

TORONTO ADMIRALTY DISTRICT

1927  
Jan. 4-7.  
Mar. 8.

BETWEEN:—

KEYSTONE TRANSPORTS LIMITED . . . . PLAINTIFF;

AND

THE OTTAWA TRANSPORTATION }  
CO., LTD. . . . . } DEFENDANTS.

*Shipping—Collision—Absence of proper lights—Responsibility—Negligence—Barge's responsibility.*

The tug *Florence* was at night coming down stream in a narrow channel, in which and in the waters below it, there was a cross current, towing a string of barges and proceeding without the proper regulation lights upon the barges, when a collision occurred, with an upgoing vessel. The weight of evidence was that the Master of the upgoing vessel was misled, by the absence of proper lights, into accepting a passing signal.

*Held* that the tug and barges were negligent in deliberately breaking Rule 12, and thus misleading the upgoing vessel, and in failing to keep a proper and sufficient lookout, and were liable for the damages caused by such collision, notwithstanding the acceptance of the passing signal.

2. That though the barges, each in charge of a crew, are bound to obey the orders of the Master of the tug, the crew remains responsible for the lighting and watching on their particular barge.

[Certain findings were made by the judge, in this case, in reference to the navigation of the waters just west of the Lachine Canal, which should prove useful to all vessel owners and mariners traversing these waters.]

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This was an action for damages by collision between barges in tow of the tug *Florence* and the steel-vessel *Keybell*, in the waters just west of the Lachine Canal.

The action was tried before the Honourable Mr. Justice Hodgins at Ottawa, on the 4th, 5th, 6th and 7th days of January, A.D. 1927.

*Francis King, K.C.*, for plaintiff.

*R. C. Holden, Jr.*, for defendant.

The facts are set out in the reasons for judgment.

HODGINS L.J.A., now (March 8, 1927), delivered judgment.

Action tried at Ottawa for damages done to the SS. *Keybell* owned by the plaintiffs, due to a collision between her and barges in tow of the tug *Florence* owned by the defendants. The collision took place at 1.15 a.m. on the 12th May, 1925.

The *Keybell* is a steel vessel of 1,254 gross tons, 250 feet long, 42 feet and 6 inches beam, and drawing 13 feet (light). The tug *Florence* of 61.53 tons gross and 23.59 net tons, 87 feet long, 19 feet and 6 inches beam, and 8 feet 10 inches draught. The tow consisted of 9 barges without power, but with rudders, seven of them being 124.5 feet long and 24.5 feet beam, and the remaining two barges being 90 feet long and 20 feet beam. Their draught ran from 7 feet 6 inches to 7 feet 10 inches, and they were arranged in 4 tiers each consisting of two or three barges connected by tow lines about 10 feet long. This gives about 580 feet of distance between the stem of the tug and the stern of the last of the tow.

The questions in this case that were thoroughly debated may be shortly stated. They were first, whether a tug towing a string of barges and coming down stream at night in this narrow channel and giving a passing signal is entitled to assume that an upbound steamer will take that signal as a warning to stay where she is and not attempt to pass till the tug and tow get to a position satisfactory to themselves, or can she add to the passing signal another signal having that recognized meaning.

Second: Whether or not such extended meaning can be given to the passing signal, was the *Keybell* in a position

when she received it to remain where she was? Are the position and responsibilities of each vessel, the tug and the steamer, governed exclusively by Rule 25 as modified by Rules 37 and 38?

Third: If the barges being towed had not proper regulation lights on them, and if this misled the *Keybell* into going on, is the tug disabled from contending that the *Keybell* should have acted in the manner suggested, and does it in fact cast the responsibility for the collision under the circumstances of this case on the tug and tow?

It is the third question on which the case must turn, the others being really involved in it.

The collision occurred about the black stake in the ship channel, which has no visible banks and leads about north-west from the end of the piers leading out of the Lachine Canal into what is known as the cut, a narrow channel about 250 to 300 feet wide, which bends to the southwest at the black stake, and extends for over three-quarters of a mile in that direction.

