6/1927

HAWKES

v

WEST AUSTRALIAN STEAM NAVIGATION CO. LTD.

JUDGMENT. ISAACS J.

Delivered 16.9.1927

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WEST AUSTRALIAN STEAM NAVIGATION CO. LTD.

JUDGMENT. MR. JUSTICE ISAACS.

The owners of the schooner "Merlin" sued the owners of the steam tug "Minderoo" in admiralty for negligence whereby the vessels came into collision in the open ocean, to the damage of the schooner. Burnside J., who tried the case, and by consent without experts, found that though the captain of the tug committed an error of judgment, he was not negligent, and therefore judgment was given for the respondent. From that judgment this appeal is brought.

Notwithstanding Mr. O'Connor's forcible presentation of the appellant's case, it is clear the decision of the learned trial judge cannot be shaken. Negligence is a negative expression and implies a want of that care which the law requires in the given circumstances. The standard of care is always a question of law, the failure to maintain it is a question of fact. Consequently, in every case of alleged negligence the first requisite is to ascertain or assume the legal standard of care which was demanded of the defendant in the circumstances. This is very distinctly stated by Lord Kinnear in Butler v Fife Colliery (1912 A.C., at p. 159) in these words:- "Negligence is not a ground "of liability, unless the person whose conduct is impeached is under a "duty of taking care; and whether there is such a duty in particular "circumstances, and how far it goes, are questions of law. If a

"definite duty has been ascertained, a finding that it has been duly "performed or neglected is a mere finding in fact.....But a "finding as to negligence which implies the existence of a duty without "explicitly defining it, is a proposition of mixed fact and law." Lord Herschell in Membery's case (14 A.C., at p. 190) had said very much the same.

In this case, both because the learned trial judge ~~xxx~~ considered the respondent to have committed an error of judgment, and because of some of the arguments advanced for the appellant, it is of some importance to state briefly the circumstances, and to enquire affirmatively what legal standard of care they imposed on the respondent.

The appellant's vessel was at Onslow on the north-west coast of this State, and its captain agreed orally with the captain of the tug to tow the schooner round the North West Cape and then south to a given destination. Shortly after rounding the cape the ~~xxx~~ tow-line broke. No negligence is so far imputed. The tug prepared a line to cast on board the schooner, and then returned on her course so as to approach the schooner and resume the towing. While engaged in taking up a position from which to place the line on board the schooner, the tug was forced by the wind and tide against the side of the schooner, and caused her some damage. Various suggestions were made during the present argument of learned counsel in order to establish negligence -- or want of due care -- on the part of the tug. Such, for instance, as

approaching improperly, not preserving mobility, not retiring when (again casting the line) danger was imminent, and so on. Whatever might have been the proper conclusion in other circumstances, the conduct of the respondent in the circumstances of this case is not shewn to my satisfaction to fall short of the required standard of care. I shall first state what I understand to be the right standard, so far as relevant, and then I shall explain why I prefer to say that the conduct complained of is not shewn to fall below the necessary standard.

The parties were in contractual relation. No question arises as to the condition or fitness of the tug or its equipment. The contest is simply as to its behaviour. Manifestly it had rights and obligations which are absent in the ordinary case of ships that pass each other, they having no rule of conduct but that prescribed by sea regulations, or dictated by respect for the demands of humanity, or the common duty of reciprocal care on the highway of the ocean. The parties here were bound by contract to carry out an enterprise, and the responsibility of the tug has been stated in several cases of authority. In the Julia (14 M.P.C., 210) Lord Kingsdown at p. 230 stated with considerable fulness the mutual obligations of the parties to such an engagement apart from any stipulation to the contrary. He said, inter alia:- "When the contract was made the law would imply "an engagement that each vessel would perform its duty in ~~xxxxx~~ com- "-pleting it; that proper skill and diligence would be used on board "of each; and that neither vessel, by neglect of misconduct, would

"create unnecessary risk to the other, or increase any risk which might "be incidental to the service undertaken." In the Ratata (1898 A.C., at p. 516), Lord Chancellor Halsbury speaks of the undertaking of the towage contractors:- "to exercise reasonable care and skill in "the performance of the obligation which they have taken upon themselves "for hire and reward in conducting the business of the towage to its "consummation." Sir Samuel Evans, when President of the Admiralty Court, said in the Marechal Suchet (1911 P., at p. 12) that "reasonable "skill, care, energy and diligence should be used in the accomplishment "of the work." It is therefore clear that in estimating the duty of the respondents, we must take into account as one element their right and their obligation to carry the towage to its consummation, if by reasonable nautical means this could be done. Any instance of this may be found in the Point Anne Quarries v the Whalen (39 T.D.R., 37, P.C.). Applying then the standard of duty as stated in the Julia (sup), we must approach the question of fact, as to whether there was such a negligent act or omission as is suggested from the standpoint of a person who is bound to choose between action and inaction, and bound in so choosing to use his skilled judgment according to the circumstances.

