[COLONIAL COURT OF ADMIRALTY.]

1941 *Present :* **Howard C.J. (President).**

THE TRUSTEES OF THE PORT OF TUTICORIN *v.* WILLIS S.S. COMPANY, LIMITED.

Cause No. 1 of 1939.

Action for damages—Collision between two ships—Defendant's ship towed to berth by harbour pilot—Failure to give warning to pilot—Negligence of defendant.

Plaintiff sued the defendants for damages sustained by reason of a collision that occurred in the Colombo Habour between the s.s. Harborough owned by the defendants and the dredger s.s. Tuticorin owned by the plaintiffs, which collision was due to the negligent and improper navigation of those on board the s.s. Harborough.

It was conceded that at the time of the collision the "Tuticorin" was at anchor in the Colombo Harbour which is subject to the law of compulsory pilotage and that s.s. Harborough was being navigated into a berth by a Pilot acting under the control and orders of the Government of Ceylon.

It was also in evidence that although the s.s. Harborough had a right-handed screw and as a rule when the helm is put to starboard goes to starboard, sometimes for some unknown reason she would swing to port and that the Captain had not warned the pilot of this before he took the ship to berth.

Held, that the defendants had not discharged the burden imposed upon them of establishing that the collision was occasioned by no fault on their part or that it was solely the fault of the pilot and that consequently they were liable in damages.

THIS was an action instituted in the Colonial Court of Admiralty. The facts are stated in the head note.

E. F. N. Gratiaen, instructed by *F. J. & G. de Saram*, for plaintiffs.—The dredger "Tuticorin" was at anchor when the s.s. Harborough,

which was in motion, came into collision with it. The fact that the plaintiff's vessel was, at the time of the collision, at anchor and could be seen was prima facie evidence of negligence on the part of the defendants. The burden of proof was upon them to rebut the presumption of liability—"*The Indus*".[1]

It is the duty of the master and crew to render proper assistance to the Pilot—s.s. *Alexander Shukoff v. s.s. Gothland.*[2]

It is the duty of the master to warn the Pilot of the tendency of a ship to swing to port when the helm is put to starboard.

N. K. Choksy (with *S. J. Kadirgamar*), instructed by *Julius & Creasy*, for defendants.—No liability attaches to the defendants because (1) the collision was caused by no fault on their part, (2) it was due to inevitable accident, (3) it was solely the fault of a pilot who was on board by compulsion of law.

The cause of the collision was a cause not produced by the defendants; it was a cause the result of which the defendants could not avoid. "*The Merchant Prince*".[3]

An outside influence and not something in the ship herself was responsible for the swing in the wrong direction. This outside influence was the dragging of the ship in shallow water.

The Pilot was at fault in two particulars, viz.:—(*a*) in failing to requisition a tug, (*b*) in approaching berth 28 with too much headway.

A ship of the Harborough's displacement should not be brought to her moorings without a tug.

Headway should have been taken off the ship before it reached buoy 33.

There was no "duty to warn" the Pilot of the unusual swinging to port, contrary to the helm, as it had occurred only once before and may well have been due to extraneous causes. A single such occurrence long before does not indicate any defect in the steering gear; the Captain of the Harborough had no reason to anticipate that it would ever occur again. The evidence is that the Captain did warn the Pilot as soon as the latter gave the order to put the helm to starboard. The pilot had the opportunity of countermanding the order but did not do so and chose to take the risk, and the fault was entirely his.

December 12, 1941. HOWARD C.J.—

In this case the plaintiffs claim a sum of Rs. 5,712, being damages sustained by reason of a collision that occurred in Colombo harbour on December 13, 1938, between the s.s. Harborough, owned by the defendants, and the dredger "Tuticorin", owned by the plaintiffs, which collision was occasioned by the negligent and improper navigation of those on board the s.s. Harborough. The damages were agreed between the parties at the amount stated in the claim. It was also conceded by the defendants that at the time of the collision the "Tuticorin" was at anchor. In such circumstances the law formulated in "*The Indus*" (*supra*) was applicable. In that case in an action for damage by collision where it appeared that the defendants' vessel

[1] *(1887) 12 P.D. 46.*

[2] *(1921) 1 A.C. 216.*

[3] *(1892) P. D. 187.*

while in motion came into collision with the plaintiffs' vessel which was at anchor, it was held that the fact that the plaintiffs' vessel at the time of the collision was at anchor and could be seen was prima facie evidence of negligence on the part of the defendants, and that the burden of proof was upon them to rebut the presumption of liability, by showing either that the collision was occasioned by no fault on their part, or that it was due to inevitable accident, or that it was solely the fault of a pilot who was on board their vessel by compulsion of law. The only question, therefore, that I have to decide in this case is whether the defendants have established to my satisfaction either—

(*a*) That the collision was occasioned by no fault on their part, or
(*b*) That it was due to inevitable accident, or
(*c*) That it was solely the fault of a Pilot who was on board by compulsion of law.

