Michigan Law Review

Volume 51 | Issue 1

1952

ADMIRALTY-RECOVERY FOR NEGLIGENT INVASION OF CONTRACTURAL INTEREST IN USE OF SHIP

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RECENT DECISIONS

ADMIRALTY—RECOVERY FOR NEGLIGENT INVASION OF CONTRACTUAL INTEREST IN USE OF SHIP—A fishing vessel just beginning a voyage was negligently struck by another ship and laid up for a period of time for repairs. The crew were to have been compensated on the so-called "lay plan," 32% of the gross catch going to the jointly-owned vessel and gear, and 68% being split equally among the crew of ten, which included one of the joint owners. On a libel filed originally by seven of the crew members, but later joined by both owners and the remaining two of the crew, the trial court allowed recovery of the cost of repairs to the vessel and the full value of the lost catch, this last being apportioned as per the gross catch split outlined above, the crew sharing only as the real parties in interest.[1] On appeal, *held*, the trial judgment reversed as to the nine non-owner crew members but affirmed as to the owners' recovery of cost of repairs, 32% of the lost catch, and one tenth of the 68% of the lost catch apportioned to the crew for the one working owner. The nine crew members failed because their loss arose "solely out of their contract with the owners,"[2] and thus was governed by the rule in *Robins Dry Dock and Repair Co. v. Flint*[3] denying recovery for negligent interference with a contractual interest. *Borcich v. Ancich*, (9th Cir. 1951) 191 F. (2d) 392.

The protected interest in the continued good physical condition of a thing is generally considered a right in the thing. However, where this thing has been physically damaged by some negligently tortious act a variety of interests may be invaded. The interest most directly invaded is compensated for by the costs of repair, and can generally be thought of as the interest in the marketability and usability of the undamaged chattel. The costs of such repairs may be recovered by the person in possession, legal title being of no significance unless lying with the negligent defendant.[4]

The other extreme can perhaps be thought of as those incidental interests a person may have in the continued well being of another man's chattels, and which become increasingly common as society becomes more economically interdependent. Some may be wholly circumstantial, analogous to the national interest in continued steel production, and are generally not thought of as having any legal protection. Some may be by way of contract, such as the interest of an insurer of the object, or of one having a profitable contract to perform some

[1] Ancich v. The Marsha Ann, 92 F. Supp. 929 (1950). The trial court viewed the case as tried as a single action, 92 F. Supp. at 930, with the crew joined as the real parties in interest—"And the crewmen, being entitled by the terms of the lay plan to a share of the profits, would be able to assert their claim to their aliquot portion of the amount recovered by the owner." 92 F. Supp. at 932. This admitted that the crew were to be considered as employees only, and not recovering in their own right.

[2] The working owner's recovery of one tenth of the crew's 68% should clearly have failed under this same logic.

[3] 275 U.S. 303, 48 S.Ct. 134 (1927).

[4] Brewster v. Warner, 136 Mass. 57 at 58 (1883).

work on the object, such as building a tunnel on land negligently flooded,[5] or towing a barge negligently sunk.[6] These interests arising as incidental to some contract have not been accorded protection in the courts, unless by way of subrogation. A leading case in this area is *Simpson v. Thompson*[7] in which an indemnifying insurance company was denied rights in the statutory fund supplied by the vessel which negligently sank the insured vessel. Both ships were owned by the same person; hence there was no possibility of subrogation. Lord Penzance took occasion to lay down the proposition that no one could recover for damage sustained through negligent injury to a person or chattel in which the claimant's interest was contractual, having "no immediate or reversionary property in the chattel, and no possessory right by reason of any contract attaching to the chattel itself, such as by lien or hypothecation."[8]

