ON APPEAL FROM THE TORONTO ADMIRALTY DISTRICT.

1921
June 27.

POINT ANNE QUARRIES, LIMITED (PLAINTIFF)..... } RESPONDENT;

AND

THE SHIP *M. F. WHALEN* AND THE OWNERS THEREOF (DEFENDANTS) } APPELLANTS.

Towage—Negligence—Efficient equipment—Limitation of Liability—Onus of Proof—Contract reformed—Appeal.

Held (by the trial Judge): In a contract for towage there is an implied contract that the tug or ship towing shall be efficient and properly equipped for the service.

2. A contract may be re-formed in a case where it is admitted that by inadvertence certain terms agreed upon were omitted.

3. The provisions of R.S.C. 113, s. 921 (d) relating to limitation of liability apply to a towage contract, and in ordinary cases where loss has occurred without the actual fault or privity of the owners a limitation of liability is permitted; but, where the evidence discloses facts and circumstances which indicate knowledge on the part of the owners of the insufficiency of the tug or its want of capacity either in structure, equipment or in the crew provided to carry out a contract of towage, limitation of liability will not be allowed.

4. In case of loss by improper navigation the onus is cast upon the owners of showing that what occurred was due to causes which arose without their actual fault or privity or was not contributed to by those causes, and failure to satisfy that onus, prevents the application of the provisions of the statute above referred to as to limitation of liability.

Held: On appeal (Affirming the judgment appealed from) that the owners being in control of their tug and crew, and having exercised this control by a telegram to the master, reading: "Point Anne Quarries wire that you threw scow adrift without reason and that scow still floating and you refuse to go for it. If you can save this scow without risk to your tug do so;" thereby became privy to and partakers in responsibility with all its legal consequences in respect to all actions of the tug subsequent thereto, and there should be no limitation of the liability provided for by R.S.C. 1906, ch. 113, sec. 921.

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THIS was an action brought by the plaintiffs claiming damages to a scow while being towed by the defendant ship, and loss of its cargo.

The trial of the case took place before the Honourable Mr. Justice Hodgins on the 7th, 8th and 9th days of March, 1921, at Osgoode Hall.

S. Casey Wood and *G. M. Jarvis* for plaintiff.

A. E. Knox and *George Keogh* for defendant.

The facts are stated in the reasons for judgment, which follow:

HODGINS L. J. A. now (April 11th, 1921) delivered judgment.

Action claiming damages for injury to a scow while being towed by the defendant ship, a tug of 112 gross tons, from Presqu'ile to Toronto, and for the loss of its cargo. The scow originally cost $36,000.00 and was laden with 1,000 tons of stone. It was cut adrift on the night of November 11th, 1920, by order of the Master of the *Whelan*, when beyond Port Hope, in Lake Ontario. The scow then drifted down the lake and stranded near Consecon in Prince Edward County. It was agreed, that if the plaintiffs succeeded, the damages including the value of the repairs to the scow, after they were completed, were to be fixed by the Registrar in Toronto.

The cargo was valued at $1,875.00 and was a total loss.

The tug *Whelan* and scow left Presqu'ile on 11th November, 1920, at 8 a.m., and the log of the tug, as deciphered at the trial, is as follows:—

November 11th, 8 a.m. Presqu'isle. Log out. Zero. Wind south-west, light barometer 29·60. Course south-west by south.

November 11th, 9.50. Hauled course west. Log 3–¾. Wind south. Barometer 29·50. Proctor Point.

November 11th, 11 a.m. Wind changed south-west. Strong. Barometer 29·50.

6.30 p.m. Cobourg. Course south-west by west-half-west. Wind south-west. Gale. Barometer 29·10.

10.20 p.m. Let go Scow No. 2 and drifting wind west-south-west. Gale. Barometer 29·10.

11.00 p.m. Get Cobourg. Wind-bound. Wind too strong for steering. We couldn't fetch her back to the wind. Log 32¼.

November 12th. Gale south-west; too big for going outside.

November 13th, 2.30 a.m. Left Cobourg for go after the scow. Wind west.

