after a lengthy and careful consideration of the whole matter, how the master can be exonerated from a lack of that degree of negligence which should be used by a reasonably prudent man. I find it indeed, difficult to account for his conduct which, the more one considers the case, appears to be rash. A number of authorities were cited, all of which I have carefully examined, and many others, and these which are of most service are the federal decisions in similar cases in the United States, where the general circumstances of navigation of this class more closely approach those in our country than do those in England. I shall only refer to a few of them which are in point. Thus, in *The T. J. Schuyler v. The Isaac H. Tillyer*,¹ it is said, at p. 478:—

“While the tug did not stipulate for the absolute
“safety of the schooner, yet she was bound to meet
“such requirements of her service as would enable
“her to render it with safety to the schooner. She
“must know the depth of the water in the channel;
“the obstructions which exist in it, the state of the
“tides; the proper time of entering upon her ser-
“vice; and, generally, all conditions which are es-
“sential to the safe performance of her undertaking.
“If she failed in any of these requirements, or in the
“exercise of adequate skill or care, she is justly sub-
“ject to an imputation of negligence. Was the tug
“derelict in any of these respects? She might have

¹ (1889), 41 Fed. Rep. 477

“started when the tide was at a higher stage than it
 “was when she began her movement up the river,
 “and thus, with deeper water, have insured the saf-
 “ety of her tow. When she approached the pier of
 “the bridge she might and rightly ought to have kept
 “further away from it, for which there was ample
 “room, and thus have avoided the risk of collision
 “with it, or with the obstruction under the surface
 “of the water.” And in the *Westerly*,¹ at p. 940, it
 “is said:

“The tug had the burden of excusing the failure in
 “performance of her undertaking to tow the canal
 “boat safely through a presumably safe and well-
 “marked channel: *Boston, Cape Cod, etc., Co. v.*
 “*Staples, etc., Co.*² It would be a sufficient excuse
 “if the grounding was in fact caused by an obstruc-
 “tion in the channel over which there was not water
 “enough for the canal boat, because her master
 “would have been justified in believing that no such
 “obstruction was to be found there, but it was for
 “the tug to show the existence of such an obstruc-
 “tion, and therefore to show that she had the canal
 “boat in the middle of the dredged channel when
 “she grounded, and not outside of it or on its edge.”

And in the *Lake Drummond Canal Co. v. John L. Roper Lumber Co.*³ a very similar case to this, respecting a vessel attached to a tug and passing along the side of a lock and a projecting snag, the Court said, at p. 799:

“It should be remembered, as we have stated, that
 “the captain of the tug saw, or could have seen, that

¹ (1918), 249 Fed. Rep. 938.

² (1917), 246 Fed. Rep. 549, 552, C. C. A.

³ (1918), 252 Fed. Rep. 796.

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"the gate had not fully entered the recess prepared
"for it, but that it was jutting out, so as to obstruct
"the passage intended for vessels entering the lock.
"With this projection staring him in the face, the
"captain of the tug did not take the precaution to
"stop his engines until after the barge had come in
"violent contact with the gate."

And on the question of presumption, in the case of
the *Allegheny*¹ it was said, at p. 8:

"This collision could not have occurred without
"the fault of some one, and, the lighters being with-
"out fault, it follows the fault is presumptively that
"of the tug, which was in exclusive control, unless
"she has shown the collision was the result of in-
"evitable accident, or was caused by some agency
"other than the tug or tow. The *W. G. Mason*,² and
"cases there cited."

Applying the foregoing principles to the facts be-
fore me I can only come to the conclusion that a case
of negligence has been established against the tug
and therefore the plaintiff is entitled to judgment.
From the evidence so far adduced on damages, the
fair value of the scow would, I think, be \$2,000, and
the cost of the missing granite and of salving the
balance could well be allowed at the sum claimed—
\$703.75, making a total of \$2,703.75, and there is no
reason why interest should not be charged from the
date of damage at the legal rate, but bearing in mind
that it is the established practice of this Court to
refer questions of damage to the Registrar, assisted
by merchants if necessary, I should be prepared to
adopt that course if the defendants wish it, because,

¹ (1918), 252 Fed. Rep. 6.

² (1905), 142 Fed. Rep. 915, 74 C. C. A. 83.

relying upon that practice, they may have wished to produce more evidence of the amount of loss than was given before me, although their counsel did not so state. They will be given, therefore, one week within which to apply for a reference if desired.

A question arose as to the unseaworthiness of the scow, but I am satisfied that she was in a fair condition to perform the work undertaken, though it is not strictly necessary to pass upon this point because even if she had been wholly sound the direct consequences of the knocked-off plank could not have been avoided.

Judgment accordingly.

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