1933
Feb. 23.
May 27.

BETWEEN:

HIS MAJESTY THE KING, on the Information of the Attorney General of Canada ..... PLAINTIFF;

AND

JERRY PETITE, of the City of Halifax DEFENDANT.

Collision—Jurisdiction—Exchequer Court Act, R.S.C. (1927) c. 34, s. 30, ss. (d)—Non-Profit Earning Ship—Damages

The action is one for damages resulting from a collision between plaintiff's boat and that of defendant. The Court found that the collision was due to the negligence of the defendant.

Held, that the Exchequer Court has original jurisdiction in such a case by virtue of ss. (*d*) of s. 30 of c. 34, R.S.C., 1927 (The Exchequer Court Act).

2. That even though plaintiff's vessel is a non-profit earning ship plaintiff is entitled to recover from defendant damages based on maintenance, overhead and depreciation costs, for the time the ship was actually absent from her duties as a result of the collision, in addition to the actual cost of repairs.

INFORMATION of the Attorney General of Canada, claiming damages against the defendant for loss arising from a collision between plaintiff's boat and that of the defendant.

The action was tried at Quebec, before the Honourable Mr. Justice Angers.

A. C. Dobell, K.C., and *J. C. Fremont, K.C.,* for the Plaintiff.

D. MacInnes for the Defendant.

The facts are stated in the reasons for judgment.

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ANGERS J. now (May 27, 1933) delivered the following judgment:

By his action, the plaintiff claims from the defendant the sum of $3,343, as damages resulting from the collision of the Custom cruiser *Baroff,* the property of the plaintiff, with the vessel *Emile-Louis,* owned by the defendant, on the 8th day of May, 1931, in the Gulf of St. Lawrence, at a distance varying between nine and fifteen miles, according to the divers testimonies, off Mont Louis, on the Gaspe coast. The exact distance is of no importance for the determination of the issues.

That His Majesty the King, represented by the Minister of National Revenue, was, on the day of the accident, the owner of the *Baroff,* is admitted in the statement of defence (parag. 1); moreover, the fact appears from the Registrar's certificate of ownership filed as exhibit 1.

In his statement of defence, the defendant says that he does not admit that the *Emile-Louis* was owned by him on the 8th day of May, 1931; the fact, however, is established by the Registrar's certificate of ownership filed as exhibit 2.

The certificate exhibit 1 shows that the *Baroff* was registered at the Port of Saint John, N.B., and the certificate exhibit 2 shows that the *Emile-Louis* was registered at the port of St. John's, Newfoundland.

[Here the learned judge referred to the pleadings and continued:—]

Apart from the question of want of jurisdiction, which counsel for defendant at trial did not press and of which I shall dispose forthwith, the whole case practically narrows down to a question of facts: the first question to determine is whether the *Baroff* ran into and struck the *Emile-Louis* on her port side or whether the *Emile-Louis* crossed the bow of the *Baroff* and struck her on the stem; if I reach the conclusion that the *Emile-Louis* was responsible for the accident, there will remain for me to appraise the amount of the damages.

The evidence, as is often the case in similar matters, is conflicting; the witnesses for the Crown and the witnesses for the defendant disagree on a few points of minor importance but principally on the main issue, viz., the manner in which the collision occurred.

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In his statement of defence the defendant raises the question of lack of jurisdiction. At trial counsel for defendant did not urge this ground of defence. In the circumstances I do not think it is necessary for me to deal with the matter at great length. I said at the hearing that I considered the objection to the jurisdiction unfounded and, after examining the question, I have not changed my opinion. I think that, under subsection (*d*) of section 30 of the Exchequer Court Act (R.S.C., 1927, chap. 34), I have jurisdiction to hear this case. Besides the Crown has the privilege of choosing its own forum: Chitty on Prerogatives of the Crown, p. 244; *Farwell* v. *The Queen* (1); *Attorney-General* v. *Walker* (2).

[Here the learned Judge considered the evidence adduced at trial and then continued:—]

The weight of the evidence is, in my opinion, on the side of plaintiff.

Another reason which leads me to accept the evidence adduced by the plaintiff's witnesses in preference to the evidence given by the defendant's witnesses is that on board the *Baroff* they kept a log in which the entries were made regularly, in fact daily (dep. G. Roberts, p. 15; Ascah, p. 31), while there was no log on the *Emile-Louis* (dep. Vallis, p. 111). As a result of the absence of a log on the *Emile-Louis,* the engineer Vallis was unable to say if his vessel might have steered a little bit to port: dep. p. 111:

1227. Q. Is it not possible that the Emile-Louis might have steered a little bit to port?—A. I cannot say, I did not know at the time.

