

1967

*Oct. 19, 20,

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Oct. 1

TAHSIS COMPANY LTD. (*Plaintiff*)

AND

VANCOUVER TUG BOAT CO. LTD. } (*Defendant*)

APPELLANT;

RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR

BRITISH COLUMBIA

Shipping—Contract for carriage of goods—Obligations of carrier and shipper—Seaworthiness—Loading instructions—Capsize of barge during loading—Expert advice subsequent to accident—Responsibility for loss.

Under a contract entered into by the plaintiff and the defendant, the latter undertook to provide tugs and scows for transporting pulp chips from the plaintiff's plant to their destination. The agreement provided, *inter alia*, that: "(a) Tugs and scows shall be approved by a representative of Marine Surveyors of Western Canada or other competent surveyor; (b) Carrier shall in all cases exercise due diligence to make and keep all vessels used seaworthy; (c) Shipper shall be responsible for all scows from the time they are made fast to moorings until carrier has placed a line aboard with intention of removing the same from the dock; (d) Scows shall be loaded and trimmed in accordance with loading instructions provided by carrier to shipper from time to time; (e) All shipments of pulp chips shall be carried subject to all the terms and conditions of carrier's bill of lading." The first condition on the reverse side of the form of bill of lading annexed to the contract was that "it shall have effect subject to the *Water Carriage of Goods Act*".

In the performance of this contract the defendant at first used barges of approximately 700 units carrying capacity, but the intention was that it would later use much larger barges. Due to their greater width, the plaintiff's loading equipment did not project far enough to make it possible to centre the load within the box of the larger barges, as

*PRESENT: Abbott, Martland, Ritchie, Spence and Pigeon JJ.

could be done with the smaller ones. It was agreed between the parties that the necessary alterations would not be made until some experience had been gained in the loading of the big barges. In the meantime, the load was to be put on eccentrically, the barge being turned around by a tug from time to time as the loading progressed. One of the defendant's scows capsized while it was moored to the plaintiff's dock and in the last stages of being loaded with chips through the plaintiff's equipment. Loading instructions with respect to permissible list had been given verbally by the defendant's superintendent to the plaintiff's mill foreman, who was also superintending the loading of the barges.

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Judgment at trial was given in favour of the plaintiff. On appeal, the Court of Appeal unanimously allowed the appeal and dismissed the plaintiff's action and allowed the defendant's counterclaim. An appeal from the judgment of the Court of Appeal was then brought to this Court.

Held (Abbott and Ritchie JJ. dissenting): The appeal should be allowed and the judgment of the trial judge restored.

Per Martland and Pigeon JJ.: It was clear that the provision for responsibility for the scows during loading could not have the effect of suppressing during that period the obligation of the carrier to use due diligence to make the ship seaworthy and, accordingly, it was unnecessary to decide whether the *Water Carriage of Goods Act*, R.S.C. 1952, c. 291, applied. Seaworthiness requires more than structural soundness; it also requires proper instructions. Even if this was not a legal requirement, the contract between the parties would make it such under (d) above.

As to whether the defendant did in fact provide proper loading instructions or at least used due diligence to that end, it was obvious that it did not use due diligence. The defendant had failed to obtain the advice of a naval architect or of a person of equivalent qualifications, in respect of a vessel, a substantial part of which had not been designed by such a person. The loading instructions verbally given by the defendant's superintendent to the plaintiff's foreman prior to the accident were not proper and adequate. There was no reason to believe that if competent expert advice had been sought, as it should have been before the barges were put in service, such advice would have been any different from that which was subsequently given as suitable under the conditions of eccentric loading in which the defendant had acquiesced.

On the question of whether the capsize was in fact due to the insufficient and defective loading instructions or to the negligence of the plaintiff's foreman, the conclusion was reached, following an examination of the evidence, that the Court of Appeal was wrong in finding that the capsize was due to the plaintiff's negligence. On the contrary, the accident was due to the insufficient and imprudent loading instructions given by the defendant's representatives.

Per Spence J.: The obligations of the plaintiff and the defendant were fixed by the terms of the contract entered into by the parties and under the circumstances the bill of lading was merely a receipt. Under the contract the defendant had not merely a right but a duty to issue proper instructions as to loading and it was the breach of that duty which created the occasion for the capsize of the scow.

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Per Abbott and Ritchie JJ., *dissenting*: It was the agreement and not the *Water Carriage of Goods Act* which controlled the relationship between the parties. Under the agreement the responsibility for the scow while moored at the plaintiff's dock during loading rested with the plaintiff subject to the fact that it was required to comply with any instructions provided by the carrier as to loading and trimming. The carrier had the right but not the duty to give such instructions subject to the fact that any instructions which it did give must be such as to not endanger the safety of the scow or cargo, and even if the agreement be construed as imposing a duty upon the carrier to give loading instructions, there was no breach of such a duty in the present case.

Under all the circumstances of the case, before the defendant could be fixed with the responsibility for the loss it was incumbent on the plaintiff to show not only that the instructions given by the defendant's superintendent were wrong, but that this error was the cause of the mishap. The evidence indicated that there was nothing wrong with the instructions given as to permissible list.

The underlying causes of the collapse of the vessel were that the plaintiff company was employing loading equipment which was not thoroughly adapted to the loading of these large scows and that its superintendent was not exercising the care required to supervise the undertaking. The immediate cause of the capsizing was the negligence of the foreman who was responsible for the loading of this particular scow.

[*Standard Oil Co. of New York v. Clan Line Steamers Ltd.*, [1924] A.C. 100; *Canadian Transport Co. Ltd. v. Court Line Ltd.*, [1940] A.C. 934; *Kruger & Co. Ltd. v. Moel Tryvan Ship Co. Ltd.*, [1907] A.C. 272, considered.

APPEAL from a judgment of the Court of Appeal for British Columbia¹, reversing a judgment of Collins J. Appeal allowed, Abbott and Ritchie JJ. *dissenting*.

W. J. Wallace, Q.C., and *D. B. Smith*, for the plaintiff, appellant.

D. McK. Brown, and *B. Trevino*, for the defendant, respondent.

The judgment of Abbott and Ritchie JJ. was delivered by

ITCHIE J. (*dissenting*):—I have had the benefit of reading the reasons for judgment of my brother Pigeon in which he has made an extensive analysis of a great deal of the evidence, but as I take a somewhat different approach to the problem involved and as I place a different interpretation on some of the facts, it is perhaps as well for me to

¹ (1967), 60 W.W.R. 65, 62 D.L.R. (2d) 371.

state independently the issues as I see them. I will endeavour to refrain from repetition in so far as is consistent with making my opinion clear.

This appeal arises out of the capsizing of one of the respondent's scows while it was moored to the dock at the appellant's plant and in the last stages of being loaded with wood chips through the appellant's equipment.

In my view the respective obligations of the appellant and the respondent concerning the supplying of scows and the loading thereof with pulp chips at the appellant's plant, are fixed by the terms of the contract (hereinafter referred to as the agreement) entered into between the parties on April 26, 1962, wherein it is recited that the carrier, *i.e.*, Vancouver Tug Boat Company Limited, has agreed with the shipper, *i.e.*, Tahsis Company Limited, to supply suitable tugs and scows to transport pulp chips from the shipper's plant to their destination. This is a contract to carry the appellant's goods in the respondent's scows between the Tahsis Company's plant and the St. Regis Paper Mill and in my view it has the character of a charter party covering a succession of voyages by these scows from the point of loading to the destination specified.

By clause 10 of the charter agreement it is provided that all shipments

... shall be carried subject to all the terms and conditions of Carrier's Bill of Lading ... which together with the provisions of this contract shall constitute the terms and conditions under which the said pulp chips are carried. In the event of any conflict between the said Bill of Lading and this Agreement, the terms of this Agreement shall govern.