The main contention of the defendants has been based on (*c*). At the same time Mr. Choksy contends that, if the collision was not solely the fault of the Pilot, the defendants come within (*a*) or (*b*). In considering whether the defendants have established that the Pilot was solely to blame, it has to be borne in mind that the law imposes on the Master and crew the duty of rendering proper assistance to the Pilot. In *s.s. Alexander Shukoff v. s.s. Gothland*[1] Lord Birkenhead L.C., at p. 223, stated as follows :—

> "In cases where such a defence" (that is to say one of compulsory pilotage) "is set up there are two factors which must be taken into account. The first is that this defence, which is of statutory origin and has been repeated in successive Acts of Parliament, is part of the settled policy of the country, and is not to be narrowed or diminished in force by decisions of the courts. The second is that this rule, which is intended as a measure of security, does not mean, and must not be taken to mean, that a Pilot when once he is in charge of a vessel is so circumstanced that the master and crew owe him no duty to inform him of circumstances which, whether he has noticed them himself or not, are material for him to know in directing the navigation of the vessel. The master and crew are not mere passengers when a Pilot is on board by compulsion of law. The Pilot is entitled to their assistance, and to apply the defence of compulsory pilotage to a case where the accident would have been averted if such assistance had been given, though in fact it was not, would defeat the policy which has created the defence, and so far from increasing the safety of navigation would actually increase its risks. The law has been laid down in a number of cases, though not, I believe, in this House. In *The Iona*[2] the Judicial Committee, after pointing out that it was for defendants to make out the defence and that therefore they must prove not merely that there was fault or negligence on the part of the Pilot but that the damage was occasioned exclusively by such default, proceeded to point out that if the Pilot had been made earlier aware of the position of a certain barge the accident might never have occurred.

[1] *(1921) 1 A.C. 216.*

[2] *L.R. 1 P.C. 435.*

Thus the neglect of duty on the part of the lookout man not only might have been conducive to the disaster but was in all probability the ultimate cause of it. Again, in "*The Velasquez*"[1], the Judicial Committee laid down the rule in these terms:—'The cases have clearly established that if, for any act or omission which contributed to the accident, the master or crew is to blame, then, although the Pilot is also to blame, the owners are not exempted from liability.'"

Colombo harbour is subject to the law of compulsory pilotage and the "Harborough" was being navigated into No. 28 berth by a Pilot acting under the control and orders of the Ceylon Government. I have to ascertain the facts with regard to what happened from what has been termed an "agreed statement of evidence" which are extracts from the record of an inquiry held by the Commissioner of Wrecks soon after the collision. Inasmuch as the persons concerned were not represented by Counsel these extracts, as might have been anticipated, leave several matters unexplained. However, I have to do my best with the material at my disposal. According to the evidence of the Pilot, at 11.38 A.M., he brought in the "Harborough" which was a vessel with a right-handed screw through the northern entrance with the intention of making for No. 28 berth. When approaching the head buoy of this berth with his engines stopped and helm hard-a-starboard, he sent away his headline and the ship was swinging bow to starboard. In order to make the manœuvre necessary for taking the ship into No. 28 berth he gave the order "full speed astern" expecting her to swing in the same way bow to starboard. She swung, however, the opposite way to port. To try and check this swinging, he let go the starboard anchor paid out to 110 feet and blew for the tug. No tug was, however, available. At 11.39 A.M. the pilot gave another "full speed astern" order which he describes as an emergency order. In spite of the check imposed by the anchor and headline (which was a brand new 7" rope and which parted) the ship carried on and hit the dredger which was in berth No. 34 at 11.39½. The "Harborough's" port anchor caught the superstructure of the dredger at about the break of the forecastle head and damaged it up to the chute. The only other point in the Pilot's evidence that calls for comment is his statement that the wind and sea at the northern entrance would tend to make a ship misbehave and that if a tug had been available he would have used her. The remaining evidence in the agreed statement is supplied by the Captain, Chief and Third Officers and the Chief Engineer of the "Harborough". No conflict as to what happened arises between their testimony and that of the Pilot. One fact, however of great importance does emerge from the evidence of the Master. He states that, when his engines went astern, he warned the Pilot that, although the "Harborough" had a right-handed screw and as a rule goes to starboard, sometimes for some unknown reason her bow will swing to port. In cross-examination he stated that once in the two years he had been on the ship he had experienced her swinging the wrong way and after that experience he warned Pilots that she may