. . . . . .

1230. Q. You kept no log on board as far as the engine is concerned, a log that would show the movements of your engine?—A. No.

1231. Q. So that you do not know for sure whether the Emile-Louis might have gone a little bit to port?—A. No, sir, I could not say. She was generally steady.

The log evidently does not point out the cause of the accident, but, if properly and regularly kept, as it seems to have been kept on the *Baroff,* it undoubtedly serves to help the witness memorize the circumstances surrounding the accident; in the present case it indicates the movements, speed and course of the *Baroff* from the time she overtook the *Emile-Louis* until after the collision and it

(1) (1893) 22 S.C.R. 553, at 561, in fine, and 562.

(2) (1877) 25 Grant's Ch. Rep., 233, at 237; 3 Ont. A.R. 195.

flatly contradicts the statements of two of defendant's witnesses, Vallis and Miles, when they swear that the *Baroff* had not slowed down her speed when she came into contact with the *Emile-Louis*.

In cases of collision, where the evidence is conflicting, the Court should look into the probabilities of the two versions which are expounded and draw its own conclusion as to which is the more reasonable and likely: *The Mary Stuart* (1); *The Ailsa* (2); *Coy* v. *The Ship D. J. Purdy* (3), confirmed by the Supreme Court on April 6, 1920; *Vancouver Orient Export Co.* v. *The Ship Anglo-Peruvian* (4).

I cannot conceive that a customs cruiser, like the *Baroff*, in charge of a duly qualified and experienced master, accustomed to chasing and overtaking vessels engaged in the smuggling business would, deliberately or otherwise, run into a smaller and slower vessel, even if her officers wanted to board her, which was not the case in the present instance. The *Baroff* was a much faster boat than the *Emile-Louis;* her maximum speed was at least eleven knots whilst the *Emile-Louis* could not exceed 7½ knots; it was impossible for the *Emile-Louis* to escape from the *Baroff*, had she wished to do so.

Gordon Roberts, the master of the *Baroff*, approached the *Emile-Louis* from behind with the object of getting her port of registry; as the name was not visible, the *Baroff* came along the *Emile-Louis* on her port side and hailed someone on board asking what was the port of registry. The *Baroff* was at a distance of between 40 and 50 feet from the *Emile-Louis*, which was, in my opinion, a safe distance had the latter kept her course.

Mention was made of the likelihood of the *Emile-Louis* trying to ram the *Baroff*. I do not believe that the master of the *Emile-Louis* ever intended to do that. What happened, in my opinion, is this: either the *Emile-Louis* made a false manoeuvre and turned to port instead of starboard or, seeing the *Baroff* at a standstill and miscalculating the distance, she tried to pass in front of her to go off shore. In fact if there had been 2 or 3 feet more the *Emile-Louis* would have passed safely and no collision would have occurred.

(1) (1844) 2 Rob., 244.
(2) (1860) 2 Stuart's Adm., 38.
(3) (1919) 19 Ex. C.R., 212.
(4) (1931) Ex. C.R., 127.

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It is quite possible, as was suggested by counsel for plaintiff, that the *Emile-Louis* was afraid of being squeezed into territorial waters, which would explain her anxiety of going off shore.

There were on the *Baroff* one port and two starboard drive engines; it was urged on behalf of defendant that the fact of putting these three engines full speed astern, the port one first, then the middle one and lastly the starboard one, had the effect of sending the bow of the *Baroff* to starboard. The evidence on this point is contradictory and is far from being conclusive (see dep. G. Roberts, p. 23, and Petite, p. 98) and the fact that the *Baroff* was practically at a standstill when the collision occurred induces me to believe that the cause of the accident does not lie there.

It was argued with some strength that the *Baroff* was either an overtaking vessel, or a crossing vessel and that in the first case she was subject to article 24 of the Regulations for preventing collisions at sea and in the latter case to article 19 of the said rules.

Article 19 reads as follows:

> When two steam vessels are crossing so as to involve risk of collision, the vessel which has the other on her own starboard side shall keep out of the way of the other.

In the light of the evidence the *Baroff* was obviously not a crossing vessel.