The learned primary judge was quite correct in holding that a mere error of judgment is not in such a case necessarily equivalent to negligence. A prudent navigator weighing reasonably, and to the best of his ability, all apparent circumstances, including the exigency of time, may still without reproach misjudge tide or wind or waves or

other operating event, and so form a judgment erroneous in fact. As he is expected and bound in a case of this kind to form a judgment and act upon it, error is not decisive. The learned trial judge who was specially entrusted by the parties to determine the facts without expert assistance, has seen and heard the witnesses, and has (had) placed before him the natural conditions as appearing to the contesting parties. I have no doubt the confidence both parties placed in His Honor's ability to judge of the requirements of the situation accounts for the absence of further expert testimony. Probably the learned judge has a more than ordinary experience in such matters, and doubtless a much more reliable acquaintance with navigation than I possess. His investigation has been thorough, and his reasons full and explicit. He was left unsatisfied by the appellant as to the respondent's alleged negligence, and so far as I am able to judge for myself, the conclusions at which he arrived are correct.

Remembering the duty of the tug to resume its enterprise without undue delay, if that could be donw without unnecessary danger, the bona fide efforts it made to do so, the complications that presented themselves, and the absence of any distinct and reliable proof of failure to display that seamanship ordinarily to be expected in the circumstances, I see no reason for holding in opposition to the opinion of Burnside J. that the appellant has satisfied the burden he undertook . In this connection I would refer to what Lord Kingsdown said in the Julia (sup., at p. 236) as to the position of a appellate tribunal in a matter of this

nature. The observations apply only by analogy, because the circumstances are not identical, and therefore the analogy, like every other analogy, is not perfect. But it is so far similar as to be of application to the present case. Lord Kingsdown said:- "In these cases of appeal "from the Admiralty Court, when the question is one of seamanship, where "it is necessary to determine, not only what was done or omitted, but "what would be the effect of what was done or omitted, and how far under "the circumstances [illegible] the course pursued was proper "or improper, their Lordships can have but slender means of forming an "opinion for themselves, and certainly cannot have better means of form-"-ing an opinion than the Judge of the Admiralty Court." See also per Lord Sunmer in the Hontestroom (1927 A.C., at pp. 47-48).

The question we are asked to answer is not one of common knowledge or experience; it is very special and depends almost wholly on expert training or great familiarity with the subject of navigation. In part also it depends on the preference given to some very discordant statements by witnesses we can neither see nor hear. Consequently, to reverse the finding of Burnside J. would at best be mere guesswork, and as it is, my own impression, so far as I am able to form one independently, is that the judgment appealed from is sound.

This appeal should in my opinion be dismissed.

Hand down

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Judgment Higgins J.

I am of opinion that this appeal should be dismissed; and substantially for the reasons stated by the learned judge of first instance. Beyond the fact of the collision itself there is really no reasonable proof of negligence. The master of the Minderoo had to come to close quarters with the Merlin in order to carry out the contract to tow her after the rope broke; and he appears to have done all that he could be expected to do under the circumstances, during the critical 40 minutes. He bestowed full attention to his task, and used his expert knowledge; but fate was against him. The plaintiff has not shown anything that was done which ought not to have been done by him, or that was left undone which he ought to have done. As Willes J. said in Daniel v Metropolitan Rly Co (L.R. 216, 222; see per Blackburn J. on appeal p.593)----

"It is necessary for the plaintiff to establish by evidence circumstances from which it may be inferred that there is reasonable probability that the accident resulted from the want of some precaution which the defendants might and ought to have resorted to; and I go further and say that the plaintiff should also show with reasonable certainty what particular precautions should have been taken".

Misfortunes occur without negligence. Indeed, I am not sure that the learned judge has been even more severe on the Minderoo than he need have been, when he refers to the Master's "error of judgment". I rather think that the Master merely did not foresee what he could not foresee---- the strength and the effect of the wind on the Minderoo under the circumstances.

Judgment Starke J

One cannot help suspecting that the collision between the vessels mentioned in the pleadings in this case ought not, with proper and skilful seamanship, to have occurred. The evidence however is so meagre and unsatisfactory that I do not think that we can interfere with the findings of the learned trial judge. The acts or omissions relied upon as constituting negligence are :- (1) That the 'Mindaroo' should have gone to leeward instead of to windward of the 'Merlin' and thus floated a line to her. The learned judge regards the suggested course of action as more dangerous than that which was actually adopted. In my opinion he is clearly right in that view, and in any case we cannot differ from him.

(2) The failure of the 'Mindaroo' to fire a rocket on to the 'Merlin' with a line attached. No evidence whatever was offered in support of this suggestion, and we are quite unable to appreciate its practicability or impracticability in the circumstances of this case or even to say whether such a course of action was even possible.

(3) That the 'Mindaroo' was stopped in a position totally unsuitable for floating a line to the 'Merlin' and no effort was made to steam ahead or astern when it was seen that she was drifting towards the 'Merlin' faster than did the buoy with a line attached. This seems to me the critical contention for the appellant. The 'Mindaroo' was not, as I read the finding of the learned judge, placed in a position unsuitable for floating a line to the 'Merlin'. The line however attached to the buoy behaved in a manner wholly unexpected and floated under the counter of the 'Mindaroo' in close proximity to her propeller. The learned judge thought that the movement of her propeller, which involved the possibility of its being fouled by the line, was a dangerous course of action for both vessels, and consequently that the 'Mindaroo' was not, in the circumstances, in fault in omitting to go ahead or astern. More evidence by competent seamen on this point would have greatly assisted and enlightened the Court, but as the evidence stands I cannot see my way to dissent from the finding of the learned judge. Other operations may also have been possible but the appellant is bound by the acts of negligence on which he relied and the manner in which he framed his case.