

United States v. Carroll Towing Co.
159 F.2d 169 (2d Cir. 1947)

L. HAND, J. These appeals concern the sinking of the barge, 'Anna C,' on January 4, 1944, off Pier 51, North River. [That sinking gave rise to two separate claims for damages. The first was brought by the United States against the Carroll Towing Company for the loss of a load of flour which it was shipping on the Barge Anna C, which was owned by the Conners Company. The second suit was brought by the Conners Company against Carroll Towing and the Grace Line, to whom it had chartered its tug, the "Carroll," for the loss of the barge, and to which the contributory negligence of the Conners Company was raised as a partial defense. The proceedings took place in admiralty, and the trial judge found that Carroll,

but not the Grace Line, was responsible for one-half the loss of the damage to the Anna C and for the entire loss of the flour.

The record revealed that the Conners Company had chartered the Anna C to the Pennsylvania Railroad "at a stated hire per diem, by a charter of the kind usual in the Harbor, which included the services of a bargee, apparently limited to the hours 8 A.M. to 4 P.M." The accident arose when the tug Carroll attempted a tricky maneuver to move another barge that had been tied up in a tier of barges on the so-called Public Pier just to the north of Pier 52 where the Anna C was berthed. The first barge on the Public Pier was tied directly to it. Thereafter each of the other barges was tied in a separate line to the barge next in from it to the pier. The Anna C was the innermost barge in a tier of five on Pier 52. A line had been run from one of the barges on the Public Pier to one of the barges in the Anna C's tier. When the Carroll sought to untie this line in order to move that barge from the public pier, it dislodged all the barges from Pier 52. A strong current took the barges to the south where the Anna C sank after its hull was pierced below water by the propeller of a tanker berthed at Pier 51. Learned Hand, J., held first that the Grace Line had to share responsibility with Carroll Towing for the damage to the Anna C because its employee had assisted in the maneuvering of the Carroll. He then continued:]

We do not therefore attribute it as in any degree a fault of the "Anna C" that the flotilla broke adrift. Hence she may recover in full against the Carroll Company and the Grace Line for any injury she suffered from the contact with the tanker's propeller, which we shall speak of as the "collision damages." On the other hand, if the bargee had been on board, and had done his duty to his employer, he would have gone below at once, examined the injury, and called for help from the "Carroll" and the Grace Line tug. Moreover, it is clear that these tugs could have kept the barge afloat, until they had safely beached her, and saved her cargo. This would have avoided what we shall call the "sinking damages." Thus, if it was a failure in the Conner Company's proper care of its own barge, for the bargee to be absent, the company can recover only one third of the "sinking" damages from the Carroll Company and one third from the Grace Line [under an admiralty rule that divided damages equally among all three culpable parties.] For this reason the question arises whether a barge owner is slack in the care of his barge if the bargee is absent.

As to the consequences of a bargee's absence from his barge there have been a number of decisions; and we cannot agree that it is never ground for liability even to other vessels who may be injured. As early as 1843, Judge Sprague in *Clapp v. Young*, [Fed. Cas. No. 2786,] held a schooner liable which broke adrift from her moorings in a gale in Provincetown Harbor, and ran down another ship. The ground was that the owners of the offending ship had left no one on board, even though it was the custom in that harbor not to do so. [A review of other cases follows.]

It appears from the foregoing review that there is no general rule to determine when the absence of a bargee or other attendant will make the owner of the barge liable for injuries to other vessels if she breaks away from her moorings. However, in any cases where he would be so liable for injuries to others, obviously he must reduce his damages proportionately, if the injury is to his own barge. It becomes apparent why there can be no such general rule, when we consider the grounds for such a liability. Since there are occasions when every vessel will break from her moorings, and since, if she does, she becomes a menace to those about her; the owner's duty, as in other similar situations, to provide against resulting injuries is a function of three variables: (1) The probability that she will break away; (2) the gravity of the resulting injury, if she does; (3) the burden of adequate precautions. Possibly it serves to bring this notion into relief to state it in algebraic terms: if the probability be called P ; the injury, L ; and the burden, B ; liability depends upon whether B is less than L multiplied by P : i.e., whether B is less than PL . Applied to the situation at bar, the likelihood that a barge will break from her fasts and the damage she will do, vary with the place and time; for example, if a storm threatens, the danger is greater; so it is, if she is in a crowded harbor where moored barges are constantly being shifted about. On the other hand, the barge must not be the bargee's prison, even though he lives aboard; he must go ashore at times. We need not say whether, even in such crowded waters as New York Harbor a bargee must be aboard at night at all; it may be that the custom is otherwise, as Ward, J., supposed in 'The Kathryn B. Guinan,' [176 F. 301 (2d Cir. 1910)]; and that, if so, the situation is one where custom should control. We leave that question open; but we hold that it is not in all cases a sufficient answer to a bargee's absence without excuse, during working hours, that he has properly made fast his barge to a pier, when he leaves her. In the case at bar the bargee left at five o'clock in the afternoon of January 3rd, and the flotilla broke away at about two o'clock in the afternoon of the following day, twenty-one hours afterwards. The bargee had been away all the time, and we hold that his fabricated story was affirmative evidence that he had no excuse for his absence. At the locus in quo — especially during the short January days and in the full tide of war activity — barges were being constantly "drilled" in and out. Certainly it was not beyond reasonable expectation that, with the inevitable haste and bustle, the work might not be done with adequate care. In such circumstances we hold — and it is all that we do hold — that it was a fair requirement that the Conners Company should have a bargee aboard (unless he had some excuse for his absence), during the working hours of daylight.