6.10. In Presqu'isle.

6.20. Brochton's Dock. Wind south-west. Gale. Barometer 29·65.

The log is not accurate in all its details and as to part of it there was, in my judgment, a deliberate attempt to manufacture evidence. To this I will recur.

The plaintiffs and the Kirkwood Steamship Line made a contract dated October 27th, 1920, which dealt with the towage of what were denominated as the plaintiff's "barges." It appears that the owners who intervene, and whose exact status becomes material later on, were anxious to sell the *Whelan* to the plaintiffs, and this trip was to some extent a test which would in all probability determine whether or not a sale would be effected. The tug was sent to Presqu'ile and the instructions to its Master from the Kirkwood Steamship Line were that he was to get

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his orders from the plaintiffs "taking whatever is light (as stated in the contract) at this (Toronto) end, and bringing up what is loaded at the quarry end." In consequence of these instructions the tug undertook the towage of the scow and cargo in question. It is asserted that this towage was outside the scope of the contract, a point important as to the liability of the owners, but not entirely controlling responsibility for what happened in the course of the voyage.

The arguments urged on behalf of the plaintiffs were concentrated on four periods of time—on the 11th November—off Cobourg, between Cobourg and Port Hope—off Port Hope and beyond, and the whole of the day following. The charges were that negligent navigation was shown by not putting into Cobourg when off that port, in not seeking refuge in Port Hope, and in the alternative, in not turning back towards Presqu'ile during one or other of these periods. It was also asserted that the crew were both negligent, incompetent and disobedient and that the tug was not properly equipped and efficient for the work undertaken.

The tow rope was a long one, about 600 feet, and there was about 9-10 of its length out board, and the remaining tenth in board. This length of rope was given as the reason why refuge was not sought in Cobourg or Port Hope when passing there. It is a fact which is practically conceded, that the horse power of the *Whelan* was not sufficient for the task in hand, in view of the weather conditions which supervened. It fell from 140 H.P. to 100 H.P. before Cobourg was reached. This caused a consultation between the Master and the Mate of the tug, one Mailhot, as to whether it would not be safer to get into that harbour. It was decided that with the

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length of tow rope which was out, the *Whelan* could not make that port in safety, the trouble alleged being that the approach was difficult to negotiate with a heavy scow in a south west wind, and that if the harbour was reached there was no space in it of sufficient depth to allow manoeuvering so as to bring both tug and tow to anchor in safety and afloat. Having arrived at that decision the Master kept past Port Hope, the steam pressure steadily diminishing, the wind and sea increasing meanwhile. About 10 p.m., when 2½ to 3 miles beyond Port Hope, the *Whelan* began to drift back though being driven with all the steam she had. An attempt was made to turn to starboard for Port Hope. She was so light, her towing posts were so far back and her power so small that she could not be got to swing round and was unmanageable. In an endeavour then to turn to port so as to be able to return to Presqu'ile, the tow rope caught in a chock on the quarter. This accident, according to the Master's evidence, caused the tug to lose its power to turn, every effort being defeated by the awkward strain of the scow, while the diminished power, and the violence of the wind aided to prevent the tug from overcoming the drag and to bring herself into the wind and turn. In consequence of this unfortunate situation and being of the opinion that the rope could not be got out of the chock owing to the space available in which to work being so limited that a sufficient force of men could not tackle it together, and because the vessels were on a leeshore, the Master decided to cut the scow adrift, and he did so. He then turned and reached Cobourg harbour before midnight. I accept the evidence given as to the restricted space at the stern rendering it very

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difficult, if not impossible, owing to the wind and sea to get any slack on the rope at 10 p.m., so as to enable the crew to extricate it from the chock.

