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*Mar. 11
*May 3

HIS MAJESTY THE KING (RESPONDENT) ..... } APPELLANT;

AND

SAINT JOHN TUG BOAT COMPANY, LTD. (SUPPLIANT) ..... } RESPONDENT.

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA

Shipping—Collision in harbour during fog—Petition of right—Claim for damages to tug and for loss of earnings—Both vessels at fault and fault in equal degree—Crown held liable for one-half the damage and loss sustained by suppliant—Crown also ordered to pay costs of action—Whether Crown liable for costs—

The tug *Ocean Hawk I* and its tow and H.M.C.S. *Beaver,* belonging to His Majesty in the right of Canada, collided in the harbour of Saint John, N.B. during a fog. On a petition of right presented by the respondent, O'Connor J. in the Exchequer Court of Canada found that the injury to the Crown's vessel was insignificant, but that the damage to the tug boat amounted to $2,367 and that there was loss of earnings to the extent of $1,400. The trial judge, holding that such damage and loss were caused by the fault of both vessels and that the fault was in equal degree, directed that the Crown should bear half the damage and loss sustained by the suppliant, and pay the costs of the action. The Crown appealed to this Court from that judgment and further contended that it should not be made liable for costs, following a rule of the Admiralty Court.

*PRESENT:—Rinfret C.J. and Kerwin, Hudson, Rand and Estey JJ.

Held that the finding of the trial judge, that the damage and loss to the *Ocean Hawk I* was caused by the fault, in equal degree, of both vessels, and the direction that they should be apportioned equally between them, should not be disturbed; but

Held The Chief Justice and Kerwin J. dissenting, that the evidence as to loss of earnings was not sufficient to enable the Court to make any allowance and that the sum of $700 should be deducted from the amount of damages awarded to the respondent.

Held, also that the Crown could be made liable for costs of the action.

Per The Chief Justice and Kerwin, Hudson and Estey JJ.—If the proceedings in this case, originated in a petition of right, are taken to be in the Exchequer Court of Canada in its general jurisdiction, the right to adjudge that the suppliant is entitled to recover its costs from the Crown is unquestionable, and, if the proceedings are treated as being on the Admiralty side of that Court, then section 12 of the *Petition of Right Act* would confer upon the Court power to award costs against the Crown.

Per Rand J.—The proceedings are in the Exchequer Court of Canada proper and not in its Admiralty jurisdiction and, therefore, the costs are at the discretion of the Court unhampered by the rule of the Admiralty Court.

Judgment of the Exchequer Court of Canada ([1945] Ex. C.R. 214) affirmed in part.

APPEAL from the judgment of the Exchequer Court of Canada, O'Connor J. (1), maintaining a petition of right by the respondent to recover from the Crown damages for loss resulting from a collision, between the respondent's tug *Ocean Hawk I* and H.M.C.S. *Beaver* owned by the Crown, alleged to be due to the negligence of an officer or servant of the Crown acting within the scope of his duties or employment.

H. A. Porter K.C. and *C. Stein* for the appellant.

C. F. Inches K.C. for the respondent.

The judgment of the Chief Justice and of Kerwin J. (dissenting in part) was delivered by

KERWIN J.:This is an appeal by His Majesty from a judgment of the Exchequer Court of Canada on a petition of right presented by the respondent, Saint John Tugboat Company, Limited, the owner of the tug *Ocean Hawk I.* On September 17th, 1942, a collision occurred between that tug and its tow, on the one hand, and H.M.C.S. *Beaver,*

(1) [1945] Ex. C.R. 214.

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belonging to His Majesty in the right of Canada, on the other. Mr. Justice O'Connor in the Exchequer Court of Canada found that the damage and loss to the *Ocean Hawk I* was caused by the fault of both vessels and that the fault was in equal degree. I am not prepared to disagree with this finding.

The trial was fought on the basis of the applicability of the rules of the International Regulations for Preventing Collisions at Sea as they appear in Annex II to the *Canada Shipping Act,* 1934, chapter 44, where it is stated that

> These rules shall be followed by all vessels upon the high seas and in all waters connected therewith, navigable by sea-going vessels.

