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Judge decides tug and tow one unit

Simon Tatham looks at how overturning a very Victorian ruling on collisions with towage has not necessarily simplified matters for everyone involved

► *Simon Tatham*

A very long time ago, a very famous (and senior) judge steered a course that led to some very lucky escapes for negligent tug owners in cases of collision between a tug and tow and another ship. It took 50 years and a decision of the House of Lords (now the Supreme Court) to overturn it.

What he did was to fix the tow with responsibility for the fault of the tug regardless of whether the tug had actual control of the towage. In those days, the late 19th century, it was often the case that the tow was in command of the operation, very different from what is almost invariably the case today.

However, to suggest that in every case the tow must take the blame seems a very Victorian way of resolving conflicts. It compelled another senior judge to "confess I have been somewhat astonished", and to look to whether another rule might be "more in conformity with my own ideas of justice".

Eventually, common sense prevailed and, in 1912, it was established that the tow should not be held liable for the acts and omissions of the tug unless those on board and in charge of the tug were actually acting under the control of the tow. To put this another way, the particular circumstances were now to be looked at in each case to see whether the tug or the tow, or both, were liable. That has now been the position for more than 100 years.

In the meantime, the circumstances of collisions with a tug and tow have not got any simpler, albeit that the frequency of such cases occurring has diminished on account of electronic navigation aids.

However incidents do occur. If they get to the desk of a solicitor, then you can be fairly sure that they are factually interesting. Considerations are often quite different to the conventional application of the ColRegs between two navigating vessels, and not just because of the obvious fact that the tug and tow will usually be restricted in terms of ability to manoeuvre under Rule 3(g)(vi).

One such case before the Admiralty Judge in London was reported about five years ago and involved a collision between a seismic tow and another vessel. A fundamental question in that case was whether the tug and tow, in the form of extensive streamers, were a 'vessel' – that is, a water-borne object to which the ColRegs applied. The streamers were 7km long, marked only by stern buoys (the collision was at night) presenting virtually no radar profile, with a spread of 1.6km, being towed at a depth of 12m at five knots, this array being the subject of an attempted exclusion zone covering 140km^2 of ocean.

It was held that this array was indeed an integral part of the towing vessel, ie one large navigational unit. The court had much less difficulty deciding that it was restricted in its ability to manoeuvre, but given the nature of the spread the tug was under a correspondingly higher duty to advertise its presence to other vessels and it had failed in a number of respects to do so with the result that it shared a proportion of the blame.

In another case, it was argued on the facts that the tug should have stopped, which may indeed be the only avoidance manoeuvre readily available to a tug in open water. That was quickly dismissed by the court which found that this was not desirable: the tow wire would sink, pulling the tow towards it, risking both collision and entanglement in the propeller.

Meanwhile, it might be tempting to think with AIS, satellite and radar assisted navigation avoidance technology that the court would place less emphasis on symbols or lights and sound signals. How many people, for example, have read, let alone applied, Rules 35(c) and (e)? For sure the courts will look at causative efficiency in deciding where blame should attach, but it would be naive to think that a tug and tow not exhibiting correct lights and sounds will be exempt from criticism and a potential share of liability.

When it comes to looking at the towing contract, the BIMCO regime requires damage to lie where it falls without recourse as between tug and tow, irrespective of blame. However, that will not assist a negligent tug, in command of the tow, from bearing substantial liability towards a third vessel nor prevent the tow from claiming its damages, including economic losses, from the latter.

Where both the tow and third vessel are damaged, or indeed all three damaged, and losses set off in proportion to blame, this can lead to a very interesting final adjustment as between tug and tow.

Contrast the case of a collision during a salvage tow. LOF gives no knock for knock protection whatsoever to the tug owner, which is another reason salvage awards need to be considerably greater than levels of commercial towage remuneration. But then what if the salved vessel had the use of its radar and rudder to avoid collision? However, that is, I think, enough for now.

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