The tug *Florence*, downbound with her barges in tow, when at a point in the cut shown on exhibit 3 and so marked, gave two blasts of her whistle and proceeded down the cut, intending to take her northern or port side of the channel in making the turn and straightening up for the Lachine Canal. The *Keybell*, upbound, had come through the Lachine Canal and had passed the end of the pier leading therefrom before she saw the tug's lights and heard her two-blast signal which was answered at once by two blasts. The tug was then about a mile, or somewhat less, distant and in the cut. The vessels were well within two miles of each other during the period in question.

The tug proceeded on her course at 4 miles an hour and when her barges in tow were about opposite the black stake they had angled down across the channel and into the southern half of it, where some of the barges came into collision with the *Keybell*. At this time the Master of the tug says that 110 feet would have cleared all the barges and that three-quarters of the tow was out of the cut. The black stake was seen by the *Keybell's* Mate, Hawthorne, ahead of and over the bow of the *Keybell* when it was passing the second tier, and it was then five or six feet from the

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stern of the last tier. He thought the barges had gone over the stake. In this, Harle, the wheelsman, concurs. Scullion, the second engineer, says that before the *Keybell* grounded, as it did almost immediately after the collision, he saw the black stake 15 feet away just opposite to where he was standing at the starboard gangway. The *Keybell* was in collision with the second tier of barges, having passed clear of the tug by 40 or 50 feet, and clear of the first tier by between 20 and 30 feet; the third tier also came in contact with the *Keybell*.

At the point where the collision occurred in this narrow reach of water which I have mentioned, including the cut, and the waters to the east, west and southwest of it, there is a current which comes from a northwesterly direction and sweeps across the channel, going over the shoal water to the south of it, and heading about east into the Lachine Rapids, the head of which, as shown on exhibit 3, is below the point of collision in a southeasterly direction, and not far off. The master of the *Florence* admits that the current is stronger at the black stake above mentioned.

The current is estimated at from 3 to 4 miles an hour, some of the witnesses putting it more and some less, and it is said to be more strongly felt just on leaving the piers leading to the Lachine Canal.

From the whole of the evidence I draw the following conclusions: A tug and tow, down-bound, coming through the cut, is very likely to take the port or northern side of the channel in order to make the turn, because at the turn barges are apt, owing to the force of the current, to sag downward into the other or southern half of the channel and therefore the northern side forms a safer course. To signify an intention to do this two blasts are necessary, and this, I find, is the usual signal in such a case. It was suggested that a two-blast signal given in the cut is understood by vessels coming out of the Lachine Canal to indicate that they should stop and wait till the tow had rounded the bend, and had straightened away to enter the canal, but I do not find that there is any such meaning attached to the signal required to be given by the rules, which extends or modifies it, though it is in evidence that a check signal might be, and often was, sounded immedi-

ately after the two blasts which would have that meaning. This, however, was not given.

I find, further, that up-bound steamers when meeting a tug and tow, if the tug has more than one barge or scow in tow, and they have warning in time, usually wait inside the piers.

I further find that if an up-bound vessel has left the piers with such knowledge and being aware of the tendency of barges and scows to tail down into the south half of the channel, it may, and in some cases, must, disregard the two-blast signals, and giving an alarm signal, proceed towards the range light on the Lachine wharf heading well up to the extreme north of the channel in order to let the tug and tow go safely by, leaving in such a case three-quarters of the channel for them.

I also find that if an up-bound vessel has no reason, due to the length of the tow, to fear that her southern half of the channel will be blocked or interfered with, she can count on safely navigating in answer to the accepted two-blast signal, her southern half of the channel.

