

TORONTO ADMIRALTY DISTRICT.

BETWEEN

THE LAKE ONTARIO AND BAY }
 OF QUINTE STEAMBOAT COM- } PLAINTIFFS;
 PANY, LIMITED }

1909
 May 8.

AND

MARY WILDER FULFORD.....DEFENDANT.

*Shipping—Collision—Rules of navigation—"Special Circumstances"—
 Claim for profits.*

Where the captain of a ship neglects, in the "special circumstances" of the peril then imminent, to observe the dictates of the highest prudence, and especially the just and peremptory measures of precaution which the Rules of Navigation enforce, the ship is liable for damages arising from a collision.

2. *Held*, that the profits that would have been made if the collision had not taken place are recoverable as part of the damages, and are not too remote.

THIS was an action brought by the plaintiff company against the defendant Mary Wilder Fulford, the life-tenant of the steam yacht *Magedoma*, for damages arising from collision.

The trial of the case took place at Kingston before the Local Judge of the Toronto Admiralty District on the 5th, 6th and 7th days of April, A.D. 1909.

Written arguments were subsequently put in, on which judgment was reserved. The facts of the case are set out in the reasons for judgment.

HODGINS, L. J., now (May 8th, 1909) delivered judgment.

This is an action brought by the plaintiff company against Mrs. Fulford, the life-tenant of the steam yacht *Magedoma*, for damages caused by the collision of the

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Magedoma with the steamship *Caspian* in Kingston harbour during the afternoon of Saturday, the 27th June, 1908.

The evidence proves that the steamer *Caspian*, which had been moored stem inwards on the north east side of Swift's dock, steamed stern outward on a semi-circular course from the dock about five o'clock that afternoon, and after steaming a certain distance out, commenced her voyage towards Lake Ontario, taking a semi-circular course under helm hard-a-starboard on a course to port so as to pass clear of the dock. That about the same time the steamer *Kingston* which had been moored at the other side of the dock also steamed stern outwards taking a more direct course out, and then started on her voyage towards Lake Ontario on the port side of the *Caspian*. The yacht *Magedoma* had been moored bow inwards at the same side of the dock and between the *Kingston* and the shore.

After the two steamers *Caspian* and *Kingston* had left the dock, and were backing out preliminary to commencing their respective voyages, the master in charge of the *Caspian* noticed that the *Magedoma* was commencing to back out from the dock, and thereupon the *Caspian* gave two whistles to warn the yacht that he was directing his course to port, which was the proper course to enable him to clear the dock; but no notice was taken of the warning or any responsive whistle given by the *Magedoma*.

When nearing the dock the *Caspian* was steaming at about ten miles an hour, and the master of the *Caspian* seeing that the *Magedoma* was coming on towards a course intersecting that which the *Caspian* was taking, ordered the helm first amidship and then hard-a-port, so as to steady her and prevent the *Caspian's* stern swinging on to the *Magedoma*.

That the *Magedoma* continued backing and impinging on the course of the *Caspian* is shown from the evidence

of Captain Mills of the *Caspian*; and this fact is proved by Captain Johnston of the *Magedoma* who said that he gave the yacht two kicks astern to back her from the dock so as to turn the bow of the yacht; and both he and the seaman Soderstrom of the *Magedoma* would not deny that there may have been stern-way on the *Magedoma* from these "kicks astern" when the boats came together.

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Both the preliminary act of the defendant, and the statement of defence, allege that the collision was occasioned by the fault of the *Caspian*:—the preliminary act stating that: "Shortly before the accident, the master of the *Caspian* blew two whistles, which, to the master of the *Magedoma*, indicated that the master of the *Caspian* was to starboard his helm and keep to port. The master of the *Caspian* did not carry out this signal, but acted opposite thereto and sent his helm to port, and kept to the right." The fifth paragraph of the statement of defence is substantially to the same effect. These whistles of the *Caspian* were not answered by the *Magedoma* as they ought to have been; for the rule is that the duty to answer a signal is as imperative as is the duty to give one.

In answer to my questions on this charge, the master of the *Caspian* gave the following evidence:

"Q. You said while you were going full speed ahead "on the semi-circular course you kept your helm hard-a-starboard? A. Kept the helm hard-a-starboard, yes.

"Q. Then when you saw the collision imminent you "steadied the *Caspian*? A. Yes.