Carrier shall supply Shipper with Bill of Lading forms which shall be completed by Shipper and signed by each party hereto prior to the sailing of each scow ...

I mention this clause because the learned trial judge took the view that the provisions of the "Rules Relating to Bills of Lading" which are a schedule to the *Water Carriage of Goods Act*, R.S.C. 1952, c. 291, governed the loading and carriage of the chips shipped under the agreement and as I disagree with this conclusion and consider the matter may be of some importance in determining the rights of the parties, it appears to me to be desirable to state at the outset the reasons for my disagreement.

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In this regard it is to be observed that the rules in question, with the exception of art. 6, only apply to "contracts of carriage" as defined in art. 1(b) of the schedule, and are therefore limited to:

... contracts of carriage covered by a bill of lading or any similar document of title in so far as such document relates to the carriage of goods by sea, including any bill of lading or any similar document as aforesaid issued under or pursuant to a charterparty from the moment at which such bill of lading or similar document of title regulates the relations between a carrier and a holder of the same.

In the present case it was the shipper, *i.e.*, Tahsis, who chartered the vessel directly from the owner as opposed to the common situation in which an owner has chartered his vessel and the charterer in turn contracts with the shipper. There is a long line of cases to the effect that where, as here, the shipper has chartered the vessel directly from the owner, the bill of lading in so far as it may differ from the terms of the charterparty, is to be treated as a mere receipt for the goods.

The effect of these cases is well summarized in the reasons for judgment of Lord Halsbury in *Kruger & Co. Ltd. v. Moel Tryvan Ship Co. Ltd.*² where he said:

The bill of lading cannot control what has been agreed upon before between the shipowner and the merchant and what has been expressed in a written instrument which is the final and concluded agreement between the parties. It is in truth a bill of lading; it is somewhat inaccurately described as a contract in the Bills of Lading Act, but Bramwell L.J. said in *Wagstaff v. Anderson*, (1880), 5 C.P.D. 171, 177, that "to say it is a contract superseding, adding to or varying the former contract under the charterparty is a proposition of law to which I never can consent."

In Scrutton on Charterparties and Bills of Lading, 17th ed. at p. 397, the matter is dealt with in relation to the language used in the schedule to the *Water Carriage of Goods Act*. The learned author there says:

For as between the charterer and the shipowner the operative document is the charterparty, the bill of lading being generally a mere receipt . . . and there is between them no "contract of carriage" within the meaning of Article 1(b) and, therefore, the shipowner is not within the meaning of Article 1(a) a "carrier" (*i.e.*, a person who "enters into a contract of carriage")...

I am accordingly of the opinion that it is the agreement and not the *Water Carriage of Goods Act* which controls the relationship between the parties.

² [1907] A.C. 272 at 278.

I have dealt with this matter at such length because counsel for the appellant invited us to adopt the conclusion of the learned trial judge that the respondent had failed to exercise due diligence "before and at the beginning of the voyage to make the ship seaworthy" as is required by art. 3(1) of the schedule to the *Water Carriage of Goods Act*. The word "seaworthy" is not defined in that Act or in the schedule thereto and it has been variously interpreted by the Courts having regard to the facts of the various cases before them, but the meaning of the word "seaworthy" as used in the agreement is fixed by the provisions of clause 1(b) thereof and the combined effect of that clause and clause 3(c) makes it clear that the obligation of Vancouver Tug in this regard was limited to exercising due diligence to make and keep the scow "in a normal condition, safe to tow in the trade for which" it was "being used and that the amount of water contained within the hull" did not "exceed the equivalent of 4 inches depth over the entire bottom of any single main compartment of" the scow.

The agreement itself describes in some detail the carrier's obligation to supply scows and to arrange towing operations so as to provide efficient transportation and the shipper's obligation to load the chips on the scows. The following provisions appear to me to be most relevant to the present inquiry:

Clause 3(a)

Carrier shall provide sufficient tugs and scows all of which shall be approved by a representative of Marine Surveyors of Western Canada, or other competent surveyor, for the purposes of transporting not less than 60,000 units, nor more than 80,000 units, of pulp chips per annum. Scows provided hereunder shall have a minimum aggregate carrying capacity of 3,000 units and a maximum aggregate carrying capacity of 4,500 units and shall be properly boxed and fitted for the transportation.

Clause 3(c)

Carrier shall in all cases exercise due diligence to make and keep all vessels used hereunder in good order and condition and in all respects seaworthy.

Clause 5(b)

Carriers shall deliver the scows to Shipper at loading places in good order and condition and in all respects ready to load.

Clause 5(e)

Shipper shall be responsible for all such scows from the time they are made fast to moorings as directed by Shipper until Carrier has placed a line aboard such scows with the intention of removing the same from the plant, whether loaded or empty.

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(a) All pulp chips shall be loaded and trimmed by Shipper solely at the expense of Shipper, PROVIDED ALWAYS that Carrier shall bear any costs occasioned as a result of faulty equipment supplied by Carrier.

(b) Scows shall be loaded and trimmed in accordance with loading instructions provided by Carrier to Shipper from time to time.

(c) Loading shall be deemed to be completed when any loaded scow has been examined and accepted by the master of the tug.

(d) Shipper shall load each scow to capacity with all reasonable despatch.

11. *Risk and Liability.*

(a) Shipper shall be liable for and shall pay for all damage caused to vessels provided by Carrier hereunder which shall be caused by the negligence of Shipper, its servants or agents, and shall indemnify and save Carrier harmless from all loss and damage whatsoever caused by the negligence of St. Regis Paper Company, its servants or agents.

(b) Shipper shall procure and maintain at its expense, insurance on all pulp chips carried hereunder to the full insurable value thereof against all sea, fire and marine risks which may arise during the loading, transportation and discharge thereof.

It appears to me that the division of responsibility between the parties under this agreement was that the shipper would be responsible for the scows from the time they were made fast to the moorings at its dock until the tug master put a line aboard to tow them away, while the carrier undertook to provide scows approved by a representative of Marine Surveyors of Western Canada and accepted the responsibility for safe carriage of the cargo to the specified destination. In so doing, the carrier reserved the right to have the scows loaded and trimmed in accordance with its instructions from time to time. Loading was "deemed to be completed when any loaded scow" had "been examined and accepted by the master of the tug".

In my opinion, by virtue of the provisions of clause 7(d) the shipper accepted the responsibility of loading "each scow to capacity with all reasonable despatch" and further agreed under clause 7(a) to load and trim all pulp chips solely at its expense. As the carrier was responsible for the scow and its cargo during the voyage, it appears to me to be only reasonable that the agreement should contain a provision that the scows would be loaded and trimmed in accordance with such instructions as the carrier might, from time to time, provide and that the loading would not be deemed to be completed until the tug master had examined and accepted the loaded scow. Clause 7(b) undoubt-

edly placed the shipper under the obligation to load and trim in accordance with any instructions provided by the carrier, but I do not read it as creating any concomitant obligation on the carrier to provide such instructions. The loading was left to the shipper but the carriage at sea was left to the carrier. As will hereafter appear, instructions were in fact given by the carrier to the shipper as to the maximum permissible list to be allowed in loading the type of scow with which we are here concerned, and whether these instructions were wrong, and whether or not they were carried out by the shipper, are two of the questions involved in this appeal.

During the early months of the life of the agreement, the respondent was supplying barges of its 100 series with a carrying capacity of approximately 700 units which could be readily loaded with chips from the then existing chip conveyor and chip delivery spout at the appellant's plant, but it decided to acquire a much larger type of barge which was later known as its 150 series and which had a capacity of 1,680 units of chips. This decision was conveyed to the appellant with a view to determining what effect the change would have on the method of loading with its existing loading facilities.