[1] *Ibid. 494, 498, 500.*

swing the wrong way. The Master also stated that, when the "Harborough" went astern, she was about the ship's length from the dredger. The Chief Engineer also stated that he had seen the ship swinging the wrong way before, but could not account for it. The Chief Officer stated that the headline on the buoy did not check the vessel until it was at its full length—90 fathoms—by which time they were within twenty feet of the dredger and his men were not quick enough to get turns on the bitts as the vessel had such way on her.

To supplement the evidence of the eye-witnesses of the collision the defendants called Mr. W. S. Watt, a fully qualified Master with seventeen years' experience at sea and twenty-seven in Colombo as Master of the "Sir William Matthews", a dredger, and with the Ceylon Wharfage Company. The establishment of the defendants' case with regard to the negligence of the Pilot is based on the expert evidence tendered by this witness. He has made certain deductions from the evidence of the eye-witnesses which evidence indicates, so he maintains, that the collision must be attributed to the Pilot who was at fault in two particulars, that is to say (*a*) in failing to requisition a tug, (*b*) in approaching berth 28 with too much headway. On the other hand the plaintiffs have called Commander Pocock, the senior Pilot, and Lieut.-Commander Rigby Swift, who maintain that the evidence indicates that the collision cannot in any way be attributed to the negligence of the Pilot, but was due to the ship turning to port when the engines were put full speed astern. These witnesses also contend that the Master should have warned the Pilot that the ship had this peculiarity.

Is it established that the Pilot was at fault in failing to requisition a tug to assist him in berthing the "Harborough"? There are only two tugs, one only of which according to Commander Pocock is as a rule on duty. Sometimes four ships are berthed at the same time. Commander Pocock further states that it is the practice of the Pilots to bring ships to their moorings without tugs and that he does so in nine cases out of ten. On the other hand the Pilot states that he would have used a tug if one had been available and it would have been possible to have waited. Although Mr. Watt in his evidence states a ship of the "Harborough's" displacement should not be brought to her moorings without a tug, and it would be very foolish to try and moor a ship in berth 28 without a tug, he admitted in cross-examination that taking a vessel to its berth without a tug was not a risk and that he cannot say he would have insisted on a tug. Having regard to the practice of the pilotage service and the lack of any evidence to prove that the mooring of a vessel in berth 28 was a hazardous operation necessitating the use of a tug, I am of opinion that the failure to requisition a tug for the berthing of the "Harborough" cannot be regarded as negligence.

Is the collision attributable to the negligent act of the Pilot in approaching the buoy with too much headway? Mr. Watt states that headway should be taken off before the ship reaches buoy 33 and that this was not done. In fact he makes the calculation that, when full speed astern was ordered, the ship was proceeding at a speed of four knots. He makes this calculation from the distance travelled before the

