1919
March 8.

BRITISH COLUMBIA ADMIRALTY DISTRICT.

THE TUG "JESSIE MAC",

PLAINTIFF;

v.

THE TUG "SEA LION",

DEFENDANT.

Common harbour of refuge—Act of God—Responsibility—Burden of proof—Inevitable accident—Definition of—Negligence—Costs—Rule 132, *Admiralty Practice.*

Held, 1. That where the action of tide and currents is so contrary to experience, that it could not be reasonably anticipated or foreseen it is to be regarded as an "Act of God", and collision due to such is an "inevitable accident".

2. That "inevitable accident" is that which the party charged with damage could not possibly prevent by the exercise of all reasonable precautions which ordinary skill and prudence could suggest.

3. That where "inevitable accident" is pleaded the onus is primarily on the plaintiff to show that blame does attach to the vessel proceeded against, and a *primâ facie* case in this behalf must be established.

4. That, on an action being dismissed on the ground that the damage was due to inevitable accident, costs will follow the general rule, unless special circumstances exist requiring a departure therefrom.

The *"Marpesia"*, (1872), L.R. 4 P.C. 212, referred to.

THIS was an action for damage done to the tug "Jessie Mac" alleged to be owing to defendant tug having given her a foul berth in consequence of which she was forced upon the rock and suffered damage.

1919

THE "JESSIE MAC" v. THE "SEA LION."

Reasons for Judgment.

The case was heard before the Honourable Mr. Justice Martin, Local Judge in Admiralty, at Vancouver, on March 6 and 7, 1919, and judgment was rendered on March 8 reserving the question of costs for further argument. This was decided on May 8, 1919.

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

Hume B. Robinson, for the plaintiffs.

E. P. Davis, K.C., and *James H. Lawson,* for defendants.

MARTIN, LOC. J. (March 8, 1919) delivered judgment.

It appears, briefly, that owing to a strong westerly wind with resulting heavy swells, a number of tugs, about ten in all, with their tows of booms of logs were forced to take shelter in Trail Bay under the lee of Trail Island off Sechelt, at various times between March 30 and April 1, 1918, inclusive, which small bay, it is common ground, is the customary and proper place in that locality to seek refuge in, though it is only of a limited area of safety and unsafe in easterly winds with the exception, probably, of the inside shore position between the southwest point of the island and a well-known rock, which was taken by the plaintiff tug upon its arriving first in the bay, which position is sheltered, to a considerable extent at least, from all winds.

After it had made fast its boom of 9 swifters to the shore by three wire ropes, it took up its position outside its boom, attached thereto by two lines, and later three other small tugs of a similar size, with

1919

THE "JESSIE MAC" v. THE "SEA LION."

Reasons for Judgment.

booms, arrived at various times and took up outside positions in like manner, *viz.*, the "Chieftain", the "Stormer" and the "Vulcan" which last had a double boom and lay outside of it like the others.

This was the position when the "Sea Lion" a much larger tug, came in with a large triple boom on the early morning of March 31, and anchored at a spot about 1,000 feet from the rock which it is clear is the best and safest position for herself for a large tug to take, and up till the afternoon of the next day she lay with her boom out to sea towards the east and away from the "Jessie Mac" under the westerly wind, and I have no doubt that it was not considered an unsafe position by the masters of the other tugs, otherwise they would have warned the master of the "Sea Lion" as the master and pilot of the "British Trident" did in the *"Woburn Abbey"* case,[1] though this failure is, of course, not at all conclusive. But that afternoon, with the tide flooding and the wind dying down, the "Sea Lion's" boom swung round to the south-west till the end of it touched the shore inside the point which protected the "Jessie Mac" and lay there in a position of no danger on a rising tide, with the expectation that at the change of the tide it would float off with the ebb in the usual way. But, *contrary to expectation, and all experience in the case of a westerly wind,* the tide continued to set in towards the shore after the ebb, and at 9.30 the "Sea Lion's" anchor began to drag, which put her in a position of danger to herself and her boom, which, if it were not got off the shore, would be broken up by a change of wind to the east, and, therefore, she raised her anchor and, heading to the north of east, started to tow the boom off the

[1] (1869), 38 L. J. Adm. 28.

shore, using the shore end of the boom, (which being a triple one, was very stiff and would bend inappreciably) as a fulcrum in so doing.