The discussions between the parties at this stage of the proceedings are well described in the evidence of Mr. W. G. Beale, who was the superintendent and former manager of planning and engineering for the Tahsis company, and who said:

We had previously received drawings of the proposed barges, the V.T. 150 and 151 in order to determine whether it was—whether these barges would present any difficulty in so far as loading with our facilities was concerned. As a result of having received these and made a preliminary investigation, we had determined that it was quite possible and practical to load these barges and this was discussed at this meeting. I conveyed to Mr. Plester and to Mr. Lindsay that we would load the barges with the present facilities in the initial stages, but that once we had seen physically what the barges looked like, what the problems were, we would then extend the conveyor then we could load the barges more economically.

Q. What do you mean by more economically?

A. I explained to Mr. Plester that we proposed to turn the barges during the process of loading. This was a fairly—this was something which we had done—that I had done during my stay in B.C. Forest Products in Victoria, and it was a fairly common type of procedure.

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He was later again asked:

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Q. Now, you mentioned that—I think I asked this question about—you mentioned something about being economical, that you would make changes to make it economical. What did you mean by that?

A. Oh, we proposed to accept the cost during the initial stages of turning the barges during the loading, and this of course, was a direct cost. We proposed to use the local tug owned by Texada Towing at their going rates to turn the scow.

It is, I think, fair to conclude from this evidence that the problem in loading the V.T. 150 and 151 scows as opposed to the 100 series was created because Tahsis had not got the proper facilities for loading such large scows directly, that this problem was discussed before the scows were ever constructed, that it was the Tahsis managing engineer who suggested loading by turning the barges so as to cover first one side and then the other with chips, and that he had, on behalf of Tahsis, made a preliminary investigation as a result of which he determined that it was practical to so load the scows. Mr. Beale had had experience in loading in this fashion and it is clear that the whole operation was to be conducted independently of Vancouver Tug by the use of the "local tug" for turning. This procedure appears to have been adopted on a temporary basis until Tahsis had found out "what the problems were" after which it was contemplated that the conveyor would be extended.

It was not until October 13 that the first of the new barges arrived at the Tahsis plant. Captain Plester, who was port superintendent for the tug company had intended to be present during most of the loading but unfortunately his arrival was delayed until October 17 after the loading was practically completed and the scows had been turned end for end five times in order to assist in the distribution of the load.

It was at this time that Captain Plester had a conversation with Mr. Kovlaske, who was in charge of loading the 150 series scows for Tahsis under the direction of Mr. Beale, which he describes as follows:

... I asked Mr. Kovlaske when he expected to turn the barge again as he had informed me that he would be turning her once more before completion, and he then asked me, and while he was asking me he was looking at the width of the barge, and he said, now he said, "How much list should I put on this barge before I

turn her as this is an unfamiliar piece of equipment to me?" So I said, "Well, Al, two to three feet. You can go two to three feet to be quite safe, but you should not exceed three feet in any case."

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It is with respect to this evidence that the learned trial judge made the following comment:

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However, he did not tell Kovlaske that in the final stages of loading the effect on stability by the placement of the latter part of the cargo could be controlled by watching to keep the list within the limit of three feet, nor how tricky this could become in the final stages of loading. I particularly find that although Captain Plester advised him not to allow a list to exceed three feet he did not advise him of any plan or sequence of placement of cargo which would enable Kovlaske to keep the list under three feet. In my view it is meagre advice to advise one to keep the list not more than three feet and to fail to explain how this can be done.

In quoting the evidence of the conversation between Plester and Kovlaske, the learned trial judge omitted to refer to what followed after Kovlaske had been told that he should not exceed three feet in any case. Mr. Plester's evidence, which is uncontradicted, continues:

Q. Alright, and what did he say in response to that?

A. And he said, "Okay," and I said, now, I said, "Due to the size the barges you should take measurements from time to time or have your loader take measurements to establish the list." I said, "These can be very confusing due to the size of the barge. You can get more than that if you don't watch." He said, "Okay. I'll watch that pretty carefully."

As I have indicated, the loading procedure adopted by Tahsis was on a temporary basis and to some extent was a question of trial and error to find out what the problems were, but whatever the exact instructions may have been which were given to Kovlaske by Captain Plester, it is clear that having received these instructions Kovlaske had successfully superintended the loading of six such scows eccentrically between October 15 and December 30 and that on December 27 when the V.T. 151 was delivered by Vancouver Tug, he was the only person who had had any actual experience in superintending the loading of these scows with the equipment available and he was in a better position than anyone else to know what was a safe load.

It is in my view highly significant and clearly indicative of the responsibility accepted by Tahsis for loading that after observing the first two loads, the superintendent and

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managing engineer of Tahsis decided to change the loading arrangements at the plant. As to this he gave the following evidence:

- Q. Well, now, as a result of this loading and your experience what plans were made with respect to the conveyor?
- A. After we had observed a couple of loadings of V.T. 150 we were still somewhat undecided as to exactly what action we should take. We then laid out again in great detail the barge at all water levels and all load conditions.
- Q. What do you mean you laid it out?
- A. We drew a sketch to scale showing the conveyor, the dock face, the water at high tide, the barge at full load and empty, to examine completely the relationship of the barge to the conveyor and to the spout. Having done this, we decided that we should then lengthen the conveyor and re-hang the spout and lengthen the spout.

It is to be remembered that Mr. Beale was a qualified engineer with years of experience in the loading of scows and his next answer deals with details of re-hanging the conveyor. He then says:

We then would add one section to the conveyor spout so that the chips could be directed further away from the dock, further in all directions. This course of action was decided upon. It was uncertain at this point how much inconvenience we would run into in loading the scows this way. We determined for certain that we could load them, and I think below 5 or 6 foot tide we could load a scow in any condition. We would have to plan our loading so that the top load was built at tides so that the corners of the top loads would have to be built at tides below 5 or 6 feet, something in that order.

If this proved to be inconvenient, which we did not anticipate, then it would be no more costly to raise the conveyor after these changes were made than to raise the conveyor before the changes were made, so we decided we would do it in 2 steps, we would make the 3 changes to the conveyor, and observe what happened for a period of time, and if we found it was inconvenient or costly, then we would raise the conveyor, and as a second step—
Now, having decided this we then went ahead with it.

- Q. What relative dates are involved there, Mr. Beale?
- A. Well, in the middle of October we loaded the first scow. Some time in November we made these decisions after several sketches and some fairly detailed layouts. As to the exact timing, I am not sure, but between that time, between the middle of November and the end of December, we fabricated and installed a new support mechanism for the conveyor, in order to support the additional lengths, and this had been installed when the conveyor was knocked down by the barge.

I have quoted at considerable length from the evidence of Mr. Beale because he was the general superintendent of the Tahsis company and because it was he who suggested

the method of loading the scows "to a list" which was undoubtedly a factor contributing materially to the capsizing of the V.T. 151 at the dock side on December 31. It is to be noted that when he was called out to view the scow shortly before its collapse, his reaction was "that it may have been loaded very poorly."

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As I have indicated, I take the view that the responsibility for the V.T. 151 while moored at the appellant's dock during loading rested with the appellant (see clause 5(e)) subject to the fact that it was required (under clause 7 (b)) to comply with any instructions provided by the carrier as to loading and trimming.

In the course of investigating the cause of the accident, both parties took the opinions of experts in naval architecture and I think it is fair to say that the effect of their evidence is that the scow was "tender" and the loading had to be closely watched even before the list reached the three feet specified by Captain Plester, although none of these experts was prepared to say that the scow would have capsized as the result of loading alone if Captain Plester's instructions had been followed and the list not allowed to exceed three feet.

