WISDOM

TSUI & CO Solicitors

Shipping

The Owners and/or Demise Charterers of the Ship or Vessel "TS Singapore" v the Owners and/or Demise Charterers of the Ship or Vessel "Xin Nan Tai 77" and the Owners and/or Demise Charterers of the Ship or Vessel "Med" (formerly "MCC Jakarta"), HCAJ 48 of 2011, HCAJ 158 of 2012 and HCAJ 49 of 2013 (consolidated), Judgment on 2 June 2017

This case concerns two almost simultaneous collisions near the East Lamma Channel Traffic Separation Scheme. Both MCC Jakarta and TS Singapore (being on port side of MCC Jakarta) were travelling south-easterly outbound from Hong Kong and MCC Jakarta was overtaking TS Singapore. At that time, Xin Nan Tai was steering in a westerly course in a crossing situation with MCC Jakarta, with Xin Nan Tai 77 being the give-way vessel (having MCC Jakarta on her starboard side) and MCC Jakarta the stand-on vessel.

Xin Nan Tai 77 did not give way but instead maintained her course and speed until a close-quarters situation was created. MCC Jakarta also failed to notice Xin Nan Tai 77 until then, and hastily turned to port to avoid collision. Unbeknownst to MCC Jakarta, Xin Nan Tai 77 turned starboard at the same time. As a result, port bow of Xin Nan Tai 77 collided with starboard bow of MCC Jakarta ("1st Collision"). Jakarta did not stop completely but continued to swing to her port side, colliding with TS Singapore soon after ("2nd Collision").

MCC Jakarta sued Xin Nan Tai 77 for the 1st Collision. TS Singapore in turn sued Xin Nan Tai 77 and MCC Jakarta for the 2nd Collision. The parties agreed that TS Singapore was not to blame for the 1st Collision, and 5% to blame for the 2nd Collision.

Held

It was held that compliance with crossing rules according to COLREGS was of vital importance. Xin Nan Tai 77, as the give-way vessel, was obliged to take early and substantial action to keep well clear of MCC Jakarta but failed to do so. The only possible implications, on finding of facts, were either a failure to keep a proper lookout, or a failure to take timely action by Xin Nan Tai 77. Either way, Xin Nan Tai 77 was at fault. Meanwhile, it was found that MCC Jakarta was concentrated in overtaking

TS Singapore, sailed at unsafe speed and failed to take proper look out, thus also at fault.

Since both vessels were found to be at fault to some degree, the Judge then considered apportionment of liability based on an assessment of blameworthiness and causative potency of both vessels. Having found that Xin Nan Tai 77 created the close-quarters situation in the first place by not taking early avoidance action, its fault was held to be more serious than that of MCC Jakarta, which was given a short time to respond to the situation. Apportionment was 80:20 in favour of MCC Jakarta.

Since there was nothing that MCC Jakarta could have done between the 1st and 2nd Collisions, the Judge adopted the same apportionment of liability as between Xin Nan Tai 77 and MCC Jakarta for the 2nd Collision.

Comments

In a previous collision case “The He Da” [2011] 5 HKLRD 126, the Court unusually ruled one vessel to be 100% liable for the collision despite the other vessel was also at fault, being in breach of COLREGS. That case had been criticized for being against the trend in UK case law that the Court would almost inevitably make an apportionment of liability between the two parties that are at fault.

The present case has clarified the stance of the Hong Kong High Court in apportionment of liability and will provide a useful guidance for parties in collision actions in the future in the negotiation of settlement. It is also a reminder for those at the helm to stay alert and abide by the COLREGS whenever possible.

The Learned Judge further formulated the “usual directions” to be used in collision cases involving the use of Nautical Assessor. Significantly, the parties would be given chance to file written submissions as to whether the advice of Nautical Assessor should be accepted.

Personal Injury

David John Slater v Commissioner of Police, HCPI 646 of 2012, Judgment on 7 July 2017

The Plaintiff, aged 51 at the time of accident, was a Chief Inspector posted to the Marine West Division. While participating in a Marine Police Combined Operational Tactics Training Course, he was assigned as a crew member of a Divisional Fast Patrol Craft and was standing behind the coxswain but sprained his low back when the Craft was hit by a big wave. Liability was initially contested by the Defendant but was later admitted. The judgment concerns the assessment of damages.

One issue of contention between the parties was whether the missed opportunity of the Plaintiff to take up part-time job during the sick leave period was caused by the accident. Another issue was whether the Plaintiff was entitled to damages for loss of earnings where the Plaintiff voluntarily decided to leave the employment of the Defendant.

Held

It was found that the Defendant had granted approval for the Plaintiff to work part-time for a particular company before the accident. However, shortly after the accident, that company was a target of investigation by the Defendant and hence approval for Plaintiff to work for it was revoked. Despite investigation being completed afterwards (during sick leave period) and the Plaintiff applied for approval again, the Defendant refused to grant the same as the Plaintiff was still under sick leave and was suggested to engage in activities good for his health.

It was held by Bharwaney J that the Plaintiff was physically fit to return to such part-time work after the reasonable sick leave period. His inability to return to such work was caused entirely by the Defendant's unwillingness to grant the requisite approval, but not caused by any injury suffered by the Plaintiff in the accident. Loss of earnings for part-time work was therefore dismissed.

Further, it was found that the Defendant had a well-developed system offering appropriate positions for "health-impaired officers" until their retirement. Although in another case involving the same system, *Chun Yat-nam v AG* for and on behalf of Commissioner of Police, it was held that the continued employment by the police would aggravate the plaintiff's mental condition and it was reasonable for the plaintiff to retire, that case was not

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applicable to the present case. Prior to the accident, 80% of the Plaintiff's duty involved office duties. If the Plaintiff were to stay with the Defendant, he would only be required to perform 100% office duties for about 1 more year before he would have retired, which the Plaintiff failed to show that such modified position would cause any depressive illness upon him such that it was reasonable for him to voluntarily apply for mutual termination of his contract of employment with the Defendant. Thus, his claim for loss of earnings after sick leave period was also dismissed.

Comments

Causation is an important element in tort cases but could sometimes be overlooked. As demonstrated in the present case, when there is an established system by the employer (Police Force) for providing suitable positions for injured employees, the Court may find that the voluntary retirement or resignation of the plaintiff to be unreasonable and thereby breaking the chain of causation. So long as it makes good commercial sense to do so, employers seeking to manage risks arising from work injuries may set up systems to accommodate the disabilities of their injured employees, or make sensible offers for long-term injured employees to work on lighter duties to mitigate their losses.

WISDOM OF THE ISSUE

There is a time for everything.

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