But I have come to the conclusion, after much consideration, that the Master of the *Whelan* cannot be absolved from negligence in navigation nor can it be said that the tug was, in the circumstances which occurred, and which might have been foreseen, adequate for the duty undertaken. While not convinced that his judgment was entirely wrong, as to the possibility of taking an unwieldly scow safely into Cobourg Harbour, I have no doubt that the situation at that time—6.30 p.m.—was such as to demand some definite decision by the Master as to what his ultimate course should be. He noticed at 6.30 p.m. that the power was diminishing. The fact that he discussed his position when off Cobourg with the Mate and had before his eye the low barometer and the increasing wind and sea, rendered it in my judgment reasonable that he should have made up his mind as to what safety and good seamanship demanded. He ought to have realised that if Cobourg was impossible, Port Hope would be so also, and that his only hope then would be to press on for Toronto or turn back. But the failure of power of which he was fully conscious, when opposite Cobourg, was as he knew, bound to increase, and the likelihood of heavier weather should have aroused in him the certainty that he could not persevere very long on his course and might be driven ashore if the steam pressure dropped much lower. In the circumstances in which he found himself at 10 p.m. with his tow rope fast in a chock and his power low and the tug failing to make progress or to respond to her helm, I cannot say that his act in cutting the rope was not justified. But I have heard nothing on

his behalf to warrant me in holding that either off Cobourg or later until the last moment when the rope got fast, he could not have turned both tug and scow and made down the lake, favoured by the wind and the drift. This, in view of the conditions I have described, was not only possible but advisable, and the length of tow rope was not any hindrance but rather a help in executing that manoeuvre. Added to the consideration of immediate safety was the fact that by retracing his course he would have had a chance of standing by the scow and keeping it off shore. To sum up my view, the weather, the barometer, and the increasing loss of power required action, either in seeking shelter or if he could not make a port by reason of his length of his tow line, then by turning back when conditions were still favourable, thus taking advantage of the set of the wind and waves, and keeping the scow under his control. If, indeed, this alternative had been taken, it is entirely probable that when turned he would have been able to haul in some portion of the rope when the strain on it would be less, and if so to have resumed his course and gone into either Cobourg or Port Hope if he found that expedient more desirable.

I cannot see why this change was not decided upon. The tug is shown to be an ocean vessel staunch and good. The difference between an attempt to turn at 10 o'clock at night and at 6.30 p.m. is easily calculable, as the conditions were radically changed for the worse as the evening wore on, apart from the jamming of the tow rope. In what he did the Master displayed, as I see it, neither proper seamanship nor resource and he seemed to lack realization of what would be likely to happen if he kept on his course during the night, while the power continued to decline

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and the sea and wind got higher. The inability of the tug to maintain its horse power at an efficient figure is a very important factor. It was due either to want of capacity to develop or to maintain sufficient power in bad weather or to do so with the crew then on board. From the evidence I am forced to conclude that both factors were present on this occasion and that to continue safely on its course was more than the tug was capable of. There is an implied obligation in a contract for towage that the tug shall be efficient and properly equipped for the service. The *Undaunted* (1), the *West Cock* (2).

A further failure on the following day, must be laid at the Master's door. Being safely moored in Cobourg Harbour, his engineer and crew refused next morning to go out to seek for the drifting scow. The duty of a tug, when it has had to cut its tow adrift or has lost it through stress of weather, is to stand by so far as that can be done without actual peril to life or property. The *White Star* (3); see also *Minnehaha* (4). It is no excuse that it would have been difficult or even dangerous to try and secure the tow again, unless that result is clearly proved to be the reasonable consequence of such an attempt. It was said that if the tug had gone out and found the scow, it would hardly have been possible to secure it, as the tow rope was floating with the scow and no other cable was available. Besides this it was urged that no man could have been landed upon the scow to make it fast, if a rope had been procured in Cobourg.

I do not deny the probable difficulty or the danger, but I do not think the excuse can be accepted at its face value, unless it is shown that all reasonable

(1) 1886, 11 P.D. 46.
(2) 1911, P.D. 208.
(3) (1866) 1A & E 68.
(4) (1861) 30 L.J. Adm., 211 P.C.