Based on the very exhaustive analysis made by its experts after the event, it is now contended on behalf of the appellant that the scow was unseaworthy in that the loading instructions given by Plester to Kovlaske on October 17 were insufficient. It is to be remembered that under the provisions of clause 1(b) and 3(c) of the agreement, pursuant to which the loading was being conducted, the carrier's agreement was to exercise due diligence to keep the scow in all respects in "normal condition, safe to tow in the trade for which" it was "being used" and that the water contained in any main compartment of the bottom of any scow did not exceed four inches.

There is no suggestion that the scow was not in normal condition, or that it was unsafe to tow in the trade or that there was any water contained within the hull. The scow was in this sense seaworthy within the meaning of the agreement, but it is contended on behalf of the appellant that a ship which is structurally sound may nevertheless be unseaworthy if those who charter it are not instructed in the proper method of using it. The contention is based on

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the case of *Standard Oil Co. of New York v. Clan Line Steamers Ltd.*³, (hereinafter called "*Clan Line*") and it is in my opinion important that this case should be analysed so as to determine whether it affords authority for the proposition that a structurally sound ship chartered by an owner for loading by a shipper is not seaworthy unless it is accompanied by detailed loading instructions embodying the conclusions of a marine architect based on stability data compiled by him concerning the ship. In *The "Hildina"*⁴, Lord Merriman, who was then President of the Admiralty Division, had occasion to make the following explanatory comment on the *Clan Line* case. He said, at p. 258:

This was the case, to put it quite shortly, of the turret ship which turned turtle and it is a little important, in comparing so far as possible one set of circumstances with another, to know that an earlier turret ship of the same construction had turned turtle. The whole point was this, that in a ship of that description it proved on subsequent investigation after the loss of the first ship that unless there was water ballast in two of the holds up to a certain measure the ship was unseaworthy. If she was properly ballasted she was perfectly seaworthy, and, as the result of the first loss, the builders had circularized elaborate instructions to those in whose possession their ships were, about the absolute necessity of keeping the water ballast intact. In the case of the second ship, some nine years later than the original casualty, it was proved that those instructions had not been passed on to her master, who had deliberately, but in absolute ignorance of the necessity for keeping these holds full of water ballast, pumped the ballast out . . .

It was under these circumstances that the House of Lords held "that the ship was inherently unseaworthy under certain not improbable conditions unless special precautions were taken which it was the duty of the owners to enjoin as being required by the structure of their ship and that the owners were therefore liable for the loss of their cargo".

When he came to consider the *Clan Line* case in relation to the facts of *The "Hildina"*, Lord Merriman observed, at p. 260:

. . . I do not think there is anything in the circumstances of this case which remotely resembles the outstanding fact in the *Clan Line* case that nine years before the casualty in question another ship had turned turtle for lack of the very precaution with which the owners had in the case in question failed to acquaint the master of the ship involved in the second casualty. There is nothing comparable to that at all in this case.

³ [1924] A.C. 100.

⁴ [1957] 2 Lloyd's Rep. 247.

With the greatest respect for those who may hold a different view, I think that this language of Lord Merri-
man is applicable to the present case, and I do not think
that the *Clan Line* case affords authority for the proposi-
tion that when a shipowner delivers a structurally sea-
worthy scow into the hands of a shipper for loading and
that shipper is experienced in the loading of the cargo to be
carried, that the scow can be said to be unseaworthy
because its owners have not retained naval architects to
devise a detailed loading plan and conveyed detailed load-
ing instructions to the shipper as to the point beyond
which it becomes dangerous to overload the scow on one
side. In the present case there had been no similar collapse
of such a scow at its moorings while loading, the plant
superintendent at Tahsis was a man of long experience in
loading scows and only a very short time before the acci-
dent his company had prepared a scale sketch of the barge
and loading facilities and had "laid out again in great
detail the barge at all water levels and all load conditions".

In the case of the *Clan Line* the owners knew that the
vessel was only seaworthy so long as the detailed instruc-
tions furnished by the builders were complied with, but
they failed to convey these instructions to the master of
the ship. The real question in that case was whether the
owners had proved "that the loss occurred without their
actual fault and privity" within the meaning of s. 503 of
the *Merchant Shipping Act*, 1894, and it was held that the
failure to give the instructions to the master brought the
fault home to the owners.

It is, however, also contended that the provisions of
clause 7(b) of the agreement placed upon the respondent
the burden of providing the shipper with the kind of
detailed instructions which were worked out by the marine
architects after the event and in this regard it is to be
observed that the right to control the manner in which a
ship is to be loaded rests primarily with the shipowner as it
has to protect its ship from being made unseaworthy, but
that the obligation to discharge the function of loading
may be shifted to the shipper by the terms of the contract
of carriage. As I have indicated, I read the provisions of
clause 7(b) as giving expression to the carrier's right to
dictate loading instructions and I think that the shipper is
required to comply with such instructions, but I do not

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think that the carrier is placed under any obligation to give them although if it does so, its instructions must be such as not to endanger the safety of the scow or cargo.

In my view there is a strong analogy between the circumstances of the present case and those which were considered in *Canadian Transport Co. Ltd. v. Court Line Ltd.*⁵ In the present case clauses 7(b) and (c) of the agreement, when read together, provide that the cargo (i.e. pulp chips) "shall be loaded and trimmed solely at the expense of the Shipper—in accordance with loading instructions provided by the Carrier—from time to time" whereas in the *Court Line* case clause 8 of the charterparty provided in part that "charterers are to load, stow and trim the cargo at their expense under the supervision of the captain...". In that case the captain stood in the place of the shipowners who brought the action against the charterers for damage due to improper stowage of cargo. In the course of his reasons for judgment, Lord Atkin said, at p. 937:

The shipowners claimed to recover this sum which had been paid to the bill of lading holders from the charterers on the ground that they were liable to the owners for improper stowage under clause 8. The first answer which the charterers made was that there was no such liability because the duty of the charterers was expressed to be to stow, etc., "under the supervision of the captain". This, it was said, threw the actual responsibility for stowage on the captain; or at any rate threw upon the owners the onus of showing that the damage was not due to an omission by the master to exercise due supervision. This, we were told, was the point of commercial importance upon which the opinion of this House was desired. My Lords, it appears to me plain that there is no foundation at all for this defence; and on this point all the judges so far have agreed. The supervision of the stowage by the captain is in any case a matter of course; he has in any event to protect his ship from being made unseaworthy; and in other respects no doubt he has the right to interfere if he considers that the proposed stowage is likely to impose a liability upon the owners. If it could be proved by the charterers that the bad stowage was caused only by the captain's orders, and that their own proposed stowage would have caused no damage no doubt that might enable them to escape liability. But the reservation of the right of the captain to supervise, a right which in my opinion would have existed even if not expressly reserved, has no effect whatever in relieving the charterers of their primary duty to stow safely . . .

In that case the charterparty was in "time-charter" form but it was in fact a charter for a single voyage from Rotterdam to the Northern Pacific and return to the United Kingdom or the Continent. In my opinion the position

⁵ [1940] A.C. 934.

of the charterers was analagous to that of the shippers in the present case and as I have said, the captain stood in the place of the owners. I therefore think the decision of the House of Lords, when applied to the interpretation of clause 7 of the agreement in the present case can be construed as meaning that the reservation of the right of the owner to give loading instructions from time to time and to require that the loaded scow be examined by its master (clauses 7(b) and (c)) has no effect whatever in relieving the shippers of their primary duty under clauses 5(e) and 7(a) to stow safely, and I think also that in order to succeed in the present action the shippers would have to prove that the bad stowage resulting in the collapse of the scow was caused only by the loading instructions given by the carrier and that their own proposed stowage would have caused no damage at all.