"Q. How did you do that? A. Putting the wheel to "port. The helm had to go amidships and then I told "him to port.

"Q. Which did you do? A. I told him to steady, "and the wheel was a-starboard, and he put the wheel "to port to steady her.

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“Q. As far as you can estimate, what was your rate of speed when you came to the dock to pass it on the semi-circular course you were taking, when you got abreast of the dock? A. I don’t suppose she could have been going over ten miles anyway, because she hadn’t got under headway yet.

“Q. When you were going this ten miles an hour how far was the yacht from your course? A. She probably might have been 50 or 60 feet in from where I would have gone.

“Q. If instead of steadying the *Caspian* by putting her helm to port you had kept it hard-a-starboard, and on the semi-circular course, would you have kept away from the yacht? A. No sir, her stern would have swung in on the yacht; her stern was coming in all the time on the yacht.

“Q. Now when you saw the collision imminent, was the stern of the yacht across or nearing the course you were steering? A. Well, she was coming pretty near the line that I was steering on.

“Q. Was she moving? A. Yes, sir, she was moving.

“Q. Did her stern, when she was backing out, move towards the course you were steering on? A. Yes.”

And this is confirmed by the evidence of the customs officer, Mr. Comer, the agent Mr. Horsey, who were on the dock, and the chief engineer Leslie on the *Caspian*; all of whom said that the *Magedoma* had not stopped up to the time of the collision; and that she was still going backwards; two of them adding that the *Magedoma* was moving to cross the bow of the *Caspian*. And it is proved that the captain of the *Magedoma* waved his hand to the *Caspian* and towards the lake.

This evidence that the *Magedoma* was moving has not been contradicted but is confirmed by the evidence of the captain of the *Magedoma*, and one of the crew, both of whom said they would not swear that the *Magedoma* had

no stern way on her when the boats came together; and the force of the blow on the *Caspian*, which made a breach in her side aft of the paddle wheel of about 3 or 4 feet and back about 10 or 12 feet, confirms this.

The statement of defence further states: "Those in charge of the *Caspian* disregarded the provisions of the Navigation Rules adopted by Order-in-Council on the 25th April, 1905, and amended on the 18th of May, 1906, and particularly Articles 19, 27, 28 and 29."

Before considering these rules, it may be proper to cite here the view expressed by the Supreme Court of the United States on the right of a backing steamer as against a steamer on her regular course in mid-river. In giving judgment in *The Servia*, (1) the Court said "*The Noordland* [the backing steamer] was at no time before the collision, on a definite course as contemplated by the statute and rules of navigation; and on the facts found she cannot claim she had the right of way against the *Servia*. The statutory and steering and sailing rules have little application to a vessel backing out of a slip before taking her course; but the case is one of 'special circumstances' under Rule 24 [Canadian Rules 27 and 29] requiring each vessel to watch and be guided by the movements of the other." See further as to "special circumstances" *The Tweedsdale*, (2) *The Prince Leopold de Belgique*. (3)

This view of the rule as to "special circumstances" did not appear to have been entertained by the captain of the *Magedoma*, who claimed before me that it was not his duty to go ahead and get out of the way of the *Caspian*, and so he allowed his yacht to continue her stern-way in backing towards the course the *Caspian* was taking at the speed proved, instead of making her engine move her ahead, and away from that course, and so giving the

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(1) 149 U. S. at p. 156.

(2) (1889) P. 164.

(3) (1909) P. 108.

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Caspian the right of way which his wave of the hand to her seems to have indicated. And as to the duty to exercise reasonable skill in such an emergency, see the *Sunlight*, (1). And as to the duty where there is a "chance of escape from a collision", and an "actual necessity" for escape, it is admitted that a captain is justified in taking the benefit of the chance, although it necessitates a departure from the rules, see *The Benares*, (2).

And in *The Rockaway*, (3) the Court said in another backing out case: "The collision in this case was caused by the fault of the tug backing directly under the bows of the steamboat then approaching in plain sight, without any signal having been given to the steamboat to show an intention on the part of the tug to back across her bow. I see no fault on the part of the steamboat. There was no time after the intention of the tug to cross the bow of the steamboat was manifest, for the steamboat to do more than she did." See also *The Koning Willem I*, (4).

