



RETREAT FROM 'NEW FOR OLD' FOR COLLISION DAMAGES

INTRODUCTION

In *Laichkwiltach Enterprises Ltd v F/V Pacific Faith (Ship)* the British Columbia Court of Appeal refused to award 'new for old' repair costs to a vessel damaged by a collision and applied a rate of depreciation against the repair costs to account for betterment.¹ The court stated that betterment is a question of fact to be determined on the evidence and with regard to what is reasonable in a particular case.

Citing a number of authorities, the plaintiff asserted that Canadian and English courts had consistently applied the admiralty principle of 'new for old' when assessing damages for collision. However, the court of appeal dismissed the authorities cited as "not cases of general application".

'Betterment' refers to an improvement put upon a property which enhances its value more than mere replacement, maintenance or repairs. In Canada, damages arising from betterment are generally not recoverable.

FACTS

On November 18 2003 the aluminium fishing vessel Pacific Faith approached its assigned berth at the Campbell River, British Columbia marina. As the ship was attempting to dock, its electrical clutch failed, preventing the master from shifting from forward into reverse. The master shut down the main engines to slow the vessel's progress and tried to steer using only bow thrusters. However, he could not prevent the vessel from striking another aluminium fishing boat

moored in the adjacent berth. Pacific Faith hit the partially lowered adjustable stern ramp of the F/V Western Prince and then continued forward until its bow came into contact with a portion of the dock.

The Western Prince sustained damage in the collision. However, it was not surveyed until February 2004 and repairs were not completed until September 2004.

The owners of Western Prince, Laichkwiltach Enterprises Ltd, subsequently brought an admiralty action *in rem* against Pacific Faith and *in personam* against its owners and its master for collision damage.

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TRIAL DECISION

At trial the British Columbia Supreme Court was asked to determine, among other issues, the defendants' liability in negligence for damage to the Western Prince and the value of such damage.²

In an agreed statement of facts the parties confirmed contact between the two vessels. Following *Canada v Delta Pride (The)*³ and *A/S Ormen v The Ship Duteous*,⁴ the judge concluded that the defendants were *prima facie* negligent.

The trial judge also accepted the defendants' evidence for the clutch failure. However, the defendants failed to establish that the clutch failure was due to no act or omission on their part. As a result, the judge denied the defence of inevitable accident as set out in *Bell Telephone Co v Mar-Tirenno*.⁵

The court assessed the severity of the collision, finding that the contact between the vessels had been more than the "glancing blow" advanced by the defendants and less than the "ramming" asserted by the plaintiff.

The plaintiff claimed damages of C\$105,665.82, including the cost of repairs, surveys, fuel consumption for travel to and from shipyards and lost income for the ship's crew.

¹ 2009 BCCA 157

² 2007 BCSC 1852

³ 2003 FCT 11

⁴ [1987] 1 FC 294

⁵ [1974] 1 FC 294



Given its conclusion on the force of contact, the court found the plaintiff's damages claim to be unsupported. The judge awarded the plaintiff C\$17,832.60 plus interest, on the grounds that (i) most of the repair costs were not attributable to damage suffered in the collision, and (ii) repair or replacement of parts that were damaged had extended the working life of those parts beyond what it would have been had the collision not taken place. For the latter reason, the judge reduced the damages claimed by 67% due to betterment.

APPEAL

One of the main issues on appeal was whether the trial judge was legally correct in determining the effect of the betterment on the assessment of damages. The plaintiff, now an appellant, argued that a principle of admiralty law known as 'new for old' applied and there should be no deduction arising out of the replacement of new for old.

According to the court of appeal, once the cost of repair was proven by the plaintiff, the defendants assumed the onus of proving betterment. On the evidence, the court concluded that this had been done, leaving it only to determine the effect of betterment on assessment of damages.

Citing a number of authorities,⁶ the plaintiff asserted that Canadian and English courts had consistently applied the admiralty principle of 'new for old' when assessing damages for collision. However, the court of appeal dismissed the authorities cited as "not cases of general application" (Paragraph 31). At Paragraph 34 the court said that:

"In modern law, this 'new for old' principle, if it ever was a principle of general application, has been modified by the commercially more realistic betterment concept."

The court preferred the principle set out in *Upper Lakes Shipping Ltd v St Lawrence Cement Inc*⁷ - namely, that the plaintiff should have deducted from its award the amount by which its property had improved, but also be compensated to the extent that it had to put out money prematurely to obtain the betterment.

Citing *Nan v Black Pine Manufacturing Ltd*⁸ and *Prince George (City) v Rahn Bros Logging Ltd*,⁹ at Paragraph 36 the court of appeal stated that:

"Betterment is a question of fact to be determined on the evidence and with regard to what is reasonable in the particular case. The starting point is the cost of repair. In some cases, that will also be the end point. In other cases, betterment will be proven and it will fall to the trier of fact to assess the extent of the betterment."

The court went on to conclude that the trial judge had erred in assessing betterment at 67%.

The court of appeal took issue with the finding at trial that there was an immediate need for extensive repair to the Western Prince as of the date of the collision. Instead, the court was of the view that the imprecise evidence showed only that repairs of an uncertain extent were required at some unknown time in the future.

The court of appeal concluded that analysis of betterment must involve a determination of what is reasonable and what is fair to both parties, accounting for the fact that, in this case, the cause of the immediate need for repair was the defendants' negligence. It also found that the defendants' evidence went only part way towards establishing significant and immediate betterment of the condition of the Western Prince's ramp.

Accordingly, the appeal was allowed, betterment was assessed at 33% and the plaintiff's damages award for the repairs increased accordingly.

The court of appeal refused to disturb the trial judge's finding that the defendants were liable for the full cost of marine surveys on the basis that those costs were reasonably incurred as a natural and probable consequence of the tort.

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⁶ Collins Bay Rafting & Forwarding Co v Kaine (1898) 29 SCR 247; The Ship Dumurra v Maritime Telegraph and Telephone Co Ltd (1977) 75 DLR (3d) 766 (FCA); Harbutt's Plasticine Ltd v Wayne Tank & Pump Co Ltd [1970] 1 QB 447 (CA)

⁷ (1992) 89 DLR (4th) 722 (Ontario CA) at 723-724.

⁸ (1991) 55 BCLR (2d) 241 (CA).

⁹ (2003) 9 BCLR (4th) 253

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