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*Apr. 30, May 1 Oct. 1

MONARCH TOWING & TRADING CO. LTD. (*Plaintiff*) ..... APPELLANT;

AND

BRITISH COLUMBIA CEMENT CO. LTD. (*Defendant*) ..... RESPONDENT.

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA

Shipping—Limitation of liability for loss—Tug and tow—Negligence of persons in charge of tug—The Canada Shipping Act, R.S.C. 1952, c. 29, ss. 2(61), 657(1).

The plaintiff company was engaged by contract to transport a load of cement for the defendant company. For this purpose it used a tug owned by it and a scow rented by it from the owners. During the course of the voyage, the scow stranded and sank and her cargo was destroyed. There was no one on board the tow at the time of the accident and it was admitted that the stranding and consequent damage were caused by the negligence of the plaintiff's servants who were in command of the tug and in charge of the navigation of the tug and tow. It was also admitted that the grounding occurred without the plaintiff's actual fault or privity. An action having been commenced by the defendant against the plaintiff for the loss, the plaintiff took these proceedings to limit its liability under s. 657(1) of the *Canada Shipping Act*.

Held: The plaintiff's liability must be computed on the basis of the combined tonnage of the tug and tow and not on the tonnage of the tug alone.

Per Kerwin C.J. and Taschereau and Cartwright JJ.: The plaintiff, as lessee of the tow, was the "owner" of it within the definition in s. 2(61) of the Act. The plaintiff was therefore within s. 657(1)(*b*) as "owner" of the tow and s. 657(1)(*d*) as "owner" of the tug. *Robertson v. The Owners of the Ship Maple Prince et al.*, [1955] Ex. C.R. 225,

*PRESENT: Kerwin C.J. and Taschereau, Rand, Locke and Cartwright JJ.

distinguished. Since it was admitted that the loss was caused by the improper navigation of the tug and tow, it could make no difference whether the defendant had a claim in contract as well.

Per Rand and Cartwright JJ.: It could not be successfully argued that the tow was an innocent vessel. Since both the tug and the tow were owned by the same person, the negligent navigation of the tug by the owner's servants was attributable to the navigation of the tow and rendered the latter a culpable vessel. *The Ran; The Graygarth,* [1922] P. 80 at 86, agreed with. *Owners of the S.S. Devonshire v. Owners of the Barge Leslie et al.,* [1912] A.C. 634, distinguished. The word "ship" in s. 657(1) must be applied to the tug and tow together, as a unit. The same result would be reached if the claim of the owner was regarded as one in tort, since the tow was a guilty agency and was within the express words of s. 657(1)(*b*) of the Act, and the tug was equally within s. 657(1)(*d*).

APPEAL from a judgment of Sidney Smith D.J.A. in an action to limit liability under s. 657(1) of the *Canada Shipping Act,* R.S.C. 1952, c. 29. Appeal dismissed.

C. C. I. Merritt, for the plaintiff, appellant.

C. K. Guild, Q.C., and *F. U. Collier,* for the defendant, respondent.

The judgment of Kerwin C. J. and Taschereau J. was delivered by

THE CHIEF JUSTICE:—This is an appeal by Monarch Towing & Trading Co. Ltd., the plaintiff in an action to limit its liability under subs. (1) of s. 657 of the *Canada Shipping Act,* R.S.C. 1952, c. 29, from a decision of Mr. Justice Sidney Smith, District Judge in Admiralty for the British Columbia Admiralty District. The judgment permitted the plaintiff to limit its liability upon payment into court of a sum computed at the rate of $38.92 per ton for each ton of the combined tonnage of the tug "Protective" (60.28 tons) and the scow "Marpole 14" (306.35 tons). The plaintiff contends that the amount should be paid on the tonnage of the tug "Protective" alone.

The action was heard upon admissions from which the following facts appear: The tug and scow were registered ships in accordance with the provisions of the *Canada Shipping Act,* the former being owned by the plaintiff and the latter by Marpole Towing Co. Ltd. In pursuance of a long-standing arrangement between these two companies for its rental from month to month by the plaintiff, the tug was in the exclusive possession and control of the plaintiff in the month of February 1953. By an unwritten

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contract between the defendant and the plaintiff, which had been in force for many years, the plaintiff provided from time to time for the carriage of the defendant's cement from Bamberton to New Westminster and Vancouver at a fixed price per ton and for that purpose used scows, manned tugs and pallet boards, as required by practice, custom, or order from time to time. In pursuance of this contract the scow "Marpole 14" was loaded with cement by the defendant at Bamberton and on February 18, 1953, while the tug was towing the laden scow through the Gulf of Georgia on the trip to Vancouver and New Westminster the scow stranded and sank and her cargo was destroyed by sea water. Paragraph 8 of the admssions of fact is particularly important and it reads as follows:

> 8. That during the course of the said voyage, the tug "PROTECTIVE" was under command of one James Stuart Allen, Master. There was no one aboard the "MARPOLE 14". The stranding and the consequent damage were caused by the negligence of those on board and in command of the tug "PROTECTIVE", the servants of the Plaintiff, who were in charge of the navigation of the tug "PROTECTIVE" and the scow "MARPOLE 14".

