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THE STEAMER *MAPLEHURST* (DEFENDANT) ..... APPELLANT; *Oct. 26. *Nov. 27.

AND

GEORGE HALL COAL COMPANY OF CANADA (PLAINTIFF) ..... RESPONDENT.

CANADA STEAMSHIP LINES, LIMITED (PLAINTIFF) ..... APPELLANT;

AND

THE TUG *MARGARET HACKETT* (DEFENDANT) ..... RESPONDENT.

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA, QUEBEC ADMIRALTY DISTRICT

Admiralty law—Collision—Vessel having barge in tow—Absence of regulation lights—Possibility of avoiding accident—Liability of both vessels.

The lake steamer *Maplehurst,* having in tow the barge *Brookdale,* both the property of the Canada Steamship Lines, Ltd., left the city of Montreal for the city of Quebec on the evening of July 15, 1920. The *Maplehurst* was not equipped for towing as she did not have the regulation towing lights required by article 3 of the "Regulations for preventing collisions." The barge *Brookdale* had the regulation red and green side lights. While the *Maplehurst* was proceeding down the channel through Lake St. Peter, a collision occurred between the *Brookdale* and the tug *Margaret Hackett* upbound with a barge in tow, both the property of the George Hall Coal Company of Canada. As a result of the collision, the tug foundered and the barge *Brookdale* sustained damages. The plaintiffs, as their respective owners, sued for damages, each imputing fault and blame to the other. The trial judge held that the officers of the *Maplehurst* had been guilty of negligence which was a direct and efficient cause of the collision; and he also found that the accident could have been avoided by the exercise of skill and promptitude on the part of those in charge of the tug *Margaret Hackett.* The owners of the *Maplehurst* were condemned to pay three-quarters of the loss suffered by the owners of the tug *Margaret Hackett* and the latter were held answerable for one-quarter of the damages sustained by the barge *Brookdale.*

Held that the *Maplehurst* had by her negligence contributed to the collision to the extent to which the trial judge found her owners answerable. Mignault J. *dubitante.*

Per Duff J.—Where the negligence of the plaintiff and the negligence of the defendant are in sequence, the question whether the collision could "have been avoided by the exercise of ordinary care and skill on the part of the defendant," depends upon the circumstances; and

*PRESENT:—Sir Louis Davies C J. and Idington, Duff, Anglin, Brodeur and Mignault JJ.

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the conduct of the plaintiff may have been such in its bearing and effect upon the conduct of the defendant as to form a very important element in the determination of that question.

Per Anglin J.—The fault of the officers of the *Maplehurst* continued operative until the collision was, if not inevitable, only to be avoided by great skill and extraordinary alertness on the part of those in charge of the *Margaret Hackett*.

APPEAL from the judgment of the Exchequer Court of Canada, Quebec Admiralty District (1), in two actions which both resulted from the same collision, Maclennan J., local judge in admiralty at Montreal, holding the steamer *Maplehurst* to blame to the extent of three-quarters and the tug *Margaret Hackett* to the extent of one-quarter.

The material facts of the case and the questions at issue are fully stated in the above head-note and in the judgments now reported.

Towers K.C. for the appellants. The failure of the *Maplehurst* to carry regulation towing lights (if so found upon the evidence) has not primarily led or caused or contributed to the collision. The fault of the mate of the *Margaret Hackett* was the sole effective cause of the collision, as, by the exercise of reasonable care, he could have avoided the consequences of the negligent act of the *Maplehurst*.

Holden K.C. for the respondents. If any fault was committed by those in charge of the *Margaret Hackett*, it was not the direct cause of the accident, but followed upon and was the result of the much greater fault committed by the steamer *Maplehurst*.

THE CHIEF JUSTICE.—Notwithstanding the able argument at bar of Mr. Towers K.C., for the appellant, I, after careful consideration of all the evidence in this case, have reached the firm conclusion that this appeal fails and that the judgment appealed from should be confirmed.

I have had the advantage of reading the reasons of my brother Anglin and I find that he has lucidly expressed the conclusions I myself had reached. It is unnecessary for me to repeat these reasons in which I fully concur.

I would only add that it is of the greatest importance, in my opinion, that the courts should not minimize or seek

(1) To be reported in [1923] Ex. C.R.

to excuse the necessity of vessels traversing Canada's great waterway between Montreal and the gulf strictly obeying the regulations prescribed in that behalf. In this case it appears clearly to me that the *Maplehurst* failed to comply with the regulation as to lights to be carried by a steamer with a tow in the waters in question, and that this failure was a direct and efficient cause of the collision between the *Hackett* and the *Maplehurst's* tow, the *Brookdale*. The absence of regulation lights resulted, as my brother Anglin says, in leading the *Margaret Hackett* "into a veritable trap." The latter's mate who was also steersman at the time, was no doubt also to blame in not acting with sufficient promptitude by starboarding his helm as he possibly should have done immediately he discovered that he had been misled by the *Maplehurst's* lights into the trap in which he found himself.