The first paragraph of article 24, which is the only one that could possibly apply in the present case, reads as follows:

> Notwithstanding anything contained in these rules, every vessel, overtaking any other, shall keep out of the way of the overtaken vessel.

This article applies to vessels on courses passing one another; I doubt very much whether the *Baroff* was an overtaking vessel within the meaning of article 24. However, taking for granted that she was, I do not think that she transgressed in any way the requirements of article 24. It was the *Emile-Louis* who veered to port and as a consequence struck the stem of the *Baroff*.

As regards article 23, upon which the defendant also relied and which decrees that a steam vessel, directed by the rules to keep out of the way of another vessel, shall, on approaching her, if necessary, slacken her speed or stop

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or reverse, the proof shows abundantly that not only the *Baroff* did not violate its stipulations, but that, on the contrary, she literally complied with them: she slackened her speed, she stopped and she reversed. Another point raised by counsel for defendant is that the *Baroff* should have manoeuvred to go to port and that she could have thus averted the collision. I cannot agree with this proposition; the *Baroff* had practically come to a stop when the *Emile-Louis* suddenly turned to port and it was then too late, nay even impossible for the *Baroff* to execute the manoeuvre to which counsel for defendant pretends she should have had recourse. In reducing her speed when she approached the *Emile-Louis,* stopping her engines when parallel with her and putting her engines full speed astern when she noticed the *Emile-Louis* coming towards her, the *Baroff,* I think, adopted the best and only manoeuvre at her disposition, in the circumstances.

For all these reasons I have reached the conclusion that the *Emile-Louis* must be held responsible for the accident and pay the losses or damages resulting therefrom.

The evidence shows that the repairs to the *Baroff* cost $593: see exhibits 6 and 7; also depositions Davie, p. 44, and Stephen, p. 66. The plaintiff is entitled to recover this amount from the defendant.

There remains the claim for $2,750 for the deprivation of the use of the *Baroff* during eleven days, representing a sum of $250 per day.

The proof of record discloses that the *Baroff* was absent from her duties for a period of eleven days as a direct consequence of the accident. Repairs other than those occasioned by the collision were made to the vessel while she was lying in the dry dock, the cost whereof is not claimed; these additional repairs were made simultaneously with those rendered necessary by the accident and did not in any way keep the *Baroff* out of service any longer than if they had not been made. The question for me is to determine if the plaintiff is entitled to damages for the temporary loss of the use of his customs cruiser and, if so, fix the amount of such damages. It is established, and practically admitted that the *Baroff* was not a profit earning vessel. Previous to the decision of the House of Lords, reversing the judgment of the Court of Appeal in England,

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in re *The Greta Holme* (1), no damage was allowed for the deprivation of the use of a vessel, if there was no pecuniary loss.

In the case of *The Greta Holme* (*ubi supra*) it was held that the owners of a dredge (a harbour board) "could recover damages for the loss of the use of the dredger while it was under repair, though they could not prove any actual pecuniary loss, and that such damages were not too remote."

The same principle was adopted by the Court of Appeal in re *The Mediana* (2) and the judgment of the Court of Appeal was affirmed by the House of Lords (3).

In the case of *The Mediana,* the vessel which was damaged, the *Comet,* was a lightship used for the purpose of lighting the approaches to the Mersey river; the head note sets forth clearly and concisely the facts as well as the decision; it reads as follows:

Whenever by a wrongful act another person is deprived of his property, a claim for damages may be sustained, and such damages are not merely nominal, though no actual pecuniary loss may be proved.

The Mersey Docks and Harbour Board are charged by statute with the duty of lighting the approaches to the Mersey and maintain four lightships in constant use, and two in reserve to take the places of the others when they need repair or in other emergencies. One of the lightships, the C., was damaged by collision with the M., a steamship belonging to the appellants. The collision was owing to the negligence of those in charge of the M. The O., one of the reserve lightships, took the place of the C. while her damages were repaired. The owners of the M. paid the cost of the repairs and all other out of pocket expenses, but the board made a claim for the loss of the use of the lightship C. while she was under repair, or for the hire of the substitute. It was admitted that the O. would not have been employed if she had not been acting as substitute for the C.

Held (affirming the judgment of the court below), that they were entitled to recover substantial damages for the loss of the use of the C.

The Greta Holme (77 L.T. Rep. 231; 8 Asp. Mar. Law Cas. 317; (1897) A.C. 596) followed.