Somewhere in between these extremes is recovery for the value of the use of a chattel during the time it is being repaired. That the right to use is a normal incident of the ownership of property is axiomatic, and the owner's right to recover for his share of the use so lost is demonstrated by the present case. The interest in the right to use is unique among interests in property in being so readily divisible by contract, with complex appropriations of the product of use becoming increasingly common. However, that one not the owner, having an executory contractual interest in the use so lost, cannot recover is also demonstrated by the present case, and the *Robins* case.[9] This denial must be viewed as an incident of the rule propounded in *Simpson v. Thompson*.[10] In the *Robins* case direct recovery was denied a charterer for his interest in the full value of the use of a negligently injured vessel, over and above that of the owner's share as measured by the hire rate, thus limiting the total recovery for negligent injury to a chattel when the full value of the use so lost was clearly within the defendant's knowledge. In the present case, indirect recovery, or a sharing in the recovery initially granted the owners for the full value of the lost use, was also denied, similarly limiting the eventual recovery for damage, the presence and value of which had been conceded by the court.[11] In both cases the defendant's

[5] Cattle v. Stockton Waterworks, L.R. 10 Q.B. 453 (1875).

[6] Société Anonyme de Remorquage à Hélice v. Bennetts, [1911] 1 K.B. 243. See also PROSSER, TORTS 991 et seq. (1941) for discussion of this area and notes 26, 27 and 28, pp. 992 and 993 for citation of leading articles.

[7] 3 App. Cas. 279 (1877).

[8] Id. at 289. Two other cases, Le Lievre v. Gould, [1893] 1 Q.B. 491, and Savings Bank v. Ward, 100 U.S. 195 (1879), must be viewed as part of this same picture (note citation in Robins case, 275 U.S. 303 at 309), although they did not involve injuries to chattels and are now considered more as a part of the law surrounding negligent misrepresentation. See PROSSER, TORTS 737 (1941).

[9] Text, infra.

[10] See citation of Elliot Steam Tug Co. v. The Shipping Controller, [1922] 1 K.B. 127, 139, 140, in the Robins case, 275 U.S. 303 at 309 (1927) and discussion of Elliot case in ROSCOE, THE MEASURE OF DAMAGES IN MARITIME COLLISIONS, 3d ed., 40, note (g) (1929).

[11] See note 1 supra as to the trial court basing the crew's recovery on the owner's right to recover. Of further interest is Van Camp Sea Food Co. v. Di Leva, (9th Cir. 1948)

liability was limited merely because a contractual division had been made in the interest in the right to use.[12] A better solution would appear to be full recovery for the objective value of the lost use with perhaps the limitation that all parties having a contractual interest in the right to use be joined to avoid a multiplicity of suits and possible double recovery. Where the damage suffered was by way of an incidental interest in the continued well being of the chattel the rule in the *Simpson* case may still be a sound limitation for policy reasons.

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171 F. (2d) 454, wherein, on facts very similar to the present case, the crew was allowed to recover directly because both vessels were owned by the same person and he could not be expected to sue himself. The contrast with the Simpson case, note 8 supra, is striking. Perhaps the different results may be explained in part at least by the difference of the rights in which the plaintiffs had interests by contract. The court of appeals in the present case chose to limit the Van Camp case to its "own peculiar facts," 191 F. (2d) at 398.

[12] In the Robins case, Justice Holmes met this point by refuting the owners' right to recover the full value of the lost use had they sued. 275 U.S. 303 at 309. However, this does not appear to be the American view, unless so settled by the Robins case. See 39 HARV. L. REV. 760 (1925). In 1883 an action "on behalf of the owner, master, and crew" of a fishing vessel resulted in recovery of the full value of the lost catch. The Risoluto, [1883] 8 P.D. 109. Apparently such fishing cases have not been viewed as part of the controversy over subjective or objective valuation of the lost use. See ROSCOE, THE MEASURE OF DAMAGES IN MARITIME COLLISIONS, 3d ed., 99 (1929). See also the excellent discussion of the circuit court decision in the Robins case in 40 HARV. L. REV. 302 at 304 (1926). The present writer does not agree with the conclusion there noted that the charterer did not have a "property interest" in the ship, and would cite TERRY, LEADING PRINCIPLES OF ANGLO-AMERICAN LAW 340 (1884), in refutation of the point taken. The decision in the Aquatania, (D.C. N.Y. 1920) 270 F. 239, which protected the charterer's interest in the right to use as a "property interest" seems well reasoned and essential to avoiding the denial of recovery to the charterer. Otherwise the rule in the Simpson case at least seems applicable to deny direct recovery, although indirect recovery would seem logical even lacking a "property interest" definition.