Before the note to rule 21 and the rules 27 and 29 were adopted, Dr. Lushington in the *John Buddle* (5) said: "All rules are framed for the benefit of ships navigating the seas; and no doubt circumstances will arise in which it would be perfect folly to attempt to carry into execution every rule however wisely framed. It is at the same time of the greatest possible importance to adhere as closely as possible to established rules, and never to allow a deviation from them unless the circumstances which are alleged to have rendered such a deviation necessary, are most distinctly proved and established; otherwise vessels would always be in doubt, and doing wrong."

(1) (1904) P. 100.

(2) 9 Pro. D. 16.

(3) 25 Fed. R. 775.

(4) (1903) P. 114.

(5) 5 No. Cas. 337.

And in considering any "special circumstances" warranting a departure from the rules, it must be remembered that these rules were not intended to prevent collisions but to prevent a situation so fixed as to involve "the risk," or "the probability of the risk," of a collision.

Since Dr. Lushington's judgment amendments have been made, and some new rules have been added, so as to provide for special emergencies which suddenly arise and which had not been otherwise provided for. Thus in the note to rule 21, if the risk of collision is so close that it cannot be avoided by the action of the giving way vessel alone, the other vessel "shall take such action as will best aid to avert the collision." Rule 27 provides that, "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 necessary in order to avoid immediate danger. And rule 29 is more far reaching by providing that "nothing in these rules shall exonerate any vessel, or the owner, or master, or crew thereof, from the consequences * * * of the neglect of any precaution which may be required by the ordinary practice of seamen, or by the special circumstances of the case." And this rule is in harmony with the observations of the court in the *Santiago de Cuba* (1). "They demand that in circumstances of peril the dictates of the highest prudence, and especially all just and peremptory rules of precaution shall be observed."

In this case I find that when the possibility of a risk of collision was imminent, the *Caspian* was on her regular course steaming at the rate of ten miles an hour, that she promptly steadied her course to prevent the swing of her stern causing her to strike the *Magedoma*, that after the *Magedoma's* engine had been given two kicks to give her stern-way and to back out from the dock, it was not

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(1) [1873] 10 Blatch. at p. 455.

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reversed so as to give her headway, and out of the course intersecting that on which the *Caspian* was steaming at the rate mentioned, and that she neglected in the special circumstances of the peril then imminent, to observe the dictates of the highest prudence, and “especially the just and peremptory rules of precaution” which the regulations enforce; and that it was her duty to cause her engine to move her ahead so as to keep her out of the course the *Caspian* was taking, as would clearly have best averted the collision.

The defence contends that the damages claimed by the *Caspian* cannot include the loss of profits that might have been made had the *Caspian* been able to continue her voyage on the Saturday afternoon of the collision; the proposed voyage was from Kingston to Charlotte or Rochester, then to Coburg and Port Hope and return to Charlotte, and then back to Kingston. The Sunday continuation of the voyage is objected to by the defendants as being an “excursion.” But this objection is not sustained by the Lord’s Day Act for it allows “the continuation to their destination of trains and vessels in transit when the Lord’s Day begins, and work incidental thereto.”

And as to estimated profits lost by the cancellation of the proposed voyage then just begun, I think they are allowable under the case of *The Argentino* (1) as the profits the *Caspian* might ordinarily and fairly be expected to earn on her advertised voyage, and which but for the collision might have been realized by the plaintiff company.

And in giving judgment in the House of Lords, Lord Herschell said, “I think the damages which flow directly and naturally, or in the ordinary course of things, from the wrongful act, cannot be regarded as too remote. The loss of the use of a vessel, and of the earnings which would

(1) 13 P. D. 61 and 191; and in appeal, 14 A. C. 519.

ordinarily be derived from its use during the time it is under repair, and therefore not available for trading purposes, is certainly damage which directly and naturally flows from a collision. And if at the time of the collision the damaged vessel had obtained an engagement for an ordinary maritime adventure, the loss of the fair and ordinary earnings of such a vessel on such an adventure appear to me to be the direct and natural consequences of the collision."

I therefore assess the damages to which the plaintiffs are entitled against the defendant at \$460.76, costs to follow the event. The claim of the defendant for damages against the *Caspian* is dismissed.

Solicitors for plaintiffs: *Smythe, King & Smythe*;

Solicitor for defendant: *H. A. Stewart*.

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