This manoeuvre was, I am satisfied on the evidence, the most proper one to take in the circumstances, and if nothing had happened it would, it is clear, have been successfully carried out without any damage to the adjacent small tugs fastened to the shore. But in the course of it the inmost triple boom, which was made up of 2 sections of 9 and 6 swifters, broke its fastenings, leaving the inner section of 6 ashore, while the outer swung round and fouled the head of the "Chieftain's" boom, which in turn caused two of the 3 wire shore ropes of the "Jessie Mac" boom to break, whereupon it swung out and round and forced the "Jessie Mac" upon said rock and damaged her as aforesaid. The breaking of the boom was later found to have been caused by a weak chain in one corner and a weak ring in another; the boom, or its chain or gear, were not owned by the "Sea Lion" nor had she made up the boom, but was simply towing it.

The defences set up are that the anchorage taken up by the "Sea Lion" was not a foul one; that there was no negligence because the extraordinary inset of the ebb tide in a westerly wind could not have been foreseen, and that the breaking of the boom gear was an inevitable accident.

As to the first and second, I am of opinion that, having regard to the circumstances, the anchorage was not a foul one and the "Sea Lion" was entitled to take it. Though her boom could, in a straight line, reach those fastened to the shore, yet it was prevented from so doing in the inevitable course of swinging round with the tide, by the point, in ordin-

1919

THE "JESSIE MAC" v. THE "SEA LION."

Reasons for Judgment.

ary circumstances, and I am unable to find that her master failed to take any reasonable precaution which ordinary skill and prudence could suggest, founded on his intimate knowledge of the locality. He was entitled to rely upon the ordinary action of the tide and current. *The "Rhondda"*,[1] and as their Lordships of the Privy Council said in that case he "had no reason to anticipate" that the ordinary risk had been increased. This is not like the well-known case of *The "City of Peking"*,[2] wherein their Lordships held that the master should have kept in mind the "undoubted fact" known to mariners and to him, "that in certain states of the weather" the tide at Kowloon is "deflected out of its ordinary course", and "a cautious mariner, is, therefore, "bound always to keep in view the possibility of "these currents being met with". In the case at Bar, on the contrary, such a current as caused the boom to stay in-shore instead of floating off-shore, was unknown to anyone. See also *Lack* v. *Seward*.[3]

On the question of foul anchorage I have this observation to make, that in certain circumstances where the question of safety to a ship, including her tow, is involved she is justified in taking that degree of risk which the circumstances may justify, *e.g.*, the rigour of the elements may impose a common risk upon all who seek refuge in a common harbour—and constitute "a cause which (a ship) could not resist"; *The "Innisfail"*,[4] *The "William Lindsay"*,[5] *The "Maggie Armstrong"* v. *The "Blue Bell"*,[6] and see *The "Annot Lyle"*,[7] on the point of only one course open for safety. And in weighing these cir-

[1] (1883), 8 App. Cas. 549.
[2] (1889), 14 App. Cas. 40.
[3] (1829), 4 C. & P. 106.
[4] (1876), 3 Asp. M.C. 337.
[5] (1873), L.R. 5 P.C. 338.
[6] (1866), 14 L.T. 340.
[7] (1886), 6 Asp. M.C. 50.

1919

THE "JESSIE MAC" v. THE "SEA LION."

Reasons for Judgment.

cumstances there must be considered the facts that tugs with tows of booms are of an unwieldy nature and the booms are easily broken up by rough water and they cannot face a state of weather which would present no damage to ordinary vessels; and in a haven require a considerable amount of space for a clear anchorage which may not be available in time of danger when many vessels are forced to resort to it for as much shelter as may be possible, in which circumstances it comes down to a question of good seamanship, "*Bailey* v. *Cates*".[1] As to the handling of a tug with scow in a narrow channel, see *The "Charmer"* v. *The "Bermuda"*,[2] *The King* v. *The "Despatch"*,[3] and of *Paterson Timber Co.* v. *The "British Columbia"*.[4]

If, therefore, the anchorage was not, and I so hold, a foul one, then the case resolves itself into one of inevitable accident, and the onus is primarily upon the plaintiff when the defence is set up—*The "Marpesia"*;[5] and it is beyond question here that the damage was primarily caused by inevitable accident, which means, as their Lordships of the Privy Council therein say at p. 220, that:

"We have to satisfy ourselves that something was "done or omitted to be done which a person exer- "cising ordinary care, caution and maritime skill, "in the circumstances, either would not have done or "would not have left undone as the case may be".

This definition was adopted by the Court of Appeal in *The "Merchant Prince"*[6] and *The "Schwan"* v. *"The Albano"*.[7]

1 (1904), 11 B.C.R. 62, 63; 35 Can. S.C.R. 293.
2 (1910), 15 B.C.R. 506.
3 (1916), 16 Can. Ex. 319, 28 D.L.R. 42, 22 B.C.R. 496, 501.
4 (1913), 16 Can. Ex. 305, 11 D.L.R. 92, 18 B.C.R. 86.
5 L.R. 4 P.C. 212.
6 [1892] P. 179.
7 [1892] P. 419.

