

ONTARIO
SUPERIOR COURT OF JUSTICE

B E T W E E N:)
)
OLIVER B. TUCHEL) James Leone, for the Plaintiff
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Plaintiff)
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- and -)
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)
RONALD ARTHUR GUNTON and) Lisa D. Belcourt, for the Defendants
VERNA MARION GUNTON)
)
Defendants)
)
)
) **HEARD:** November 13 and 14, 2003

2003 CanLII 40010 (ON SC)

RIVARD J.

[1] On August 7, 2000, the plaintiff was operating his boat in a westerly direction on a waterway in Parry Sound. Upon entering a narrow channel he noticed the defendant, Ronald Gunton, operating a boat in an easterly direction in the same channel. This channel is only approximately 40 to 50 feet wide. Mr. Tuchel testified there was a distance of approximately one-half mile between his boat and the defendant's boat when he first saw it. At that point, the plaintiff's boat was not on plane, being operated cautiously at the rate of approximately 10 kilometres per hour.

[2] The defendant's boat was traveling at a speed of approximately 20 miles per hour. It was planing.

[3] Mr. Tuchel testified he kept as close to the starboard side of the channel as was practical. He said the defendant's boat was coming straight toward his boat, and it was not reducing its

speed. Mr. Tuchel remained on the starboard side of the channel. He reduced his speed to idle. As the defendant's boat was not changing its course and not reducing his speed, Mr. Tuchel testified he had one of three decisions to make, namely

- (a) to run his boat aground on his starboard side;
- (b) to have a head-on collision;
- (c) to swing his boat to port side.

[4] Mr. Tuchel decided to turn his boat to port side. He testified this was in conformity with his obligation to do everything he could to avoid a collision.

[5] At the last moment before the collision, the defendant steered his boat to starboard. A collision ensued. The bow of the defendant's boat rode up onto the starboard side of the bow of the plaintiff's boat.

[6] The impact was violent, causing damage, agreed upon at \$15,000, to the plaintiff's boat.

[7] The defendant, Mr. Gunton, drove his boat to a nearby dock following the impact. The plaintiff's boat was towed to a nearby marina. Police was called and statements taken.

[8] Mr. Gunton was charged with careless boating and subsequently pleaded guilty to the charge. I accept that this plea was for convenience, as Mr. Gunton lives in the Western United States, and it made no economic sense for him to return to Parry Sound for a trial when the charge could be resolved by paying a small fine.

[9] John Nichols, the plaintiff's friend who was on the plaintiff's boat at the time of the collision, testified and corroborated the plaintiff's evidence. He said that just before the collision, he saw Mr. Gunton looking to his left and then he turned to his starboard side.

[10] Before the impact, Mr. Tuchel sounded the horn on his boat several times. The passengers in Mr. Tuchel's boat were waving and yelling in an effort to get the Gunton boat to avoid a collision.

[11] Ms. Wynna Powell, the defendant's daughter, testified. She confirmed she was a passenger in her father's boat at the time of this collision. They were proceeding easterly through the channel. The defendant's boat was planing. When she first observed the plaintiff's boat in the channel, it was approximately 50 metres away. It did not appear to be moving.

[12] She testified her father continued in an easterly direction. She next saw the plaintiff's boat moving in their direction. She said she believed they would pass each other, gunnel to gunnel, with very little space between the boats. She called out to her father. They were still traveling at the speed which allowed their boat to plane.

[13] Upon yelling at her father, he put his boat in neutral. This pulling back of the throttle caused the bow of the defendant's boat to go up. The collision ensued.

[14] Ms. Powell testified it seemed to her her father was navigating his boat to the right of the center of the channel. She said she doesn't believe her father saw the plaintiff's boat. He responded to her cry when she saw the plaintiff's boat the second time.

[15] She said her father did not sound the horn to his boat.

[16] The defendant, Chaplin Ronald Gunton, stated in his evidence that he proceeded through the channel at a speed of approximately 20 miles per hour. His boat was kept in a planing mode. He proceeded through the middle of the channel as he saw no other boats. He did not reduce his speed. Suddenly, he heard someone yell: "Dad, watch out". He immediately pulled back on the boat's throttle placing it in neutral. This caused the bow of the boat to rise. He looked to his right and saw three persons in the boat he was about to strike. The bow of Chaplin Gunton's boat then came down on top of the plaintiff's boat. The swell behind the defendant's boat pushed it on top of the plaintiff's boat. The defendant's boat teetered there, momentarily, then slid off the back of the plaintiff's boat.

[17] Chaplin Gunton cannot explain why he did not see the plaintiff's boat. He speculates that he came around a 'blind corner' at the end of the channel, preventing him from seeing the plaintiff's boat.

[18] On all of this evidence, I find that the collision between the two vessels was caused by Chaplin Gunton's failure to keep a proper look-out. If he was in fact entering a 'blind corner', it was incumbent upon him to slow down and to proceed only in safety. He failed to do so.

[19] I can find no fault on the part of the plaintiff. He saw the defendant's boat approaching. I accept he stayed on the starboard side as required. He proceeded at a very slow speed and veered to the left because that was his only hope of avoiding the collision.

[20] I also find that Mr. Tichel sounded the horn on his boat. This unfortunately did not prevent the defendant from striking the plaintiff's boat.

[21] Ontario boating regulations require that when two boats meet head on, each must alter course to starboard to pass.

[22] In this case, the defendants submit the plaintiff is at fault because, when the two vessels met, the obligation on the plaintiff was to alter course to starboard, or to stop and to reverse.

[23] I accept the evidence of Mr. Tichel that he did not alter his course to starboard because there was no room to do so without striking the rocks to his right. I also conclude, on the evidence, that, had he stopped and remained in his location, that would not have avoided the accident.

[24] There was an obligation on Mr. Tuchel to avail himself of the last clear chance to avoid being struck.

[25] He did so by veering left. Unfortunately, due to the speed of the defendant's vehicle, there was insufficient time for him to avoid the collision.

[26] On the facts of this case, no liability ought to be imposed on Mr. Tuchel for attempting to take evasive action in the face of imminent danger caused by the defendant's speed and failure to keep a proper look-out.

[27] As a result, the plaintiff will recover his entire claim as he did not contribute to the accident.

[28] The defendants' counterclaim will be dismissed.

[29] There will be judgment in favour of the plaintiff against the defendants for the sum of \$15,000 together with pre-judgment interest pursuant to section 128 of the *Courts of Justice Act of Ontario*.

[30] Counsel are to make written submissions relating to costs, within 15 days.

JUSTICE PAUL RIVARD

Released: December , 2003

COURT FILE NO.: 02-CV-232902SR
DATE: 20031208

ONTARIO
SUPERIOR COURT OF JUSTICE

B E T W E E N:

OLIVER B. TUCHEL

Plaintiff

- and -

**RONALD ARTHUR GUNTON and VERNA
MARION GUNTON**

Defendants

REASONS FOR JUDGMENT

RIVARD J.

Released: December 08, 2003