While Mr. Porter contended that these rules did not apply to the Crown, he admitted that the relevant ones provided a reasonable course of conduct to be followed by the Commander of the *Beaver.* In assessing one-half of the damages against the Crown, the trial judge referred to section 640 of the *Canada Shipping Act* but, as appears by section 712, this does not apply to His Majesty. That it applied to the suppliant was not controverted by Mr. Inches. No question was raised as to the power of the Exchequer Court of Canada to order that the Crown pay one-half the damages and loss sustained by the suppliant if it be held that both ships were equally to blame but it was argued that the Crown could not be made liable for costs.

These proceedings originated in a petition of right pursuant to the *Petition of Right Act,* R.S.C. 1927, chapter 158. By virtue of section 5 thereof, the Exchequer Court of Canada had exclusive original cognizance of the petition and by section 12 the suppliant is entitled to costs against His Majesty in like manner and subject to the same rules, regulations and provisions, restrictions and discretion, so far as they are applicable, as are or may be usually adopted or in force in respect to the right to recover costs in proceedings between subject and subject. Section 87 of the *Exchequer Court Act* empowers the President to make general rules and orders "(*e*) for awarding and regulating costs in such Court in favour of or against the Crown as well as the subject" and Rule 260 passed in pursuance thereof provides that costs may be awarded against the

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Crown. If these proceedings be in the Exchequer Court of Canada in its general jurisdiction and not on its Admiralty Side, the right to adjudge that the suppliant is entitled to recover its costs from His Majesty is unquestionable.

By virtue of the *Admiralty Act,* 1934, chapter 31, the jurisdiction of the Exchequer Court of Canada on its Admiralty Side extends to and may be exercised in respect of all navigable waters. If it be taken that the direction in section 5 of the *Petition of Right Act* to file the petition and fiat in the Exchequer Court of Canada means in such a case as this to file it in that Court on its Admiralty Side, Rule 131 of the General Rules and Orders Regulating the Practice and Procedure in Admiralty must be considered. That rule provides:—

> In general costs shall follow the event; but the Judge may in any case make such order as to costs as to him shall seem fit.

It was pointed out that this is a reproduction of an order formerly in force in Britain under which it was held that the "event" referred to was that each party there succeeded and failed in equal degree since at that time the law did not inquire into degrees of fault. This is referred to by Mr. Justice Hill in *The Modica* (1) where that experienced judge also stated that it seemed to him that the old rule as to there being no costs in cases between subjects should not be treated as governing the changed conditions since the *Maritime Conventions Act* of 1911, which contains the provision found in section 640 of the *Canada Shipping Act* that

> the liability to make good the damage or loss shall be in proportion to the degree in which each vessel was in fault.

In the *Robert Koeppen,* noted at page 81 of the same report, Mr. Justice Hill, while finding the plaintiff's ship one-fourth to blame, ordered the defendants to pay one-half of the plaintiff's costs. I quite agree that in view of section 640 of the *Canada Shipping Act,* Rule 131 confers a discretion upon the trial judge in cases between subject and subject and, even if these proceedings be treated as being on the Admiralty Side of the Exchequer Court, section 12 of the *Petition of Right Act* confers upon the Court power to award costs against His Majesty.

(1) [1926] P. 72, at 78.

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The item of $1400 for loss of earnings, included by the trial judge in the loss sustained by the suppliant, was attacked on the ground of the absence of any evidence to justify it. While the evidence on the point is meagre, I think it is sufficient to warrant the allowance of the items. At the argument we declined to permit the appellant to raise the question as to whether the locus of the collision was in a narrow channel within the meaning of Article 25 of the Rules as the pleadings do not refer to the point and no evidence directed to it was introduced.

The appeal should be dismissed with costs.

The judgment of Hudson and Estey JJ. was delivered by

HUDSON J.—This is an action for damages arising from the collision in Saint John Harbour of a tug boat belonging to the suppliant and a naval vessel belonging to His Majesty.

At the trial Mr. Justice O'Connor found the vessels to be equally at fault and directed that damages should be apportioned equally between them.