At page 42 of the report, the Lord Chancellor (Lord Halsbury) says:

That decision (*in re The Greta Holme, ubi supra*) has a much wider application than has been assigned to it by the appellants' counsel, and Lord Herschell in terms stated the proposition, and I may say that I myself intended to lay it down, that where by a man's wrongful act something belonging to another was injured or taken away, a claim for damages may be sustained, and that the damages in such a case are not

(1) (1897) 8 Aspinall's Rep., 317. (2) (1899) 8 Aspinall's Rep., 493.
(3) (1900) 9 Aspinall's Rep., 41.

merely nominal. Damages are not necessarily nominal because they are small in amount. The term "nominal damages" is a technical one which negatives any real damage, and means nothing more than that a legal right has been infringed in respect to which a man is entitled to judgment. But the term "nominal damages" does not mean small damages. The whole region of inquiry into damages is one of extreme difficulty, and you cannot lay down any fixed principle to a jury as to the amount of compensation which ought to be given. Take the most familiar and ordinary case. How is anyone to measure pain and suffering caused by an accident in terms of moneys counted? By a manly mind pain and suffering, when passed, are soon forgotten, but the law recognizes that as a topic under which damages may be given. In this particular case the broad proposition is that the respondents were deprived of their vessel. I purposely do not use the words the use of their vessel. For the wrongdoer has no right to inquire what or whether any use would have been made of the vessel of which the respondents were deprived.

. . . . . .

The broad principle applicable to this appeal is quite independent of the particular use which the respondents would make of the *Comet*. It is wholly different from a case of special damage, where you have to ascertain the specific loss of profit or other advantage which would otherwise have accrued. Where special damage is alleged you must show precisely the nature and extent of the injury sustained, and the person liable must have an opportunity of inquiring into the details before the case comes into court. In the case, however, of general damage no such principle applies, and the jury have only to give a proper equivalent for the unlawful withdrawal of the particular subject-matter. That broad principle comprehends this and many other cases, and the jury may assess damages which are not nominal damages though the amount may be trifling.

In the case of *The Marpessa* (1), in which a sand dredger was concerned, it was held by the House of Lords, affirming a judgment of the Court of Appeal:

That, no vessel having been hired to take the place of the disabled dredger, the damages were rightly calculated on the daily cost of maintaining and working the dredger, with an allowance for depreciation, but with no allowance for owners' profit.

In re *The Astrakhan* (2), in which the same principle was applied, the facts were briefly the following: a Danish warship came into collision with a British vessel and the latter was found to blame; had there been no collision the warship would have been docked and overhauled and would not have been commissioned for a period of three months; before the expiry of three months, the damages caused by the collision had been repaired and the warship was ready to be commissioned on the day she would have been, if no accident had happened; the Danish Government claimed

(1) (1907) 10 Aspinall's Rep., 464. (2) (1910) 11 Aspinall's Rep., 390.

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£1,500 for the loss of the use of the vessel and an additional sum for repairs to the bottom of the vessel, rendered necessary by one of the blocks in the dry dock being upset. Regarding the claim for the loss of the use of the vessel, it was held by the Probate, Divorce and Admiralty Division of the High Court of Justice, reversing the registrar's decision, "that the Danish Government were entitled to recover damages for the deprivation of the use of the vessel for the period during which she could have been repaired".

Bargrave Deane, J., at page 393, says:

If you deprive the owner of the use of a thing, it is not necessary to show that he would have used it, but if you put it out of the power of the owner to use it, then, according to Lord Halsbury's reasoning in *The Mediana,* I think you have to pay damages for that.

See also: *Clyde Bank Engineering and Shipbuilding Co.* v. *Don Jose Ramos Yzquierdo y Castaneda* (1).

In this case the Spanish Government had contracted with the appellant company for the building of four torpedo boats, the delivery whereof was to be made within varying periods from the date of the contract. A penalty at the rate of £500 per week for each vessel for late delivery was stipulated in the contract. The boats having been delivered several months after the stipulated period and the price of the boats having been paid in full, the Spanish Government claimed from the company payment of £500. per week for late delivery, in accordance with the terms of the contract. The company appellant claimed that the sum of £500 per week for late delivery did not constitute liquidated damages pre-estimated by the parties as representing the loss which might be incurred through late delivery, but a penalty in the strict sense of the word and recoverable only to the extent to which actual loss was established. The House of Lords, affirming the decision of the Court below, held "that the sum of £500 a week was to be regarded as liquidated damages and not as a penalty and that the Spanish Government were entitled to recover".