As I have indicated, I am of opinion that the shipper was required to comply with any instructions which were given to it by the carrier and that the carrier had the right but not the duty to give such instructions subject to the fact that any instructions which it did give must be such as to not endanger the safety of the scow or cargo. I am, however, in any event of opinion that even if clause 7(b) be construed as imposing a duty upon the carrier to give loading instructions, there was no breach of such a duty in the present case because, as will hereafter appear, I do not think that the instructions not to exceed a three-foot list "in any case", which were given by Captain Plester, can be said to have endangered the safety of the scow or that they were in any way inadequate having regard to the fact that they were being furnished to a company, the superintendent of which, who was in overall charge of the loading, had had previous experience in the eccentric loading of pulp chips and who regarded it as "a fairly common type of procedure".

It is true that in the present case if the loading instructions, prepared by marine architects after the accident, had been available and had been followed on December 31, they would have provided a greater margin of safety during loading operations, but the extent of the obligation undertaken by the carrier under clause 3(a) of the agreement was to provide scows "approved by a representative

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of Marine Surveyors of Western Canada or other competent surveyor” and there can be no doubt that the V.T. 151 had been so approved by Captain Brown, the principal surveyor for the Marine Surveyors of Western Canada, who had held that position for seventeen years and that it was according to the advice furnished by this expert that Captain Plester made his recommendation to Kovlaske with respect to the list not being allowed to “exceed three feet in any case”. It may be that Captain Brown was not as skilled in the exact scientific preparation of stability data as the marine architects who examined the situation after the event, but I do not think it can be said that the respondent failed to exercise due diligence to make and keep the scow in a normal condition and safe to tow in the trade for which it was being used when it is considered that it was structurally seaworthy and that the respondent had obtained the opinion and approval of a marine surveyor as it was required to do in accordance with clause 3(a) of the agreement. There was no other obligation on the carrier to have the scows surveyed before delivery and I do not think that the decision in the *Clan Line* case or any other case which I have been able to find required it as a matter of law to consult marine architects before putting the scows in service.

The fact that amended loading instructions were given by the respondent after the accident in conformity with the advice which it received from the experts, cannot of itself be treated as any evidence of the inadequacy of the instructions given by Captain Plester. (See *Hart v. Lancashire and Yorkshire Railway Co.*⁶.) It is appreciated, however, that the main argument in support of the appellant’s position does not depend in any way upon the fact that amended instructions were given after the event, but is on the other hand founded on the contention that under the circumstances disclosed by the evidence, the respondent could and should have consulted marine architects with a view to a more accurate determination of the stability factors in the scows before they were put in service and that its failure to do so resulted in insufficient loading instructions being supplied by Captain Plester. I find myself unable to accept this view of the matter.

⁶ (1869), 21 L.T. 261 at 263.

As I have indicated, I am of opinion that the Tahsis people accepted full responsibility for loading these scows and at the time when the accident occurred they were in the course of experimenting in order to achieve the best result. In my view, it was the superintendent at Tahsis and the man who had been in charge of loading the last six scows of the 150 series who were best able to judge as to the effect of the permeability of chips to rain and as to the effect of wind and weather on the operation which they were conducting.

Under all the circumstances of this case, I am of opinion that before the respondent can be fixed with the responsibility for the loss it is incumbent on the appellant to show, not only that the instructions given by Captain Plester were wrong, but that this error was the cause of the mishap. It is not enough in my view to prove that the loading operation could have been conducted with greater safety if the instructions had been more elaborate, the question as I see it is whether the instructions were wrong in the sense that if they were followed the scow would be likely to capsize.

As I have indicated, I do not find in any of the evidence of the marine architects a statement that the loading to a 3-foot list would of itself cause the scow to capsize; whereas there is on the other hand evidence that six of these scows had been safely loaded in this fashion by Kovlaske without capsizing and that the very scow in question had been moored at the appellant's dock with a 3-foot list from 2 a.m. on December 29 to 7.30 a.m. on December 31, the day of its loss.

Without going into any further detail, I am prepared to agree with Mr. Justice MacLean when he says in the course of his reasons for judgment in the Court of Appeal for British Columbia:

I can find no evidence to indicate that danger is involved in loading this barge to a three foot list.

I am accordingly of opinion that there was nothing wrong with the instructions as to permissible list given to Kovlaske by Captain Plester.

The evidence as to the cause of the mishap is contradictory because Kovlaske testified the scow was only listing 2 feet 2 inches at 12 noon and 2 feet 4 inches at about 12:15, shortly before it capsized and this would indicate that he

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had followed the respondent's instructions; whereas the loading experts were of opinion, after considering all the circumstances, that this estimate must have been wrong and that the scow by 12:15 was at a substantially greater list in excess of three feet and that it had become "hung up" on the dock or that the normal progression of the list had been interfered with in some other way so as to make it appear less than it actually was.

In my view the underlying causes of the collapse of the V.T. 151 on December 31 were that the Tahsis company was employing loading equipment which was not thoroughly adapted to the loading of these large scows and that its superintendent, Mr. Beale was not exercising the care required to supervise the undertaking. The immediate cause of the capsizing was, in my opinion, the negligence of Kovlaske who was responsible for the loading of this particular scow and whose actions at the critical times on the morning of December 31 are accurately described in the reasons for judgment of Mr. Justice MacLean where he says:

At 11:30 A.M. he must have known that a critical stage in the loading was approaching, he left his post, did not reappear till 12:05 when he made a "visual" measurement for calculating list—left again to reappear at 12:15 p.m. at which time the barge was doomed. In the meantime an underling had been left in charge of the whole loading operation at the critical stage of loading.

For all these reasons I would dismiss this appeal with costs.

The judgment of Martland and Pigeon JJ. was delivered by

PIGEON J.:—The essential facts of this case are as follows:

On April 26, 1962, the parties entered into a contract whereby the respondent undertook to provide tugs and scows for transporting pulp chips from appellant's dock at Tahsis inlet, on the west coast of Vancouver Island, to the St. Regis paper mill in Tacoma, State of Washington. This agreement provided among other conditions that:

- (a) Tugs and scows shall be approved by a representative of Marine Surveyors of Western Canada or other competent surveyor;
- (b) Carrier shall in all cases exercise due diligence to make and keep all vessels used seaworthy;

- (c) Shipper shall be responsible for all scows from the time they are made fast to moorings until carrier has placed a line aboard with the intention of removing the same from the dock;
- (d) Scows shall be loaded and trimmed in accordance with loading instructions provided by carrier to shipper from time to time;
- (e) All shipments of pulp chips shall be carried subject to all the terms and conditions of carrier's bill of lading.

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The first condition on the reverse side of the form of bill of lading annexed to the contract was that "it shall have effect subject to the *Water Carriage of Goods Act*".

In the performance of this contract, respondent at first used mostly barges designated as the V.T. 100 series, carrying each approximately 700 units of chips (a unit is 200 cubic feet). However, they intended to use much larger barges known as the V. T. 150 and V. T. 151 which had been ordered built for this purpose. These were much larger barges intended to carry as much as 1,680 units.

The barges were loaded by means of an overhead conveyor at the end of which a movable spout directed the chips inside the box in which they were carried above the deck of the barge. Due to the greater width of the larger barges, the conveyor did not project far enough to make it possible to centre the load within the box of the larger barges, as could be done with the smaller ones. It was agreed between the parties that the necessary alterations would not be made until some experience had been gained in the loading of the big barges. In the meantime, the load was to be put on eccentrically, the barge being turned around by a tug from time to time as the loading progressed.