I also find that it would not be safe for an up-bound vessel, having passed out beyond the piers leading from the Lachine Canal, to go at less than half speed at night. The night in question is described in the plaintiff's Preliminary Act as dark, and the weather is described, in the defendant's Preliminary Act, as clear, with a fairly strong breeze from the northwest, i.e., from the same direction as the current. See *Cayser, Irvine & Co. v. Carron Co.* (1). The danger lies in the force of the current and the shoal water immediately to the south of the channel.

I further find that scows and barges which draw less than 12 feet can, if they take the southern half of the channel, safely pass somewhat to the south of the black buoy as a sufficient depth of water exists at that point. This is agreed to by Lapine and Legault called for the defendants.

Having in view these conclusions, it is necessary to consider the exact position which confronted both the up-bound steamer and the tug and tow in this case, before the collision.

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(1) (1884) 9 A.C. 873 at p. 880.

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The tug when it gave its signal was about half way between the upper and lower end of the cut. The *Keybell* was, I find, some 500 feet past the end of the pier at the north side and about at the red fixed light off the end of the northern pier and first saw the tug's lights from that position. The evidence of the wheelsman, Harle, on the *Keybell*, fixes it somewhat further on as being after the vessel left the end of the south pier. Much of the evidence for the defence as to seeing the *Keybell* between or behind the pier is explained by noting that the south pier extends further out than the north pier, and that when past the north pier there is no protection to the north unless it be what was somewhere called a crib. What is meant by 'leaving the piers' and the distance from the 'pier' to the turn into the channel are to be read and understood, having this in mind.

Having accepted the tug's signal, the *Keybell* reduced to half speed and proceeded on her way.

The night is described as a dark one and the lights which were seen by the *Keybell* on the tug were two masthead lights and a green light, which indicated to the master that she had a tow. No other lights were seen at this time, according to the evidence given by all those on the *Keybell*, and neither the master of that vessel nor anyone else on board had any intimation that the *Florence* was towing barges which stretched out as far as did the four tiers of barges behind her on this occasion.

The *Florence* had in fact another white light lower down on the mast to which the two towing lights were attached. It was not seen by anyone on the *Keybell*. If it had been seen no great importance would have been attached to it, as the third towing light does not, above Montreal, indicate the length of the tow, and further in this case the master of the *Florence* admits that during the season of 1925, no matter what the length of his tow was, he carried these three white lights.

I cannot, in view of the fact that no one on the *Keybell* saw the third light, there being no rule giving it any special significance in the waters above Montreal, and particularly in the absence of the usual coloured lights to be carried by barges in tow, fasten upon the *Keybell* the warning

which that third light would have had in other waters, if seen, or that which, whether seen or not, would, if in conjunction with those coloured lights, have been given to her master, namely, that a long tow was following the *Florence*. The admission by the master of the *Keybell* that if he had seen the third light he would have taken it to mean a 600 foot tow, when in fact he did not see it, nor did anyone else on the *Keybell*, cannot afford a reason for a finding of negligence against him. In that respect he must be judged on what he knew and saw unless it is shown that he neglected precautions which might have warned him.

It is to be noted that Cardinal, who saw the towing lights of the *Florence* on another occasion at about 3½ miles away, noticed only two lights, while Mainville, who saw them at 3 miles, did not at first see three lights, but the third one came into his view "quite a piece" before passing.

But it is said that these barges were lit with white lights and that they should have been seen and if so the necessary warning was in fact actually given.

This makes it of importance to consider the evidence as to the way in which the barges themselves were lit.

I find the testimony upon this point very unsatisfactory in view of the clear issue involved. It was said by the master of the tug that there were white lights on all the barges, one lamp on each, that before the accident he looked back and saw that there was one on each, placed on top of the load of lumber carried by each barge, and that they could be seen all around and that after the accident he saw these same nine lights.

The evidence of those called to support him is not very convincing.

Morinville, the engineer of the tug, says he noticed some white lights on the tow but cannot say where.

Laframboise, the wheelsman, says he noticed two lights on the first two tiers, on the right hand side.