order to go astern was given. Mr. Watt also draws the inference that there was too much headway from the failure of the measures taken by the Pilot to check the ship, that is to say, the throwing of the headline, the letting go of the starboard anchor and the order for the engines to go full speed astern. Mr. Watt in cross-examination says that he cannot vouch for the accuracy of his calculations. They leave on my mind the impression that they were purely guess work. With regard to the ship swinging in the wrong direction Mr. Watt says that this possibility always exists and that it is the duty of every Master to warn the Pilot of every peculiarity. At the same time he says that, if a ship had swung the wrong way once, he does not know whether he would have warned the Pilot. He also evolves a theory that an outside influence and not something in the ship herself was responsible for the swing in the wrong direction. This outside influence was, so he suggests, "smelling the ground" or the dragging of the ship in shallow waters. He also asserts that, owing to silting, parts of the harbour are shallower than others and in berth 28 there is a shelving towards the port side which might produce this drag. If this drag took place, the putting of the engines to full speed astern would increase the swing. Although putting forward this theory, Mr. Watt admits that the order to go astern was a proper one to give and the warning from the Master about the tendency of the ship to swing in the wrong direction came too late. Commander Pocock, whilst admitting the swing in the wrong directions could be due to outside agency and not due to something in the ship, states that he has never had experience of a ship swinging the wrong way when being taken into berth No. 28. Moreover he disclaims all knowledge of Mr. Watt's theory. With regard to the speed, he states a ship must have some headway when she reaches the buoy. He considers four knots a little too much speed, but he would have a headway of two knots. He also says that the Master should have warned the Pilot that the ship had a tendency to swing the wrong way so that the Pilot might take extra precaution. Without such a warning the Pilot would expect the ship to swing in the normal way and hence the order full speed astern was normal. The strain on the headline would be greater if the ship swung the wrong way.

Dealing with the evidence as a whole I am of opinion that the suggestion that the ship was making too much headway rests on pure surmise. Even if four knots is regarded as excessive for mooring the ship in berth 28, such excessive speed cannot be regarded as the proximate cause of the collision. If the ship had swung in the normal way, the collision would not have taken place. The abnormal swing was the proximate cause of the collision.

As already indicated in this judgment, the defendants must prove that the Pilot was solely responsible for the collision. In this connection the question arises as to whether the Master rendered proper assistance to the Pilot. It is obvious that the warning with regard to abnormal swinging was useless once the order "full speed astern" had been given. In my opinion the Pilot should have been warned before he took the ship to this berth. With such a warning he would have had an opportunity of deciding whether he would take the risk of berthing the

ship without the assistance of a tug. He would have realized, if he attempted the manœuvre without such assistance, that it was essential to proceed very slowly. Moreover he might have decided to approach the berth from the other side of the buoy. In these circumstances I have come to the conclusion that the defendants have not discharged the burden imposed upon them of establishing that the collision was occasioned by no fault on their part or that it was solely the fault of a Pilot who was on board by compulsion of law.

It has also been suggested by the defendants in the alternative that, if the Pilot was not at fault, the collision was due to inevitable accident. In this connection I have been referred to the judgment of Lord Esher in "*The Merchant Prince*[1]" where the following principle with regard to what in law constitutes "inevitable accident" is formulated:—

> "Unless you can get rid of it, it is negligence proved against you that you have run into a ship at anchor. Then they have gone on with some variation of phraseology, but I am bound to say that if you look into all the cases with an agreement of fact, that the only way for a man to get rid of that which circumstances prove against him as negligence is to show that it occurred by an accident which was inevitable by him—that is an accident the cause of which was such that he could not by any act of his have avoided its result. He can only get rid of that proof against him by showing inevitable accident, that is by showing that the cause of the collision was a cause not produced by him, but a cause the result of which he could not avoid. Inevitable seems unavoidable. Unavoidable means unavoidable by him. That being so, there comes the proposition which Lopes L.J. has put into form that a man has got to show that the cause of the accident was a cause the result of which he could not avoid. If he cannot tell you what the cause is, how can he tell you that the cause was one the result of which he could not avoid? That appears to me to be perfect reasoning. But when he comes to show the circumstances of the case, he cannot show, he says, the cause which puts him in a great difficulty, when he shows circumstances under which the Court can see a cause—I do not say see it clearly proved, but see a probable cause, and see with the evidence which he gives that, if that was a probable cause, there were means by which he could have avoided it. Then not only does he not satisfy the burden which is put upon him, but he lets you into the view of things which shows you a probable cause, and shows you that if that was the probable cause the means by which he could without difficulty have avoided it."

Applying the principles laid down by Lord Esher it may be said in this case that the collision was due to the swinging of the ship in the wrong direction. That abnormal swing is not the negligent act of the Pilot. The defendants suggest a probable cause which is not clearly proved. The burden of proving that the collision was inevitable is not in such circumstances satisfied.

The defendants have, therefore, failed to discharge the burden of proof imposed upon them and judgment must be entered for the plaintiffs as claimed together with costs. *Judgment for plaintiffs.*

[1] *(1892) P.D. 187–188.*