Consideration of the evidence does not to my mind justify any interference with this finding and direction of the learned judge.

The injury to the naval vessel was of an insignificant character and nothing was allowed in respect of same. The injury to the tug boat was more serious and the trial judge found it to amount to $2,367. He also found that there was loss of her earnings to the extent of $1,400. The amount of the damage to the boat is not seriously questioned but it is contended that no loss of earnings was established. On this point the evidence is very meagre indeed.

The onus is on the respondent to establish the actual loss and reasonable proof of the amount. It appears from the evidence that the respondent had a number of boats used in their business, some of which were idle from time to time.

The Superintendent of the respondents in cross-examination was asked very specifically if he could name any business that had been offering or available to the Tug

Boat Company, during the time that the boat in question was being repaired, which the Tug Boat Company were unable to handle through the loss of the service of the *Ocean Hawk*. He was unable to state any.

In the case of *The City of Peking* (1) it was stated by Sir Barnes Peacock at p. 442:

> There is no doubt as to the rule of law according to which compensation is to be assessed in cases of this nature, where a partial loss is sustained by collision. The rule is *restitutio in integrum*: citing *The Black Prince*, (2). The party injured is entitled to be put, as far as practicable, in the same condition as if the injury had not been suffered. It does not follow as a matter of necessity that anything is due for detention of a vessel whilst under repair. In order to entitle a party to be indemnified for what is termed in the Admiralty Court a consequential loss resulting from the detention of his vessel, two things are absolutely necessary—actual loss and reasonable proof of the amount (citing *The Clarence*, (3) and *The Argentino* (4).

See also 30 Halsbury, p. 861.

For this reason, I would allow the appeal and reduce the verdict by $700, with no costs in this Court.

It was pressed strongly on behalf of the appellant that no costs should be allowed at the trial but, for the reasons mentioned in the judgment of my brother Kerwin, I do not think that this point can be sustained.

RAND J.—I see no reason to interfere with the finding of the Court below of negligence in the navigation of both vessels and of equal responsibility.

On that basis, it is argued that there should be no costs following the old rule of the Admiralty Court. But the proceeding here is in the Exchequer Court of Canada proper and not in its Admiralty jurisdiction. The costs are, therefore, in the discretion of the Court unhampered by the rule in question.

The point also is taken that there was no proof of damages through loss of profits. The vessel was one of four tugs operated by the respondent in Saint John harbour. The business was an entirety, and damages of this nature would appear in the lessened earnings over the 16 days

(1) (1890) 15 A.C. 438.
(2) (1862) 1 Lush 568, at 573.
(3) (1850) 3 Wm. Rob. 283.
(4) (1883) 13 P.D. 61, 191.

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during which repairs were being made. The following questions and answers of the respondent's Superintendent give the only evidence on the point:

Q. And during the days that followed this collision was there any time that you were unable to do the business offering?

A. No, I don't think so.

Q. You had three boats with which to work and when anything was to be done you had a boat to send?

A. We did use the whole four of them.

Q. I am asking you whether in the days immediately after that—it was a slack time in the harbour just then, wasn't it—there was no time you were embarrassed for lack of the fourth boat?

A. I can't say for sure now.

We cannot then infer an actual loss even in gross receipts during that time, and with no running expenses including wages of the crew, there was possibly a higher net return than if the tug had been kept in service. At any rate, there is no material before us from which a conclusion one way or the other can be drawn. In these circumstances, I think it impossible to make any allowance. A claimant must not only present facts which show that damage of this nature has been suffered, but they must be of a nature from which an amount can fairly be deduced: *St. John Motor Line Ltd.* v. *Canadian National Railway Co.* (1). There is nothing of that sort here, and the sum allowed must be struck out.

I would, therefore, allow the appeal and reduce the judgment by $700. In view of divided success, there should be no costs in this Court.

Appeal allowed in part; no costs.

Solicitors for the appellant: *Porter & Ritchie.*

Solicitors for the respondent: *Inches & Hazen.*

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(1) (1929) 2 M.P.R. 55.