Malette, deckhand, was not asked about the lights.

Vesina, the second engineer, says he saw several white lights on the barges, but cannot say the number, and that what he saw were on the right-hand barge of the first tier, and some going back beyond the first tier.

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Desforges, captain of the barge *Redfern*, which was in the third tier, says that there was a white light lantern on his barge at the right hand side, and that the barge *Mylot*, which was in the last tier, had a light on a mast three or four feet above the load, and it was behind the mast which stood in the middle of the last tier of barges. This description of the position of the light on the last barge seems to place it in the proper place under Rule 12, but it does not show that the direction therein that all in the tier should be similarly equipped was complied with. The lights, such as they were, were not seen by the master of the *Keybell* till he was nearing the first tier of barges.

Hawthorne, mate on the *Keybell*, was in the bow at the collision and says he only saw 1 light and that on the pole of the last tier. In this Harle, who was with him there, and the watchman, Peake, agree. Harle, when the *Keybell* was approaching the tug, saw no lights, other than what she carried.

It is singular that if these nine lights were lit and burning after the men on board the scows had gone to bed, they should not have been seen from the *Keybell*, for they are said to have been on top of the lumber piled to a height of 4, 5, 6 or 7 feet above the deck, which was itself 6 feet above the water. The importance of carrying proper lights is not to be offset by allegations that barges from the Ottawa carry white lights and that in this case there were some lights on some of the barges, nor by the fact, if it was a fact, that they all carried one white light. This last statement is all that is alleged in the preliminary act, and pleading of the defendants. The master of the tug seems to have been unacquainted with the fact that in 1925 there was any rule in force governing the lights to be carried. No one says that these lights were strung out behind the tug though many questions were asked as to what they would indicate if so placed.

As I read the rule No. 12, canal boats when towed single or tandem astern of steam vessels are obliged to carry a green light on the starboard side, a red light on the port side, and a small bright white light aft. When towed by a hawser in one or more tiers two or more abreast, the boat on the starboard side of each tier should carry a green light,



and the boat on the port side of each tier a red light, and each of the boats in the last tier should also carry a small white bright light aft. These coloured side lights are to be of such a character as to be visible on a dark night with a clear atmosphere, at a distance of about two miles, and are to show a uniform and unbroken light from an arc of the horizon of 10 points of the compass and so fixed as to throw the light from right ahead to two points abaft the beam on either side.

The minimum size of the globes is specified in figures.

The white lights, such as they were on the barges, neither complied with the rule nor were they placed on all the barges, nor did they show their light sufficiently far to be visible at the same time and distance as were the white and coloured towing lights of the tug. The master of the tug will not say that even his towing lights could be seen that night for a distance of two miles, though on other occasions there was evidence to which I have referred that two of them had been visible at a greater distance.

I think the provisions of Rule 12 are imperative, and it is important to note that practically without exception all those who were called as experts on either side to speak with regard to the action of the *Keybell*, are unanimous in emphasizing the fact that had four green lights been shown, the position and actions of the *Keybell* might and could have been radically altered, and her responsibility might have been very different.

The real question to be determined in this action, having regard to the importance of the green lights, is to determine whether their absence led, and justified, the master of the *Keybell* to take the course he did. He testified that there would have been no difficulty in passing the *Florence* with a tow, if the tow had consisted of a single barge, and that the absence of any lights behind the tow which he could see led him to pursue the course indicated by the tug's passing signal. The *Keybell* was, and kept, in her proper water, while the barges had come down well across the middle line because the tug could not hold them up in the current. The master of the tug admits that sagging is usual, due to the current, and that there is a stronger current at the black stake. The tug passed clear at 40/50

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feet, while the first tier of barges came within 20/30 feet. Barrett, an expert witness, master for 14 years, says that he would have done what the *Keybell* did under the circumstances of this case.