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efforts were made to do what was possible under the circumstances in the endeavour to render assistance. The reasons given for the absolute failure to make any attempt were, first, the refusal of the engineer and crew to go out, and the absence of a tow rope. No evidence was given of any effort at all to supply the engineer's place. This, in case of emergency, should have been done by shipping a temporary substitute if available. There is nothing in R.S.C., c. 113, Part VII, to prevent this in a tug of the size of the *Whelan*. The crew, if they disobeyed the Master's orders, could not be compelled to do their duty. But others might be found in Cobourg. If any, even slight, evidence had been given that search was made for an engineer, sailors or rope, in the Port of Cobourg, I would be bound to find that blame could not attach to the Master. But in the absence of any such suggestion it is not reasonable to say that the duty which rested on the tug had become entirely impossible of performance. Equally so, I cannot accept the argument that had everything been done and the scow overhauled no man could have been found sufficiently agile to be capable of landing on board the scow and hauling a line aboard. Impossibility of performance must rest upon actual conditions and not upon mere apprehension accompanied by the absence of even the smallest attempt to bring about a state of affairs favourable to whatever action necessity demanded. There is no doubt in my mind, upon the evidence, that the weather conditions on the 12th November, before the scow grounded, were such that if the tug had gone out with a tow rope, a rescue would have been in all probability successfully accomplished. Incompetence and slackness vitiate what might be a good defence, and nothing has been proved

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from which it could properly be inferred that what could be done was done, nor has it been shown that those in charge of the tug were exonerated by conditions which they could not control, so as to avoid responsibility for contributing by inaction to the subsequent loss of cargo and injury to the scow.

In this connection I must refer to the entry in the log under date November 12th, made by the mate which is as follows:—

"Nov. 12th. (Gale south-west too big for going outside.") In the witness box the mate stated that he made this after midnight of the 11th–12th November, when the tug arrived in Cobourg. If so, what he did was contrary to section 243, s.s. 1 of the Canada Shipping Act, R.S.C., c. 113. I am unable to accept his testimony as truthful, or if truthful, that the entry was not intended to mislead. It is so extremely unlikely that the writing up of the log of the 12th November would be done before the day had well begun, or if made at night, that it would have referred to the impossibility of going out during the whole of the succeeding 24 hours. It was doubtless intended to make evidence for the crew and for the owners and to be read as if made at a later hour, after the refusal of the crew had to be concealed. I shall direct the Registrar to report to the Department having to do with the licensing of ship's officers the circumstances surrounding this entry and my finding thereon.

The result of the foregoing is that I find that the *Whelan* was negligently navigated by her Master and that he failed to take any reasonable steps towards endeavouring to secure the scow and its cargo on the day after its abandonment. I also find that the tug lacked capacity to accomplish the task undertaken

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by it in the weather conditions which ought to have been expected in November in that it could not sustain sufficient steam pressure, a condition aggravated by the inefficiency of the crew.

There remains a somewhat more difficult question to be determined, namely, whether the owners are entitled to limit their liability under R.S.C., c. 113, s. 921 (d). That section applies to a towage contract. *Wahlberg* v. *Young* (1); *Fulham* v. *Waldie* (2).

The condition is that the damage which happens by reason of the improper navigation of the ship shall be without the owners' actual fault or privity. The cause of the loss in question here was not only the negligent navigation, in the popular sense of the term, of the master, but was also due to what I have called the want of capacity to maintain sufficient steam pressure and also to the incompetency of the crew to bring out the best results of which the boilers were capable. The accident of the jamming of the tow ropes by reason of the action of both tug and tow in a heavy sea, which finally led to the abandonment, brought about a crisis due to the gradual failure of power. It is argued that these matters in the peculiar circumstances of this case, occurred without the owners actual fault or privity, both in law and in fact. Among these circumstances are the provisions of the contract. This names only "barges" and it is urged that to tow a scow was outside the scope of the owners' engagement, nor could it have been foreseen by them and so could not have been provided for. There is force in this contention if the facts support it. At the trial leave was asked by the plaintiffs to amend by claiming reformation of the contract so as to make it express the true bargain. I then intimated that

(1) [1876] 45 L.J. C.P. 783. (2) [1909] 12 Ex. C. R. 325.