Referring to the question of damages, the Lord Chancellor (the Earl of Halsbury) said (p. 12):

Then the other learned counsel suggests that you cannot have damages of this character, because really in the case of a warship it has no

(1) (1905) App. Cas., 6, at 12.

value at all. That is a strange and somewhat bold assertion. If it was an ordinary commercial vessel capable of being used for obtaining profits, I suppose there would not be very much difficulty in finding out what the ordinary use of a vessel of this size and capacity and so forth would be, what would be the hire of such a vessel, and what would therefore be the equivalent in money of not obtaining the use of that vessel according to the agreement during the period which had elapsed between the time of proper delivery and the time at which it was delivered in fact. But, says the learned counsel, you cannot apply that principle to the case of a warship because a warship does not earn money. It is certainly a somewhat bold contention. I should have thought that the fact that a warship is a warship, her very existence as a warship capable of use for such and such a time, would prove the fact of damage if the party was deprived of it, although the actual amount to be earned by it, and in that sense to be obtained by the payment of the price for it, might not be very easily ascertained—not so easily ascertained as if the vessel were used for commercial purposes and where its hire as a commercial vessel is ascertainable in money. But, my Lords, is that a reason for saying that you are not to have damages at all? It seems to me it is hopeless to make such a contention.

In re *The Chekiang* (1), another case in which a warship was involved, it was held by the House of Lords, reversing the decision of the Court of Appeal (2):

(1) That inasmuch as it was found in fact that there was no necessity to make the refit, the Admiralty were entitled to take advantage of the vessel being in dry dock without being called on to contribute to the expense of docking or to forego the payments in full to which they were entitled as for the loss of the use of the vessel for the period of detention which had been properly fixed at twenty days for the collision during which the vessel was rendered unfit for her active service.

Ruabon Steamship Company v. *London Assurance* (9 Asp. Mar. Law Cas. 2; 81 L.T. Rep. 585; (1900) A.C. 6) followed.

(2) That the registrar had not proceeded upon a wrong principle in an assessment of the damages, which was based on a calculation of a percentage of the actual value of the ship, with an allowance for depreciation.

Lord Sumner (at pp. 77 et seq. of the report) deals with the two questions in a very able and exhaustive manner.

See Roscoe, *Measure of Damages in Maritime Collisions*, 3rd ed., pp. 103 et seq.

In accordance with the decisions hereinabove referred to, I think that the plaintiff ought to be allowed the cost of maintenance of the *Baroff* during the time she was idle and an additional sum for overhead and depreciation. The plaintiff is claiming $250 a day. Stephen, a technical officer for the Department of National Revenue, in charge of Preventive Service Ships, heard as witness on behalf

(1) (1926) 17 Aspinall's Rep., 74. (2) (1925) 16 Aspinall's Rep., 495.

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of plaintiff, estimated at $117 per day the maintenance, overhead and depreciation (dep. p. 69):

860. Q. I want to know what additional sum you would add to the daily figure of $117 which you have given us. You gave us a total figure of $29,985 for the year, $117 per day, for a year's complete operation based on 255 operating days, but that does not include this overhead figure?—A. The overhead is included in this figure and the depreciation is such a small amount that we did not consider it worth while including it.

861. Q. What would be the figure you come to and by this I mean the cost to the Government daily; have you anything else to add to $117?—A. No, sir.

Mr. MACINNES: Does that $117 include everything?

The WITNESS: Yes, depreciation, overhead, operating costs, everything is included.

I do not think that loss of profit in the case of a customs cruiser ought to be taken into account: the damage is too remote and in addition far too indefinite; moreover, in the present case, the evidence regarding this item is, and it could hardly be otherwise, inadequate and unsatisfactory.

The amount of $117 includes $17 for fuel per day. During the time the *Baroff* was on the slip, viz., approximately eight days, the plaintiff saved $17 per day on fuel and this sum must be deducted from the amount of the claim. The plaintiff will therefore be entitled to recover from the defendant, in addition to the actual cost of repairs ($593), the sum of $1,151 for maintenance. overhead and depreciation, during the eleven days she was absent from her duties, as follows:

3 days at $117..	$ 351
8 days at $100..	800
	$1,151

There will be judgment for plaintiff against defendant for $1,744, with interest from the date hereof and costs.

Judgment accordingly.