1919

THE "JESSIE MAC" v. THE "SEA LION."

Reasons for Judgment.

Now it was not even alleged that the breaking of the boom fastenings could be attributed to any want of care on the part of the defendant, and more than was the case in the breaking of the mooring band or the jamming of the windlass in the *"William Lindsay"*, *supra,* and therefore, it follows that the action cannot be sustained and must be dismissed.

It is not, therefore, strictly necessary to consider the counter charges of negligence brought against the plaintiff for tieing up four booms together with their tugs inside except the "Vulcan" but it obviously is an act which might require justification in certain circumstances, though here the damage was done by fouling the second boom, the "Chieftain's".

But I think it proper to remark upon the strange fact that there is no evidence showing exactly how the "Jessie Mac" got aground; no person off her was called to explain it; her master did not know as he was out working on the end of the fouled boom, trying to free it, and the mate was not accounted for; her master did not know where the mate was, according to his statement to the master of the "Sea Lion" and so far as the evidence shows, no watch was kept on her and no efforts made to take the necessary precautions to protect her after the danger from the fouled boom became apparent. This is a very unsatisfactory state of affairs and might seriously prejudice the plaintiff's right to recover in any event. See *The "Kepler"*;[1] *The "Scotia"*;[2] *The "Hornet"*.[3]

With respect to the costs, I shall allow them to be spoken to in the light of the practice respecting the

[1] (1875), 2 P.D. 40.
[2] (1890), 6 Asp. M.C. 541.
[3] [1892] P. 361.

1919

THE "JESSIE MAC" v. THE "SEA LION."

Reasons for Judgment.

same in cases of inevitable accident as set out in the *"Marpesia", supra,* wherein it is laid down at p. 221:

"Their Lordships, therefore, conceive that the "general rule of the Court of Admiralty is in these "cases to make no order as to costs, and that in "order to justify an exception to that rule it must "be shewn that the action was brought unreasonably "and without sufficient *primâ facie* grounds".

See also *The "Innisfail"*.[1] How far this practice may be affected, if at all, by the later decisions in England under the *Judicature Act,* as noticed in *Williams and Bruce's Adm. Prac.* (1902), 95, I shall then consider.

* * * * *

The question of costs was subsequently disposed of after argument in a judgment handed down by Mr. Justice Martin, which is as follows:—

MARTIN, Loc. J. (May 8, 1919) delivered judgment.

In 1889 it was decided by the Court of Appeal in *"The Monkseaton"*,[2] that, as under the *Judicature Act* the Court of Admiralty had become a division of the High Court of Justice, there should be a uniform practice in all the divisions of the Court on the subject of costs, and, therefore, the existing general rule, that in the absence of special circumstances costs follow the event, should be extended to cover cases of inevitable accident, where no special circumstances required a departure from said rule.

It is submitted by defendant's counsel, that such being the case the rule was introduced into this Court in common with other Colonial Courts of Admiralty

[1] 3 Asp. M.C. 337.
[2] (1889), 14 P.D. 51.

1919

THE "JESSIE MAC" v. THE "SEA LION."

Reasons for Judgment.

by sec. 2 of the *Colonial Courts of Admiralty Act*, 1890 Imp., passed on July 25, 1890, wherein it is enacted that: "The jurisdiction of a Colonial Court "of Admiralty shall, subject to the provisions of "this Act be over the like places, persons, matters "and things, as the admiralty jurisdiction of the "High Court in England and the Colonial Court of "Admiralty may exercise such jurisdiction in like "manner and to as full an extent as the High Court "in England and shall have the same regard as that "Court to international law and the comity of "nations".

Such submission would therefore appear to be correct and furthermore there is the general rule No. 132 of this Court promulgated and approved under sec. 25 of the *Canada Admiralty Act*, ch. 29 of 54-5 Vict. brought into force on October 2, 1891, as follows: "In general costs shall follow the result; but "the judge may in any case make such order as to "the costs as to him shall seem fit".

In my opinion, therefore, the rule as to costs is the same in this Court as it is in the admiralty division of the High Court in England, and so that costs here should follow the general rule because there are no special circumstances requiring a departure therefrom as I held, there were in *McArthur* v. *The "Johnson"*,[1] and as was held in England in *The "Batavier"*.[2]

Action dismissed with costs.

[1] (1913), 14 Can. Ex. 321, 9 D.L.R. 568.
[2] (1889), 15 P.D. 37.