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reformation did not seem to be necessary but on reflection I have come to the conclusion that the plaintiffs may, if they desire it, so amend and that upon their doing so, the contract should be reformed *quantum valeat* by adding the words "and scows" after the word "barges." The evidence makes it clear that these words were omitted by inadvertence, to use the language of Mr. T. R. Kirkwood, and also that he knew the equipment of the plaintiffs included "scows" and that the *Whelan* was intended to do for the plaintiffs the work done by Russell's tug *Lakeside*, whose place this tug was to take, and I so find. I am not convinced that reformation is strictly necessary as this action does not depend wholly upon a breach of the agreement to tow but may succeed irrespective of the contractual relationship. But as the defence was permitted to set up a claim to limit liability on an application made 2 days before the trial, it seems only fair that the plaintiffs should be allowed to assert that the true bargain should be the condition under which that limitation should be determined. Had the facts appearing at the trial been before me when granting leave to set up section 921 I should have made this a term of granting that leave. Irrespective of this relief I am of the opinion that the owners cannot successfully assert want of actual fault or privity. Improper navigation is not restricted to what happens while afloat; it may include antecedent matters which reaching in effect into the voyage, so control the navigation attempted as to permit it to be rightly described as improper. In the *Warkworth* (1), Lord Esher, M.R., said that "all damage wrongfully done by a ship to another whilst being navigated, where the wrongful action of the ship whereby the damage is

(1) [1884] 9 P.D. 145, at p. 147.

done is due to the negligence of any person for whom one owner is responsible is comprised within the Statute." In that case the collision was caused by the ship's steering gear failing to act at a critical moment, due to the negligence of a person on shore employed by the owners in overlooking the machinery. See also *Diamond* (1).

The owners themselves selected this tug to do the plaintiffs' work. The correspondence makes this plain; their descriptions and their proffers before the contract was made indicate very clearly that this vessel was virtually warranted to be fit to tow whatever the plaintiffs had been in the habit of entrusting to tug boats. The Master was given definite instructions that he should take his orders from the plaintiffs and the owners did not suggest any limitation on these orders. It was of course open to the Master to decline a job for which his tug was not fitted, but that would not be because the owners had so directed him, but would have rested upon a personal election not to undertake too hazardous an enterprise. His not refusing, but accepting the tow was, so far as the owners are concerned, in line with their instructions to him. Where a principal gives open instructions he cannot restrict them after the event and if they are ambiguous he is bound by the construction placed upon them by his agent. In this case if the tug was insufficiently equipped and manned for the duty undertaken by their agent, or was structurally unsuited to its probable requirements, the owners cannot set up that what he did was so far outside what he was entitled to do that they could not in law be privy to it. And upon the contract, as reformed, there can be

(1) [1906] P. 282, and Mayer's Admiralty Law, P. 163.

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no doubt that they must stand to the plaintiffs in the position of supplying a vessel unable to perform its task through want of sufficient power and suitability in structure, as well as through lack of a capable and efficient crew. The restricted space in which the work of firing and clearing away the ashes had its effect in reducing the power. Whether the remark made by Mr. T. R. Kirkwood as to which I accept the evidence given on behalf of the plaintiffs in reply, referred to the better staying qualities and boiler efficiency or to the structure and layout of the sister tug *Metax* or to its crew, makes little difference. It discloses knowledge that there were defects in the *Whelan* or want of proper seamanlike qualities in the crew, and brings it directly home to the owners who must accept such responsibility as that knowledge casts upon them. *The Republic* (1). If nothing appeared in the case but the negligent navigation of the Master due to his want of decision and failure to use proper judgment as to what should have been done or the inefficiency of the crew and their refusal to do their duty, the owners would have a valid excuse under section 921. But the other matters raise quite a different question.

The statutory provision enabling liability to be limited in case of loss by improper navigation casts the onus on the owners of showing that what occurred was without their actual fault or privity. *Grain Growers Export Co.* v. *Canada Steamship Lines* (2). But if the damage arose because they had furnished a vessel which was not fitted for the task it undertook, and so caused the navigation to be improper naviga-

(1) [1894] 61 Fed., R. 109, Affirming [1893] 57 Fed., R. 240.