Had a check signal, as suggested by several witnesses as being used under conditions similar to those here, been added to the passing signal, although the tow lights were not visible, it would no doubt have acted upon the mind of the master of the *Keybell* in time to have enabled him to elect to take the course recommended by many of the experts, that is to blow an alarm and go well up to the northward toward the Lachine Wharf where he could have held up till the tug and tow had passed. But I cannot find, on the evidence, that at night it would be safe to attempt to hold up a vessel such as the *Keybell*, 250 feet long, in the way described by the defendant's expert witnesses, having regard to the position of the *Keybell* in the channel which is very narrow after passing the red gas buoy and has a shoal in it showing only 13 feet on the chart.

But it is a very different thing, to my mind, when, in obedience to the passing signal and in the absence of the green lights indicating the length of the tow, he proceeded, pursuant to the signal, to say that he was wrong in pursuing his course as he did. If he moved forward under the impression caused by the absence of lights or of the check signal, that he could safely negotiate a passage, in accordance with the passing signals exchanged, then I think he was justified in so doing. The tug master was apparently fully conscious of the fact that in taking the northern side of the channel he was doing so in order to hold up his barges as far as he could from overlapping the centre of the channel. He was, from his experience, aware of the current and the danger of passing at that particular point, and the nature of that danger. An expert witness for the defence, Lapine, says that in the case of light or sand barges (which are of light draught) an upbound steamer should be given the northern side of the channel. Obviously this is because such scows can safely pass over the ground south of the black stake.

While I am fully persuaded that it is most desirable that a vessel up-bound, when encountering a tug and tow down-

bound, which has the right of way, should wait if possible, and have given expression to my views on this point in the case of the *Poplar Bay SS. Co. v. the Charles Dick* (1), I think this case must be governed by the fact that owing to the plain neglect of Rule 12, and in the absence of any warning signal after the passing signal, the *Keybell* was misled as to the situation and came on to a point where it was apparently impossible to check or remain stationary in the current. Her grounding immediately after her change of course in trying to avoid the barges, is an indication of the danger to which she was exposed.

The tug carried no watchman, a precaution emphasized by the evidence of one of the defendant's witnesses, Desforges, who himself got up and kept station on his barge owing to danger which he realized might occur when rounding the bend. The barges had rudders and crews on board them, but no attempt was made in any way to avoid contact, by operating the rudders. Perhaps this was impossible, although just why that is so is not evident, as the master of the tug admits that they used the barge rudders above St. Anne's on account of the current. No one on the barges seems to have been alert except Desforges. The master of the tug himself sat in the wheelhouse and did not watch the *Keybell* till after the pilot had given the passing signals, when he first became aware of the near proximity of the ship. He then got up and took the wheel. His excuse that it was not till he was approaching the last gas buoy below the cut that he realized that the *Keybell* was intending to turn into the cut indicates to my mind a singular lack of care and alert attention which was demanded of him in difficult and narrow waters.

On the best consideration I can give to the case, I must hold that both the tug and tows which came in contact with the *Keybell* were negligent in deliberately breaking Rule 12 and thus misleading the *Keybell* and in failing to keep a proper and sufficient lookout. They thus bring themselves within Rule 38, while I absolve the *Keybell* from blame. The barges were each in charge of a crew who though bound to obey the orders of the master of the *Florence*, remain responsible for the lighting and watching on their par-

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particular barge. I may refer to the following cases: *The Mary Hounsell* (1); *The Geo. Hall Coal Co. v. SS. Maplehurst* (2); *B. W. B. Navigation Co. v. SS. Kiltush* (3); *The Hassel* (4); *Arctic Fire Ins. Co. v. Austin* (5); *Silliman v. Lewis* (6).

There will be a declaration to the above effect, and judgment in favour of the plaintiff against the defendants; the amount of the damages to be ascertained by the Local Registrar in Toronto, to whom it is referred.

The defendants must pay the costs of the action and of the reference.

*Judgment accordingly.*