On the first voyage to Tacoma, the barge known as V.T. 151 suffered damage; one side of the box gave way and part of the cargo was lost. Subsequent examination established that the stanchions holding the planks forming the sides of the box were not strong enough, part of the flange of the steel beams making those stanchions having been cut away where they went through the steel deck. The barge was repaired and the defect corrected by strengthening the stanchions.

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The barge, however, was not returned to service as soon as expected, with the result that the appellant was without a barge for a few days before Christmas 1962. As a consequence, the production during those days went to the open air stock pile, and when the barge became available great effort was made to complete the loading in the three working days between Christmas and New Year; that is on Thursday and Friday, December 27 and 28, and Monday, December 31.

On this last day, the barge was first turned early in the morning having then a three-foot list to port. This degree of list was the maximum beyond which it was not safe to go according to instructions verbally given by Captain Plester, respondent's superintendent, to Kovlaske, appellant's chip mill foreman, who was also superintending the loading of the barges. During the morning, the list gradually changed to starboard; chips being loaded both from production and stock pile. At 11:30, the chip mill stopped for the lunch hour but loading was continued from stock pile. Sometime after noon, around 12:15, Kovlaske had the loading stopped and heard what he described as a creaking noise. He then saw that the cap of the box of the scow was touching a temporary scaffolding put up on the face of the conveyor tower in preparation for the contemplated extension. An effort was made to hold the barge by tightening the spring lines but the list kept on increasing until the cap of the box came to rest on what was called the "bull rail" on the front of the dock. The barge held this position for some little time but finally something gave way and the barge capsized, bringing down a part of the conveyor and of the dock.

The trial judge held that under the circumstances the *Water Carriage of Goods Act* applied and imposed upon Vancouver Tug the duty to exercise due diligence to make the ship seaworthy and that this required that the ship be accompanied by adequate loading instructions. He also held that the same obligation was imposed by the provision of the contract to which reference has already been made.

The respondent contended that the *Water Carriage of Goods Act* did not apply, and that the provision in the agreement that Tahsis would be responsible for the vessel

from the time it became fast to moorings overrode during that time, the obligation to use due diligence to make the ship seaworthy.

In my opinion, it is not necessary to decide whether the *Water Carriage of Goods Act* applies because I find it clear that the provision for responsibility for the scows during loading, cannot have the effect of suppressing during that period the obligation of the carrier to use due diligence to make the ship seaworthy. It is well established that seaworthiness requires more than structural soundness; it also requires proper instructions: *Standard Oil Co. of New York v. Clan Line Steamers Ltd.*⁷ Even if this was not a legal requirement, the contract between the parties would make it such because it provides for "loading and trimming" in accordance with loading instructions provided by carrier to shipper from time to time. The provision for responsibility of the shipper during loading certainly cannot have been intended to displace the obligation to exercise due diligence to make the ship seaworthy by issuing proper and adequate loading instructions without which the ship would not be seaworthy during loading. Respondent's contention would result in putting on appellant's shoulders the burden of issuing to the loaders of the barge the instructions for loading that it was its legal and contractual duty to provide.

Having come to this conclusion, it is now necessary to consider whether respondent did in fact provide proper loading instructions or at least used due diligence to that end.

That it did not use due diligence is, I think, obvious. No naval architect was consulted to determine what those instructions should be. It must be noted in this connection that while the design for the barge itself had been prepared by a naval architect, this design involved not a chip box but an enclosed space for carrying newsprint. The design of the chip box was prepared by the builders without consultation with a naval architect. As we have seen, this resulted in such a poor design that on its first loaded trip the V.T. 151 lost a complete side of the box. Although the structural defect had been repaired prior to the accident,

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⁷ [1924] A.C. 100.

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the owners had not been provided with the data respecting stability that a naval architect would normally have provided.

The record shows that the loading instructions verbally given by Capt. Plester, respondent's superintendent, to Kovlaske, appellant's chip mill foreman, were the result of a discussion between Capt. Plester and Capt. Brown, principal surveyor of Marine Surveyors of Western Canada. Captain Brown, as he said himself, had practical experience only and did not possess the technical knowledge of a naval architect. His advice to Capt. Plester was not based on precise stability data pertaining to the new barges; it was in the nature of an educated guess based on practical experience. I, therefore, conclude that respondent has not used due diligence to provide proper loading instructions, having failed to obtain the advice of a naval architect or of a person of equivalent qualifications, in respect of a vessel, a substantial part of which had not been designed by such a person.

In considering whether the loading instructions given were adequate and proper, it is convenient to examine first the instructions that were issued after the accident.

Capt. Brown reacted as might be expected from a man relying essentially on practical experience. In his letter of January 24, 1963, he suggested: "that cargo box height be reduced by not less than 5 feet". The height of the box being 25 feet, this involved a reduction of 20 per cent in the volume of chips that might be carried.

Instead of acting on this haphazard advice, respondent on February 5, 1963, retained the services of a naval architect, J. G. German. In essence, his recommendations dated February 26, 1963, were that:

- "(a) The height of bin, and consequently of load, be reduced by 2 feet.
- (b) The maximum load permissible should be reduced to correspond to a loaded draft of 11'—0" in salt water. This allows additional margin for such possibilities as moisture accumulation in the bin.
- (c) When loading, the heeling angle should never be such as to permit entry of the underside of the fender in the water."

These recommendations were acted upon and instructions issued in writing accordingly on February 28, 1963. It is important to note how far these instructions differed from those that had been given verbally prior to the accident:

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Firstly, the height of the box and of the load was reduced by 2 feet, that is 8 per cent.

Secondly, the free-board was increased from 2 feet 6 inches to 3 feet, this being the free-board closely corresponding to a draft of 11 feet, as appears from the table annexed to the instructions dated April 9, 1964.

Thirdly, the maximum list at the critical stage was specified not as a difference of 3 feet between the free-board on one side and the free-board on the other, but by the requirement that the underside of the fender should not be in the water. This underside being 12 inches below the barge's deck, this last requirement preserved a margin of one foot between the moment eccentric loading should be stopped and the point where the stability of the barge would be endangered, namely deck edge immersion.

It should be observed that this margin of safety at the critical time was thus made approximately double that which existed under Capt. Plester's verbal instructions. These were to load with one foot trim aft, two feet six inches free-board, maximum heel during loading, three feet. With the trim specified, the mean free-board aft became 2 feet because a 3-foot list makes a difference of one foot 6 inches each side of the mean and, therefore, puts the aft end of the fender 6 inches in the water.

German was heard as expert witness for the respondent at the trial. He did not say that his above-mentioned recommendations had been unduly conservative or excessively cautious. What he said was that he did not then know that appellant's installation had been altered to prevent eccentric loading and that under conditions of off-centre loading he felt that his recommendations were necessary for a proper margin of stability. We, therefore, have it in the record that, on the basis of respondent's own expert's opinion, instructions to ensure a proper margin of stability during off-centre loading should have involved a reduction of 2 feet in the height of the box and, consequently, in the height of the load, an increase in the mean

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free-board to 3 feet instead of 2 feet 6 inches and a maximum list during loading defined by a prohibition against putting the underside of the fender below water level. Undoubtedly, such instructions would have made for greater stability and provided a much greater margin of safety during loading operations as German himself admitted.

As it was, the margin of safety under the new instructions was even greater because appellant's installation had, in fact, been altered so as to eliminate off-centre loading. In the latter part of March 1963, the appellant had the chip box restored to its original height. Revised loading instructions stipulated an average free-board of 3 feet and $\frac{3}{4}$ of an inch in the winter, 2 feet $6\frac{3}{4}$ inches, in the summer, with load lines 6 inches wide serving to indicate both limits. The prohibition against listing a barge so that the lower edge of the fender is immersed was retained, and it was added that the list should not exceed 30 inches.