(2) [1917] 43 O.L.R. 330.

tion, then the section does not protect them. Incapacity to tow efficiently or to manoeuvre properly due to want of sufficient motive power, or want of suitable space to work in affects the navigation of the tug in such a manner that it cannot be said that what occurred was without the actual fault or privity of the owners.

It appears that the Kirkwood Steamship Lines were managing the *Whelan* and other vessels, and in this case, as appears by the two telegrams produced, stood in relation to the registered owner, T. M. Kirkwood, in this particular enterprise, as partners and equal sharers of the profits either of operation or sale. Neither, therefore, can be permitted to take advantage of the limitation clause in the statute. *Hughes* v. *Sutherland* (1). I hold that this defence fails and that limitation of liability cannot be allowed.

There will be judgment reforming the contract as indicated and condemning the *Whelan* in damages, to be ascertained by the Registrar in Toronto, for the loss of the cargo of the scow and for the costs of the repairs to the scow and such other damages if any as follow upon the liability declared. The counterclaim will be dismissed with costs. The defendants will pay the costs of the action and counterclaim up to and including the trial forthwith and the costs of the reference after the report is made.

I am indebted to each of the counsel for the speed and skill with which they conducted their side of the case.

(1) [1881] 7 Q.B.D. 160.

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Audette J.

APPEAL was taken from this judgment to the Exchequer Court of Canada, which appeal was heard before the Honourable Mr. Justice Audette on the 21st day of June, 1921, at Ottawa.

A. R. Holden K.C. for appellants.

S. Casey Woods, K.C., and *Mr. Jarvis*, for respondent.

AUDETTE J. now (this 27th June, 1921) delivered judgment.

This is an appeal from the Local Judge of the Toronto Admiralty District, in an action *in rem*, for injury to the plaintiff's scow No. 2, and for the loss of her cargo, when the scow was cut adrift on the night of the 11th November, 1920, when beyond Port Hope, on Lake Ontario.

The details of the case are clearly and abundantly set out in the reasons for judgment of the learned trial judge and I am therefore relieved from the necessity of repeating them here on appeal. In the view I take of the case, the controversy resolves itself into a very small compass.

As I have already had occasion to say, sitting as a single judge, in an Admiralty Appeal from the judgment of a trial judge, that while I might, with diffidence, feel obliged to differ in matters of law and practice, yet as regards pure questions of fact, I would not be disposed to interfere with the judge below, unless I came to the conclusion that it was clearly erroneous. *Fraser* v. *S.S. Aztec* (1).

(1) 20 Ex. C. R. 450.

The Supreme Court of Canada further held that when a disputed fact involving a nautical question (such as the one raised in this case) with respect to what action should have been taken immediately before the accident, is raised on appeal, the decree of the court below should not be reversed merely upon a balance of testimony. *The Picton* (1).

The trial judge in the present case has had to pass upon testimony of a very important nature and in respect of which there is much conflict; but on the other hand he has had the opportunity of hearing and seeing the witnesses and testing their credit by their demeanor under examination before him. In these circumstances he disregarded the testimony of some of them whom he disbelieved. *Riekman* v. *Thierry* (2); *Dominion Trust Company* v. *New York Life Insurance Co.* (3). Therefore with his findings upon the facts, I will not interfere.

The only question which calls for special consideration is that of the statutory limitation of liability to $38.92 for each ton of the vessel's tonnage, in the case provided for by sec. 921 of the Canada Shipping Act, ch. 113 R.S.C. 1906.

The solving of the question is not without difficulty. Numerous cases were cited at bar by counsel respectively upon the point of law. The cases most stressed were that of *Wahlberg* v. *Young* (4); *Fulham* v. *Waldie* (5); and *McCormack* v. *Sincennes-McNaughton* (6). This last case was carried on appeal to the Supreme Court of Canada and the reasons for judgment of the

(1) 4 S.C.R. 648.
(2) 14 R.P.C. 105.
(3) [1919] A.C. 254.
(4) [1876] 45 L.J., C.P. 783.
(5) [1909] 12 Ex. C.R. 325.
(6) 19 Ex. C.R. 35.