An action was commenced in the Supreme Court of British Columbia by the defendant against the plaintiff, claiming for the damage sustained by it in consequence of the stranding and the loss of the cargo. The plaintiff admits its liability for the amount claimed which is in excess of a sum computed on the combined tonnage of the tug and scow and the defendant admits that the loss or damage occurred without the actual fault or privity of the plaintiff. Subsection (1) of s. 657 of the *Canada Shipping Act* reads as follows:

> 657. (1) The owners of a ship, whether registered in Canada or not, are not, in cases where all or any of the following events occur without their actual fault or privity, that is to say,
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> (*a*) where any loss of life or personal injury is caused to any person being carried in such ship;
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> (*b*) where any damage or loss is caused to any goods, merchandise, or other things whatsoever, on board the ship;
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> (*c*) where any loss of life or personal injury is, by reason of the improper navigation of the ship, caused to any person carried in any other vessel; and
>
> (*d*) where any loss or damage is, by reason of the improper navigation of the ship, caused to any other vessel, or to any goods, merchandise, or other things whatsoever on board any other vessel;
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> liable to damages in respect of loss of life or personal injury, either alone or together with loss or damage to vessels, goods, merchandise, or other things, to an aggregate amount exceeding seventy-two dollars and ninety-

seven cents for each ton of their ship's tonnage; nor in respect of loss or damage to vessels, goods, merchandise, or other things, whether there be in addition loss of life or personal injury or not, to an aggregate amount exceeding thirty-eight dollars and ninety-two cents for each ton of the ship's tonnage.

"Owner" is defined in para. (61) of s. 2 as follows:

"owner" as applied to unregistered ships, means the actual owner and as applied to registered ships, means the registered owner only; for the purposes specified in section 75 it includes beneficial owner and for the purposes of Part XII it also includes the lessee or charterer of any vessel responsible for the navigation thereof; when used in relation to goods, it means every person who is for the time being entitled, either as owner or agent for the owner, to the possession of the goods, subject in the case of a lien to that lien.

Section 657 is contained in Part XII of the Act and therefore the plaintiff, as lessee thereof, was the "owner" of the scow "Marpole 14".

Since it is admitted that the loss was caused by the improper navigation of the tug and scow, it can make no difference whether the defendant had a claim as well in contract against the plaintiff. The limitation section applies as well in the case of a stranding as of a collision and the defendant did not argue before us, as it did in the Court below, that the limitation section is not applicable, but seeks to uphold the trial judge's determination that it must be based upon the combined tonnage of the tug and scow, or, in the alternative, on the tonnage of the scow alone. If the scow were owned by the defendant and the plaintiff's contract was to tow it laden with cement and the stranding occurred, the plaintiff would be responsible for the loss of the scow and cement; in that case the extent of the liability would be based on the tonnage of the plaintiff's "ship", *i.e.*, the tug, so that the plaintiff would be better off if the agreement between it and the defendant had provided that the defendant use a scow of its own. In *Robertson v. The Owners of the Ship Maple Prince et al.* (1), Mr. Justice Sidney Smith held that where the owners of a tug had been held liable for damages caused by a collision between its tow and a fishing vessel because of the tug's improper navigation, the tow being an "innocent" ship, the tug's owners were entitled to restrict their liability to the amount allowed by the Act for each ton of the tug's tonnage and not for the combined tonnage of

(1) [1955] Ex. C.R. 225.

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the tug and tow. In the present case the learned trial judge distinguished his earlier decision on the ground that here, for the purposes of the limitation section, the plaintiff was the "owner" not only of the tug but also of the scow, and the scow was not an "innocent" ship, and with this I agree.

Counsel for the plaintiff contends that, if the owners of the scow sue the owners of the tug for the loss of the scow, the owners of the tug are entitled to limit their liability on the tonnage of the tug. That may be so, but, looking at s. 657 and in view of para. 8 of the admissions, the scow, as well as the tug, being negligent, the plaintiff is "owner" of both tug and scow and cls. (*b*) and (*d*) of subs. (1) of s. 657 are both applicable. Under the former the plaintiff is brought in as "owner" of the scow and under cl. (*d*) as "owner" of the tug.

The appeal should be dismissed with costs.