But I cannot think that his failure then to act with sufficient promptitude should be held to have been the sole and effective cause of the collision.

Both vessels were to blame, the *Maplehurst* chiefly, and I do not think the apportionment of the damages between them made by the trial judge should be interfered with.

IDINGTON J.—The deliberate violation of article 3 of the relevant regulations which should have governed those in charge of the *Maplehurst* and which required two lights to be used, in the way specified by any steam vessel when towing another vessel, as a means of warning others concerned, was the primary negligence leading to what ensued and is now complained of.

To my mind it was a most gross defiance of the law to put up a coal oil lamp as the mate, so to speak, of an electric light when the article required that "each of these lights shall be of the same construction and character," etc.

This defiance of the law was deliberate when ample time could be got for consideration and proper action.

It seems to me that complaint of another who had only a few minutes to rectify the mistake into which those in charge of her were led, comes with a bad grace from appellant under such circumstances.

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Idington J.

But the court below has properly dealt therewith by its distribution of the damages.

I would dismiss this appeal with costs.

DUFF J.—A question arises on this appeal which is by no means free from difficulty but on the whole I think the balance inclines in favour of the view at which the learned trial judge arrived. The facts are dealt with by the learned judge in a manner which leaves nothing to be desired. There is ample evidence to support his finding that the lights carried by the *Maplehurst* were not those prescribed by the regulations for a steamer engaged in a towage service and that these lights were misleading and calculated to throw the navigators of other craft off their guard and to lead them to govern themselves on the assumption that the *Maplehurst* had not another vessel in tow. On the other hand the learned trial judge in effect finds, with ample warrant, I think, from the evidence, that, on the assumption upon which the mate of the *Margaret Hackett* says he acted, namely, that the *Brookdale* was a vessel under sail, it was a negligent thing for him with another craft in tow to attempt to cross in front of the *Brookdale* and moreover there seems to be ample evidence to warrant the finding that at the last moment the collision could have been avoided if the mate of the *Margaret Hackett* realizing that the *Brookdale* was a tow attached to the *Maplehurst* had signalled his tow and passed the *Brookdale* starboard to starboard.

This being the state of facts the question raised by the appeal is the question whether the *Margaret Hackett* was solely to blame for the collision or whether the negligence of the *Maplehurst* in displaying misleading lights was negligence so contributing to the collision as to cast upon her a share of the loss.

The question can be put in another form, thus: Was the negligence of the *Maplehurst* in part the direct cause of the collision? The question is sometimes a very difficult one and where, as in this case, the negligence of the plaintiff and the negligence of the defendant are in sequence then the question arises whether the collision could "have been avoided by the exercise of ordinary care and skill on the part of the defendant" to quote from the judgment of

Lord Campbell in *Dowell* v. *General Steam Navigation Co.* (1) in a passage cited with approval by the Lord Chancellor in *Admiralty Commissioners* v. *SS. Volute* (2). What is "ordinary care and skill" depends, I think, upon the circumstances and the conduct of the plaintiff may have been such in its bearing and effect upon the conduct of the defendant as to form a very important element in the determination of that question. Here the learned trial judge has found that the negligence of the *Maplehurst* threw the *Margaret Hackett* off her guard and was one of the determining factors in inducing her mate to take the course he did take, perhaps the predominant factor. It is quite true that a time did arrive before the collision when the mate of the *Margaret Hackett* realized his mistake and realized that the *Brookdale* instead of being a sailing vessel was a tow attached to the *Maplehurst* and the learned trial judge has found that by exercise of proper skill at the moment the accident could have been avoided. On the other hand the officer of the *Margaret Hackett* was placed in a somewhat difficult position and his failure to act with promptitude and clearsightedness was probably due to the fact that he found himself suddenly confronted with an unexpected state of affairs involving a present obvious danger. The precise point for consideration is indicated by the judgment of the Lord Chancellor already mentioned and especially in the following passage at p. 144:—

> Upon the whole I think that the question of contributory negligence must be dealt with somewhat broadly and upon common-sense principles as a jury would probably deal with it. And while, no doubt, where a clear line can be drawn, the subsequent negligence is the only one to look to, there are cases in which the two acts come so closely together, and the second act of negligence is so much mixed up with the state of things brought about by the first act, that the party secondly negligent, while not held free from blame under the Bywell Castle rule, might, on the other hand, invoke the prior negligence as being part of the cause of the collision so as to make it a case of contribution.

I am not prepared to dissent from the conclusion that "in the ordinary plain common sense of this business" the *Maplehurst* did by her negligence contribute to the collision in the sense which required the learned trial judge to pronounce her to be partly to blame.