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learned judge of that tribunal were much discussed and relied upon. This judgment on appeal, important as it is, for some reason unknown, has not been reported.

All of the cases cited, and especially those specifically mentioned are distinguishable on the facts from the present case in that the owners of the defendant ship here expressly made themselves privy to all that occurred after the tug had cut the scow adrift and had sought shelter in the haven for the night. I refer to the fact creating this privity below.

Accepting, as I do, all findings upon what occurred before the scow was cut adrift and when the tug put in Cobourg for the night, we face the other phase of the case, wherein arose the question as to whether or not on the following day the tug did her duty and acted with proper seamanship when she did not go out to rescue the scow. It appears from the evidence that while it was blowing on the 12th, that it was far from blowing a gale, or that there was a wind blowing that would justify a vessel of 84 feet not going out. It would seem to be a case of funk. No one at trial seems to have assumed the impossible task of justifying this conduct.

Now, on the day following the cutting adrift of the scow, the emergency arose, constituting a concrete duty upon the crew, to avoid the consequences of the negligent events of the first day; to avoid the result, as found by the trial judge, of an antecedent negligence. And, between the first day and the end of the second day, a time came when the happening of the casualty could have been avoided and in what happened on the second day the owners of the vessel clearly became privy as appears by their telegram (exhibit 3) to the Captain, which reads as follows, viz.:

"Montreal, Nov. 12, 1920.

"Captain Henry Malette,

"Tug *Mary Francis Whalen*,

"Cobourg, Ont.

"Point Anne Quarries wire that you threw scow adrift without reason and that scow still floating and you refuse to go for it. If you can save this scow without risk to your tug do so.

"Kirkwood Steamship Line."

Another telegram (Exhibit 15) to the same effect, is sent, on the same day, by the defendants to the plaintiff.

The owners had control over their tug and crew and exercised it by that telegram. They thereby became privy to and partakers in responsibility with all its legal consequences in respect to all actions taken by the tug on the 12th November—actions which resulted in the scow being allowed to run aground and become a wreck. This happened for want of the tug running out from Cobourg in weather which, under the evidence, should not justify keeping in harbour or haven a vessel like the *Whalen*. The telegram contains the words "without risk to your tug." But the evidence establishes that there was no storm prevailing on the 12th—far from it. There is always some risk inherent to navigation, and this seems to have given rise to the doctrine popularly called "perils of the sea," understood in its more extended sense as covering all accidents on the watery plane. *Todd & Whall* (p. 249), impliedly recognizing that risk, say that a mariner must always be ready for a "sea fight."

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POINT ANNE QUARRIES LIMITED v. THE SHIP M. F. WHELAN AND THE OWNERS THEREOF.

Reasons for Judgment.

Audette J.

It appears from the evidence that from the morning of the 12th to the morning of the 13th, the scow could and should have been easily saved. Captain Malette himself repeatedly stated that there was no danger for his tug to navigate in that weather and that "she could winter out there."

Now, after the tug cast the scow adrift and sought comfort rather than necessary shelter in the harbour of Cobourg, there is no doubt that there came a time when the impending catastrophe could have been averted—but for self-created incapacity on behalf of the defendants—and the negligence which produced a state of disability, in which the crew and the owners contributed, is in very truth the efficient, the proximate, the decisive cause of the mischief. *Brenner* v. *Toronto Ry. Co.* (1); *B.C. Electric Ry. Co.* v. *Loach* (2).

In the circumstances of the case the statutory limitation of liability cannot be applied or allowed.

Under the evidence considered in its *ensemble*, weighing its conflict to the best of my ability, I am of opinion that the learned judge, who had the additional advantage of seeing and hearing the witnesses and so testing their credibility, has come to the proper conclusion, and I hereby affirm the judgment pronounced on the 7th April, 1921, on all issues and dismiss the appeal with costs. However, seeing that no additional costs were incurred in the consideration of this appeal, upon the counter claim, there will be no costs to either party upon the issue of the counter claim.

Judgment accordingly.

(1) 13 Ont. L.R. 423: (2) [1916] I.A.C. 719, at 725 et seq.