RAND J.:—Mr. Merritt's case is based essentially on the ground that the barge was an innocent vessel which, in turn, is a conclusion from the fact that the actual negligence occurred on the tug. The same point was taken in *The Ran; The Graygarth* (1), where the claim arose out of a collision and the claimant was a stranger to the barge, not, as here, a shipper. It was held that as both ships were owned by the same person, the negligent navigation of the tug by servants of the owner was attributable to the navigation of the scow and rendered the latter a culpable vessel. As Lord Sterndale M.R. put it at p. 86:

> In my opinion the tow is improperly navigated by the servants of the owners of the tow, although these servants may be upon the tug. It does not matter where they are. If they are the servants of the owners of the tow, and they are navigating the tow, the owners of the tow are liable for the negligence of the tow, and that is the vessel they are improperly navigating. The tug may be improperly navigated, but that does not prevent the tow being also improperly navigated.

The action had been brought *in rem* against the tow and was maintained as brought. In *Owners of the S.S. Devonshire v. Owners of the Barge Leslie et al.* (2), urged upon us, there was no such common ownership and the

(1) [1922] P. 80. (2) [1912] A.C. 634.

improper navigation of the barge was caused by third persons with whose acts the owner of the barge was not chargeable.

Here the owners of the tug were also the charterers of the tow, in exclusive possession of it, and the personal liability of the tug owners and charterers arises both in contract and in tort. The carriage was to be executed by barge and tug, a sea transportation that, given the loading on the scow, could not otherwise have been carried out: the two vessels operated as a single means of conveyance. The goods were carried under an unwritten contract of which the negligent stranding brought about a breach.

The language of s. 657 of the *Canada Shipping Act*, R.S.C. 1952, c. 29, is: "The owners of a ship . . . are not . . . liable to damages in respect of . . . goods . . . to an aggregate, etc." What, then, is a ship? I should say that the word in that context includes a mode of marine carriage universally known and exercised, that of a barge and tug, in which one total unit performs the undertaking. That was the scope given the word "vessel" in the phrase "the vessel transporting merchandise or property" appearing in s. 3 of the *Harter Act* of the United States by the Supreme Court of that country in *Sacramento Navigation Company v. Salz* (1). There, as here, the claimant was a shipper and the result was that both the tug and tow, owned by the same person, were required to be surrendered, the mode of limitation provided by that Act.

On the basis of tort the same result is reached. The barge here, as in *The Ran*, being a guilty agency, is within the express words of s. 657(1)(*b*):

> (1) The owners of a ship, whether registered in Canada or not, are not, in cases where all or any of the following events occur without their actual fault or privity, that is to say,
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> * * *
>
> (*b*) where any damage or loss is caused to any goods, merchandise, or other things whatsoever, on board the ship; . . .

The tug, combining with the barge in bringing about the stranding, as an independent vessel is equally within cl. (*d*) of that subsection:

> (*d*) where any loss or damage is, by reason of the improper navigation of the ship, caused to any other vessel, or to any goods, merchandise, or other things whatsoever on board any other vessel;

(1) (1927), 273 U.S. 326.

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In collision each of these vessels would be liable for its participation in the negligent act, and the same general maritime law of liability for negligence as is applicable to stranding, which is a form of collision, calls for the same distributive liability. The statute assumes that underlying law and by relating damages to the tonnage of a ship and eliminating by that means a ruinous exposure of all the assets of the owner to the liability incurred, operates in tort referably to the individual ship. It applies as well where two or more are parties to the damages as where there is only one. With a common ownership of two vessels whose combined mismanagement has caused damage through collision to the goods of a shipper in one of them, the liability of the owner is related to the several fault of each of his vessels, that is, they are deemed to be two sources of liability, two distinct agencies with different servants of the same master, each giving rise to a responsibility and each coming under the limitation of s. 657: *The Chartered Mercantile Bank of India, London, and China v. The Netherlands India Steam Navigation Company, Limited* (1). In that case the two vessels were acting independently; but I am unable to differentiate the case where, as here, the improper navigation of both the tug and the barge results from the same human agency; they must be charged distributively with the total responsibility. This seems to have been the view of Lord Sterndale in *The Ran; The Graygarth, supra,* where, at p. 84, he says: "As owners of the *Graygarth* [the tug] they might be liable also. . . ." But the suit there was *in rem* against the tow alone, a liability dependent on showing the tow to have been improperly navigated.

In either view, therefore, Smith D.J.A. was right in holding that in limitation of damages the tonnage of both the vessels must be brought into account, and the appeal must be dismissed with costs.

LOCKE J.:—In my opinion, this appeal fails and should be dismissed with costs.

(1) (1883), 10 Q.B.D. 521.

CARTWRIGHT J.:—I agree with the reasons of the Chief Justice and with those of my brother Rand and would accordingly dismiss the appeal with costs.

Appeal dismissed with costs.

Solicitors for the plaintiff, appellant: Bull, Housser, Tupper, Ray, Guy & Merritt, Vancouver.

Solicitors for the defendant, respondent: Guild, Nicholson, Yule, Schmitt, Lane & Collier, Vancouver.