In 1964, after "a thorough study of all trips made by the barges" since the last loading instructions, new instructions were issued by letter of April 9. These instructions did not embody any change in the box height nor in the maximum list allowable. However, the height of the top load was to vary according to the free-board by reference to two charts: one to be used in the summer, the other in the winter. These instructions being objected to as impracticable were replaced by another set specifying mean top load height and maximum top load height for five free-board heights only, instead of the close to forty different heights listed in the tables accompanying the previous instructions. The restrictions respecting allowable list were unchanged.

Thus, it will be seen that after more than a year of experience and elimination of off-centre loading, appellant still did not consider it prudent to list any barge during loading as much as Capt. Plester had told Kovlaske that it could safely be listed under conditions of off-centre loading which admittedly required a greater margin of stability.

I am therefore of the opinion that the loading instructions verbally given by Capt. Plester to Kovlaske prior to the accident were not proper and adequate. There is no reason to believe that if competent expert advice had been

sought, as it should have been before the barges were put in service, such advice would have been any different from that which was subsequently given as suitable under the conditions of eccentric loading in which respondent had acquiesced. If anything, the presumption would rather be that these initial instructions having to be issued in the absence of any experience in the use of those barges, restrictions designed to ensure the stability at dock side during loading would have been even more rigorous than those recommended by German in February 1963.

It remains now to be considered whether the capsizes is in fact due to the insufficient and defective loading instructions supplied by Capt. Plester or to the negligence of Kovlaske.

At the hearing in this Court, the imputation of negligence was essentially predicated on the assertion that, irrespective of any other considerations, it is a fact that if the barge had not heeled to such an extent that the deck went under the water, it would never have capsized. All the experts who were heard have agreed that the barge's maximum righting moment was reached at deck edge immersion; beyond this point, the righting moment decreased; in so far as the heeling moment represented by the load could not be removed, capsizes then became inevitable unless the barge could be restrained by mooring lines or other temporary supports. In fact, this is what was attempted but without success.

Before jumping to the conclusion that, under those conditions, the fact of the capsizes is conclusive evidence of negligence on the part of the loader, one must consider that a barge, like all mechanical devices, must be operated with an adequate margin of security. Proper operation of all human-made implements requires some margin for safety. It is never safe to operate too close to the breaking point. While the breaking point is an ultimate datum determined with a degree of scientific accuracy, the safe working load is a matter of judgment resting, on the one hand, on a consideration of the ultimate theoretical load determined by scientific considerations, and on the other hand, on the experience of the proportion between the ultimate load and the working load that has been shown to be reasonably satisfactory as striking a proper balance between the economic advantage of maximum loading and

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the safety of an adequate margin. Of course, the width of this margin depends, in part, on the degree of accuracy to which the ultimate load is known and also on the degree of accuracy to which it is possible to work in practice, taking account of the human element and of unpredictables such as weather conditions.

Three naval architects were heard as expert witnesses at the trial. Professor Baier and Gordon Snyder, for the appellant, and John G. German, for the defendant. Baier and German both submitted elaborate reports based on slightly different estimates of the various factors involved and, naturally, came to different conclusions on many points, specially on the degree of instability of the barge at the time the loading was stopped. This is not surprising seeing that, as German put it in his first report, his letter of March 8, 1963: "Very slight variations to these basic assumptions can alter the critical angle by several degrees." When it is considered that the basic assumptions include such unascertainable factors as the permeability of chips to rain, it becomes obvious that the figures submitted by both experts can be considered as scientifically accurate only on the assumption that the data on which they are predicated also are accurate. It is abundantly clear that such is not the case, most data are only estimates made to an unstated degree of inaccuracy. For one thing, permeability to rain could not even be said to have been estimated, it was assumed; for another thing, the actual volume and disposition of the load could only be said to have been estimated to a fair degree of accuracy. When the evidence shows that the results of careful measurements of the volume of chip loads by the shipper and by the consignee were sometimes found to differ by as much as 2 per cent, some idea can be obtained of the possible margin of error when no measurements were taken and a highly irregularly shaped load was merely estimated.

It is obvious from what both experts have said that the margin of error in their computations was quite substantial. Their respective conclusions cannot be said to represent anything better than that which each of them judged to be most probable in the light of his knowledge of the facts, his estimate of various quantities and his assumptions of unknown or largely unknown facts.

Near the end of his cross-examination, the following question was put to Snyder:

Then you would agree that, no matter how far off-centre a steadily increasing load may be applied, causing the vessel to increasingly heel over, if loading were stopped when the vessel reached a three-foot heel she would still have a positive righting moment for the remainder of heel angle up to the point of deck edge immersion?

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His answer was:

This is theoretically true. But we are dealing with margins here that are so small that you really can't count on what would happen.

Then this witness was made to agree that making no other assumptions than a mean draft of 11 feet 6 inches, a trim of not more than 1 foot, a list of not more than 3 feet and floating freely in the water, one would have to go on adding load off-centre to cause the barge to heel further than 3 feet. However, it should be noted that weather conditions are carefully excluded from the above assumptions, as was pointed out when the last question was put to the witness.

Concerning weather conditions, evidence was given by only one witness, Professor Baier. From his examination of one of the photographs taken by the witness Thompson while the barge was listing at an excessive angle before capsizing, he estimated by the manner in which a flag was shown flowing, that there was a wind blowing across the barge towards the dock at force four, that is 20 m.p.h., and from this he deduced a resulting moment of 21 foot-tons. This evidence was not contradicted but, strangely enough, little attention seems to have been paid to it although Baier had explained that, with the void on the port side of the load, the wind pressure was sufficient to capsize the barge without the loading being carried beyond a 3-foot list.

The trial judge said that "The strong capsizing moment was created by the weight of that part of the load which was off-centre and high up on the starboard side coupled with the existence of a void aft on the port side." In other words "the load was built lopsided on the starboard side to such a degree that it tipped the barge over, ...". But he said:

In contrast to calculated and carefully planned loading instructions of such kind the only loading advice Tahsis received allowed Kovlaske to proceed with a haphazard system of fill it up, leaving voids, putting

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a large amount of the heaviest units on top and off centre due partly to inadequate loading facilities, and due largely to his landsman's ignorance of the inherent danger of doing so. It is true that he was advised by Captain Plester during the loading of barge "VT 150" not to allow the list on the barge to exceed three feet, but he was not advised or instructed of the danger of so doing or that a critical stage of loading might be reached when the inherent stability of the barge could be overcome in about eleven minutes. It is clear to me that such a critical stage of loading would never have been reached if adequate loading instructions had been given.

On that basis the trial judge held that the responsibility for the capsizing was to be ascribed solely to the omission of adequate loading instructions. He paid scant attention to respondent's contention that the barge had become "hung up" during loading. He merely said that there was "a possibility" that the winch lines "may have to some degree retarded the development of the list to starboard".

In the Court of Appeal, Davey J.A. was of opinion that:

there was an insufficient reserve of stability to permit the barges to be safely loaded eccentrically to a three-foot list. They were not fit to meet the perils of being loaded in that way, and so were not seaworthy, and I think there was a lack of due diligence on the part of the appellant to make them seaworthy, if its duty was not absolute.

However, he said that this was not a cause of the casualty and that the capsizing was due to lack of care by Kovlaske:

Either Kovlaske was quite wrong in his estimate of the list, or the barge was hung up. If he had been watching her list during loading he would have known she was hung up because of lack of normal progression in the list, and done something about it.

When this proposition is analysed, it becomes apparent in the first place that there is another possibility which is suggested by the evidence and completely overlooked by Davey J.A., namely that the wind started blowing towards the barge and, in its condition of very limited stability, increased the list by the few inches necessary to go beyond the point where it would be doomed to capsize, namely deck edge immersion.

