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The Foul Berth: Hard-Landings and the Resulting Presumption of Negligence

The British Columbia Supreme Court's recent decision involving a collision between a moored and a berthing vessel provides a useful summary of the law on liability in negligence for a "foul berth", otherwise referred to as a "hard-landing". While the case involved relatively small fishing vessels, the law discussed in this article would, in my view, apply to any size of vessel.

In November of 2003 the *Pacific Faith*, an 87 gross tonne aluminum seiner, built by Richmond Shore Boat Builders in 1988, was attempting to moore at Campebll River when its main engine clutch failed and it lost propulsion control. At the time it was approaching a berth behind the *Western Prince*, a 1975 Matsumoto built aluminum seiner of 45 gross tonnes. The trial judge found that, despite the earnest efforts of the *Pacific Faith's* master in the seconds between the clutch failure and the collision, the *Pacific Faith* hit the dock and the *Western Prince's* stern ramp causing damage. The owner of the *Western Price* sued for the repair costs and the lost wages for the crew, alleging negligent seamanship on the part of the *Pacific Faith.* The *Pacific Faith* argued the defence of "inevitable accident", claiming that the failure of the clutch was not foreseeable and could not have been guarded against – therefore there was no negligence.

In considering whether there was negligence the court reviewed several interesting collision cases and commented:

> *In Canada v. "Delta Pride", [Judge] Layden-Stevenson found that the Captain of the ship in question made a decision that "was reasonable and prudent in the circumstances", and "fell within the standards of good seamanship". Thus, the pilot and owners would not normally have been negligent. However, Layden-Stevenson J. stated further:*

> *This finding, however, is not dispositive because if there was contact, it gives rise to a presumption of fact, i.e., when a moving object collides with an immovable one, the active role of the one as against the passive role of the other creates a presumption of fact against the former.*

Layden-Stevenson J. stated that once contact occurred, "it follows that the defendants were negligent". [Judge] Dube., in A/S Ornen v. "Duteous", noted that "a vessel running down a ship at her moorings in broad daylight" is "prima facie evidence of fault" (pp. 281-282).

Relying on this case law the trial judge found that "a*s contact [by the Pacific Faith] has been admitted, the defendants are prima facie negligent.* The trial judge went on to address the *Pacific Faith's* defence of "inevitable accident" and stated:

In Bell Telephone Co. v. "Mar-Tirenno", a ship broke free from its moorings in heavy ice at the Port of Quebec. The master ordered an anchor to be dropped to attempt to stop the ship. The anchor hooked and damaged an underwater cable. [Judge] Addy held:

> *The defendants, in this case, plead inevitable accident and, in order to succeed, they must establish that all reasonable precautions were taken to avoid the mishap and that the accident itself was inevitable in the sense that it could not be reasonably foreseen or, if foreseen, could not be guarded against by using all reasonable precautions under the circumstances.*

The trial judge adopted this last statement as good law in assessing whether the *Pacific Faith* could avoid the presumption of negligence that arose from colliding with a moored object. The responsibility to show that *reasonable precautions* were taken to avoid liability in the context of a civil claim (a claim between private parties such as the owners of the *Pacific Faith* and *Western Prince*) is akin to the defence of *due diligence* that is available in regulatory offences, such as charges brought by the Crown for breaches of the *Collision Regulations* under the *Canada Shipping Act 2001* [see March 2004 Legal Desk "*A Primer on Regulatory Offences – Absolute and Strict Liability*"] . The burden however, is on the person asserting they took reasonable precautions to prove to the court (with evidence) that, on the balance of probabilities, those precautions were indeed taken.

In addressing whether the defendant was successful in making out the defence of inevitable accident, the court found that there was insufficient evidence to "*establish the clutch failure was not due to any act or omission on their part*", such as failure to regularly maintain the clutch. The court considered whether there was evidence of "*the history of the maintenance of the clutch*", the "*the state of the electric clutch before or after the collision*", and "*what steps, if any, were taken by the defendants to determine the cause of the failure of the clutch or whether it had to be repaired after the incident*". The court concluded the defence had not been made out and stated, "*asserting that the clutch failed without warning is not sufficient to meet the onus of proof required to displace the presumption of negligence*". This is not to say that the clutch was not reasonably maintained, but the trial judge in this case was not persuaded it had been.

The law that a moving vessel is presumed negligent when it collides with a moored vessel also applies to a moving vessel that strikes a vessel that is at anchor. In the 1891 case of the *Merchant Prince*, the *Merchant Prince's* steering gear jammed while steaming down the Thames and struck the Cunard Line's *Catalonia* at anchor. In that case the court found:

> *The defendants had taken all precautions and care to have [the steering gear] properly repaired by competent people, but it did jam from something which may be called a latent [hidden] defect. For some reason or other, the machinery at the critical moment (having answered perfectly well in the steering of the vessel in the river the day before, and until this accident on this day), got [jammed]. The wheel could not be used, and so the accident was brought about.*

Of most interesting note in that case however was that the defendant could not actually explain the precise cause of the steering gear becoming jammed, but the court still accepted they have been diligent in avoiding such a possibility. On this the court stated:

> *It is, however, true that the defendants have not done what has been done in many of these cases. They have not laid their finger on the defect or the precise cause of the refusal of this machinery to act. In most cases that I recollect where the defendant has been absolved from the consequences of some latent defect in the machinery, the defect has been discovered after the accident, but that is not a necessary part of the defendants' case if he satisfies the Court that there were causes which he cannot put his finger on. There are many cases where such would be the fact; the case, for instance, of a vessel with some defect in her machinery going to the bottom. It does not follow that there was no latent defect or no latent irregularity because the defendants have not been able to point it out.*

In summary, although a mariner will be presumed to have been negligent in their vessel striking a moored or anchored vessel, they may be excused of liability if they can show that they took reasonable care to avoid the accident. The mariner may not need to show the precise cause of the collision, but they must show their conduct guarded against the cause of the collision.

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