

IN THE COURT OF APPEAL

MONTSERRAT

CIVIL APPEAL NO.01 of 1973

BETWEEN:	ALLEN ROWLAND DUTCHER	Appellant.
	AND	
	JOHN MACKINNON	Respondent

Before The Honourable the Chief Justice
The Honourable Mr. Justice St. Bernard
The Honourable Mr. Justice Peterkin

J. Kelsick for appellant.
K. Allen for respondent.

1975 July 21 & 25

J U D G M E N T

PETERKIN J.A.

This is an appeal against the judgment of Louisy J. dismissing the appellant's claim for negligence arising out of a collision between two vessels within territorial waters.

The facts and circumstances are as follows: On 20th August 1970 the island of Montserrat was threatened by hurricane "Dorothy" and the Administrator and Chief of Police made the Police launch "Emerald Star" available for the purpose of towing the appellant's yacht "Dutch Treat" the respondent's boat "Goerami" and a visiting boat named "News" to English Harbour, Antigua. It was agreed that the respondent should take command of the convoy. He took control of the "Emerald Star" while Cpl. Prospere took charge of the "Goerami". On the respondent's instructions Cpl. Prospere by using a bowline knot, joined two lengths of rope which he tied to the bow of the "Goerami" and the port quarter of "Dutch Treat". This was checked by the respondent and the appellant in his evidence expressed satisfaction with the line and type of knot used.

At about 11 a.m. the convoy left Plymouth roadstead. The order was "Emerald Star" followed by "Dutch Treat" "Goerami" and "News". About a mile or two from Montserrat, for some reason undisclosed, the bowline knot in the line joining "Goerami" to "Dutch Treat" became loose, causing the "Goerami" to drift. The "Emerald Star", with the "Dutch Treat" and "News" in tow, went to the assistance of the "Goerami", and on getting close by, the respondent boarded the "Goerami" while Cpl. Prospere took charge of the "Emerald Star". What next happened is best described in the evidence of Cpl. Prospere.

"After McKinnon got on Goerami he pushed off his boat from Police launch. It was not under power then, neither sail nor engine. After McKinnon pushed Goerami from launch it went drifting. On the launch I saw Cpl. Greenaway at wheel of launch, he was turning the launch to avoid Goerami striking the Dutch Treat. After Goerami had been pushed from launch it went and struck the Dutch Treat between the main hull and star-board position. Goerami was drifting. Goerami drifted for about 75 feet. When the Goerami struck Dutch Treat she was not under power. The bow of Goerami did the striking. The only damage I saw was that the safety nets were torn apart on the Dutch Treat. The crew of Dutch Treat was helping to fend off the Goerami as soon as Goerami struck the portion. After they pushed Goerami off she went off drifting. I could not see what happened after Goerami started drifting. We turned back to where McKinnon was with Goerami, he shouted to us to go as he can make the journey to English Harbour."

The damage to the "Dutch Treat" appeared to have been superficial. Consequently, the appellant decided to continue and the convoy continued on its way. It later however, transpired that the "Dutch Treat" had begun to ship water. It became unmanageable and it was necessary to abandon her and for her crew to board the "Emerald Star". The "Dutch Treat" was later found aground on a reef off the Island of St. Kitts.

The grounds of appeal are as follows

"(a) That the learned trial judge failed to give proper consideration to the evidence adduced by the plaintiff in support of his allegations of the negligence of the defendant and drew wrong conclusions from these facts.

(b) As regards the first ground of negligence pleaded the learned trial judge failed to consider the importance of the knot in the rope attaching the defendant's vessel "Goerami" to the plaintiff's vessel "Dutch Treat" having regard to the nature of knot used and failed to consider the defendant's liability for the act of his agent Cpl. Prospere in the circumstances of the case as adduced in evidence.

(c) As regards the second ground of negligence pleaded the learned trial judge was wrong in concluding that the state of the sea at the time when the defendant relinquished supervision of the management and control of the vessel "Emerald Star" and of the convoy and assumed the control of his own vessel "Goerami" absolved the defendant from liability for damage resulting from his failure to take action which was proper and reasonable having regard to his admitted duty of care in respect of the defendant's vessel.

(d) That having regard to the defendant's special responsibilities arising from his position as the person in supervision and control of the convoy his admitted knowledge of seamanship and to the conditions prevailing at the time of the accident and all other relevant circumstances of the case, the learned trial judge wrongly applied the principles of law relating to reasonable foresight and erred in concluding that the defendant was not negligent.

(e) That the decision is unreasonable and cannot be supported having regard to the evidence."

Counsel for the appellant stated that in the Court below counsel for the respondent conceded that a duty of care was owed to the appellant by the respondent. He then submitted that the negligence began after the breaking of the knot because the evidence did not allow him to rely on the allegation that the knot was improperly tied. He further submitted that the evidence did not support the trial judge's finding that it would have been a hazardous exercise for the respondent to remain alongside the "Emerald Star" to try and start the engine of the "Goerami" or hoist the sails, as the sea was not so rough to prevent the respondent from taking such steps and precautions as a man with reasonable skill ought to have taken. He contended that it was a basic rule of seamanship that a boat not under power cannot be properly and easily controlled, and that the respondent had neither hoisted the sails nor started the engine of the "Goerami". He finally submitted that the defence was one of inevitable accident and that this defence could only succeed if the respondent discharged the onus placed upon him to show that he had taken all necessary steps to avoid the

collision and this he had failed to do.

Counsel for the respondent submitted that there was no evidence of negligence and that 75 feet was not a great distance within which to manoeuvre a boat in the difficult circumstances in which the respondent was placed. He also submitted that to consent to being towed in the circumstances was to accept the risk involved and that the appellant stated in his evidence that he fully recognised that there was danger involved in going to Antigua.

The appellant's claim is based in negligence, and it is axiomatic that he who asserts must prove. The law requires that in a collision at sea there should be preponderating evidence to fix the loss on the party charged before the Court can adjudge him to make compensation.

The evidence of the appellant's witness Maurice Greenaway was that the sea at that time was very rough, and that the waves were about 10 feet high. The trial judge accepted this evidence and found that the respondent was not guilty of negligence. I agree. The respondent undertook charge of this convoy with the approval of all parties concerned in difficult circumstances. He then found himself in a situation of sudden difficulty in which the bowlike knot had become loose leaving his boat adrift. It then became necessary for him to attempt to save his boat, and to do so he had to board it in rough seas with waves of 10 feet high. The appellant has criticised the fact that the respondent had neither hoisted his sails nor started his engine, but has called no evidence to show what was expected of a skilled seaman in these circumstances, or that by hoisting his sails or starting his engine the collision could have been avoided. In my view he has not sufficiently sustained the burden of proof imposed upon him.

I would adopt the language of Brett, L.J., in the case of *The Bywell Castle* (1879) 41 L.T.747.

"The captains of ships are bound to show such skill as persons of their position with ordinary nerve ought to show under the circumstances. But any Court ought to make the very greatest allowance for a captain or pilot suddenly put into such difficult circumstances and the Court ought not, in fairness and justice to him, to require perfect nerve and presence of mind enabling him to do the best thing possible."

The respondent in the instant case may not have done the best thing possible, but in these circumstances I would not hold that he was

negligent even if hoisting the sails or starting the engine would have been the best manoeuvre.

I would dismiss the appeal with costs.

N. PETERKIN
JUSTICE OF APPEAL

DAVIS C.J.

I agree.

MAURICE DAVIS
CHIEF JUSTICE

ST. BERNARD J.A.

I also agree.

E.L. ST. BERNARD
JUSTICE OF APPEAL