The appeal should be dismissed with costs.

(1) 5 E. & B. 195 at p. 205. (2) [1922] 1 A.C. 129 at p. 139.

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ANGLIN J.—As I read the opinion of the learned trial judge, apart from any question of burden of proof, he found that it was established by the evidence that the officers of the *Maplehurst* had been guilty of negligence which was a direct and efficient cause of the collision between her tow, the *Brookdale,* and the tug *Margaret Hackett.* The negligence consisted in not carrying the towing light prescribed by article 3 of the "Regulations for preventing collisions." The mate in charge of the *Margaret Hackett* was led into a veritable trap. Nevertheless he was held blameworthy for having attempted to cross the channel between the *Maplehurst* and her tow, even on the assumption that the latter was a sailing vessel not in tow, and also because when he realized this mistake, while at a distance of about one hundred feet from the *Brookdale,* he could still have averted the collision by a proper manoeuvre. There being no cross-appeal this condemnation of the owners of the *Margaret Hackett* must stand.

The appellant contends, however, that the fault of the mate of the *Margaret Hackett* was the sole effective cause of the collision—that by the exercise of reasonable care he could have avoided the consequences of the negligent omission to exhibit a proper towing light on the *Maplehurst.*

Consideration of the evidence has convinced me that the conclusion of the learned trial judge was right—that the fault of the officers of the *Maplehurst* continued operative until the collision was, if not inevitable, only to be avoided by great skill and extraordinary alertness on the part of those in charge of the *Margaret Hackett.* For their failure to exercise the requisite skill and to act with the necessary promptitude, the owners of the *Margaret Hackett* have been held answerable for one-quarter of the damages sustained by the *Brookdale,* in addition to bearing one-quarter of their own loss. The *Maplehurst* on the other hand has been condemned to pay three-quarters of the loss suffered by the owners of the *Margaret Hackett.*

Agreeing, as I do, with the view of the learned trial judge that the officers of the *Maplehurst* were gravely to blame and the owners of the *Margaret Hackett* not having

appealed, I should be loath to interfere with the apportionment of the damages even if I regarded it as not quite satisfactory. But, with Mr. Justice Maclennan, I consider the officers of the *Maplehurst* as much more blameworthy for the collision than those in charge of the *Margaret Hackett*.

I would dismiss the appeal with costs.

BRODEUR J.—The evidence shews that the collision in question in this case is due largely, if not entirely, to the negligence of the appellants for not having a proper tow light on the mast head of the *Maplehurst*.

If such a light had been shewn, the pilot of the respondents would never have tried to cross to the north side of the channel in front of the barge in tow. The trial judge has found that the two vessels were at fault and there is no appeal on the part of the respondents against this part of the judgment which found them guilty of contributory negligence.

It has been contended before us by the appellants that the tug, in acting with reasonable care, could have avoided the accident even if the *Maplehurst* had not the proper tow light.

I am unable to agree with this contention. When the pilot of the tug *Margaret Hackett* saw the light of the boat in tow, he thought it was a sailing vessel because he never expected to find there a boat in tow, and he was certainly well advised, under the impression that he had, to go on and to cross on the north side of the channel. When he discovered that the boat was not a sailing vessel and was in tow, it was too late to avoid the collision.

For these reasons, the appeal fails and should be dismissed with costs.

MIGNAULT J.—I find myself in much doubt whether the collision in question in these two appeals was not solely caused by the imprudence of the mate, who was navigating the *Margaret Hackett* at the time of the accident, in attempting with his tow to cross between the *Maplehurst* and the latter's tow. The excuse given by the mate was that not having seen proper towing lights on the *Maplehurst*, he thought her tow was a sailing vessel, and judged

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that he could get safely by, although his own towing line was 500 feet long. The learned trial judge did not hear the witnesses himself but the evidence taken before the wreck commissioner was by consent of the parties tendered as evidence in the two cases. This is unsatisfactory, and I cannot entirely escape from the suspicion that the mate of the *Margaret Hackett,* when he says he thought the *Maplehurst's* tow was a sailing vessel, was testifying as to the state of his mind at the time of the accident with the advantage of subsequent reflection. I would not suggest for a moment that he was not in perfect good faith but evidence of this character is not very reliable, for persons who have contributed to an accident are apt, often unconsciously, to offer excuses or explanations which really were not present in their minds at the time when the accident was brought about, especially where their imprudence, as here, was admittedly one of the causes of the accident. I will not, however, dissent from the judgment about to be rendered, but my concurrence therein is not without considerable doubt.

Appeal dismissed with costs.

Solicitors for the appellants: *Barnard & McKeown.*

Solicitors for the respondents: *Meredith, Holden, Hague, Shaughnessy & Heward.*