In the second place, the result of this so-called dilemma is to have the appellant instead of the respondent bear the responsibility for appellant's failure to give instructions which would have ensured an adequate margin of stability during loading. In fact, the result is to say to appellant: "Irrespective of the insufficiency of the margin of stability which respondent's instructions provide, you are under

obligation to make up for such insufficiency by a high enough degree of care." In my opinion, this is contrary to the fundamental basis on which negligence is to be defined. It is not a failure to act in such a way as to prevent damage from occurring. It is a failure to act with reasonable care. What is reasonable care is to be determined not according to what will prevent the damage but according to what may properly be expected under the circumstances.

Respondent's representatives knew that Kovlaske was the chip mill foreman; therefore, he could not be expected to supervise the loading continuously. They also knew that Kovlaske had been loading smaller barges (the V.T. 100 series) without being required to pay too much attention to the degree of list during loading. In the conditions under which these smaller barges were being loaded their margin of stability was much greater than that of the V.T. 151. It was more than adequate so that the allowable list during loading was not at all critical. Captain Plester completely misjudged the situation in this respect. He believed the V.T. 151 to have a greater instead of a much smaller margin of stability during loading.

Counsel for the respondent sought to justify this by contending that if the V.T. 100 series had been operated with a smaller free-board than was in fact the case, their stability would have been no better than that of the V.T. 151. This reasoning is ill-founded for two reasons. Firstly, Captain Plester when he made that statement was specifically making the comparison on the basis of the same free-board. Secondly, the only meaningful comparison was to be made under actual conditions of operation. This was the only basis of which Kovlaske could have any knowledge and it also was the only material basis as between respondent and appellant. Capt. Plester having given his instructions to Kovlaske under a complete misapprehension of the relative stability of the two series of barges, certainly did not say anything from which Kovlaske could have inferred that much greater care and closer supervision were necessary in loading the V.T. 151; the contrary is the obvious inference.

In his reasons for judgment Maclean J.A. says: "It is fair to assume, I think, that Captain Plester's evidence as to the instructions he gave to Kovlaske was accepted by the learned trial judge for ... he said:" Then follows a

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long quotation in which the trial judge appears at first to make a finding concerning the instructions given by Captain Plester to Kovlaske as related by Plester in chief at the trial:

You can go two to three feet to be quite safe, but you should not exceed three feet in any case.

In the end, however, the trial judge underlines what Captain Plester had stated in his examination on discovery:

Try to keep the list during loading within two or three feet, not to go beyond three feet...*that would be a little too severe when turning.*

On the contrary, Maclean J.A. takes Plester's instructions as related at the trial and then stresses and underlines the words: "*in any case*", instead of "*that would be a little too severe when turning*". With respect, I consider this as an error. The trial judge having heard Captain Plester in chief and in his cross-examination with respect to his version of his instructions given in his examination on discovery clearly adopted this latter version as correct. His finding certainly did not justify relying on the other version which was very different in its implications respecting a crucial point in this case, namely the degree of care to be taken in loading and the danger involved in exceeding the permissible list.

In his reasons for judgment, Maclean J.A. further says:

No doubt if Kovlaske himself had been present he would have noticed that although chips were pouring from the loading spout the list of the barge was not changing, which would have indicated that the barge was "hung up", that is, not floating free, and consequently that the freeboard measurements gave a false impression of the list of the barge.

There is absolutely no evidence that for any length of time during the loading the list of the barge was not changing. What was said by German was that the list was changing less than what he calculated should have been normal. This is quite a different thing. On what basis should a man like Kovlaske be expected to have knowledge of the normal rate of change of list of a barge when this involves such complex calculations as those made by Baier and German, which were beyond the competence of Capt. Plester and Capt. Brown?

On the basis of their stability calculations, both Baier and German expressed the opinion that the barge had

become hung up, that is restrained from listing as far as it would have gone under the load if floating freely. No means of support other than the lines holding the barge to the dock are suggested in the evidence. It is clearly established that the lines known as the "spring lines" were slack. This is not surprising seeing that it appears that from 9:30 a.m. to 12:15 p.m. the water level rose due to the tide from 6 feet above low water level to 8 feet 6 inches. However, it is also established that the winch lines were taut.

It is very hard to see how the winch lines could have substantially restrained the list of the barge unless it was practically in unstable equilibrium as Snyder said it was. The fact is that the winch lines ran longitudinally along the dock to bollards near each end of the barge. These winch lines were used to move the barge along the dock and this obviously required that they run as nearly parallel to the dock as possible. In that condition, those steel cables could restrain the downward movement only to the extent of a fraction of their breaking strength of 23 tons. The evidence shows that the winch gave way when the barge capsized. One cable remained attached to the barge and had to be cut to permit the capsized barge to be towed away in order to clear the dock. With a single exception, all the men who were at work on or around the barge were heard as witnesses and none of them having said anything that might suggest such an occurrence, I consider it most unlikely that the winch lines or their supports suddenly gave way before the capsized. Baier put it in this way:

...you can't calculate the effect of the lines which are still holding and if they get held forever the boat will still be sitting there. If the lines let go, which again was an outside force, as was the wind an outside force—there were three outside forces, your lordship, imposed on that ship which make any calculation a matter of simply assuming that free of those lines under the condition I assumed, she would still have a righting moment. Well, she didn't, which agrees with the fact that she held up there a little bit until, as I remember Kovlaske's about 12:15 he came back and the after deck edge was under water and it makes no difference; she would have started capsizing earlier and she would ultimately have gone unless those lines could continuously hold her up. That is—regardless of any assumptions necessary the facts to me indicate that she could not have been stable unless those lines were holding her up.

According to Baier, the barge lost its positive stability even before the deck edge went under. His opinion that to

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a certain extent which he considered undefinable the barge was restrained by the winch lines, affords no basis for a finding of negligence against Kovlaske.

In final analysis, this finding in the Court below rests solely on the evidence of German on which Maclean J.A. mainly relied. It might be sufficient to say that when expert opinion is conflicting and there is no clear error on one side, a fact is not to be considered established by such opinion. However, in this case, there is a fact which in my view discredits German's opinion on this point. This is the drawing which German prepared in an attempt to show that when Kovlaske heard "creaking noises" as he was stopping the loading, the barge had already listed a great deal more than the 3 feet which he estimated by visual inspection. On this drawing filed as Ex. 133, German shows the barge as separated from the dock by the floating fender logs, these logs being represented as floating between the fender of the barge and the fender piles of the dock. On that basis, German's drawing purports to show that the opposite side of the barge would have to be approximately 11 feet above the water for the cap of the chip box to touch the temporary support under the conveyor.

This was disproved by Beale who pointed out that because earlier in the day the barge had been listing the other way, the fender logs had then been under the barge's fender floating between the hull of the barge and the fender piles. Accordingly, on the plan which he made he assumed that the fender logs had remained in that position when the barge's fender reached water level. It is erroneous to assume, as German did, that the floating fender logs pushed the barge away from the dock 10 inches. To make this possible, the lines would have had to be slack. If, as German contends, the barge was hung up by the lines, then on account of the vertical angle between the bollards on the barge and the front of the dock, the barge must have been pressed very tightly against the dock. This shows that German's assumptions underlying Ex. 133 and his testimony respecting the list required for the cap of the chip box to touch the temporary supports under the conveyor, are irreconcilable with his theory that the barge was hung up by the winch lines. The correct position of the barge is clearly that shown by Beale's plan ex. 161. There the list

at deck edge immersion is shown as 4 feet with the fender logs between the hull and the fender piles under the barge's fender and the cap of the chip box is just touching the temporary supports.

On the whole, I come to the conclusion that the Court of Appeal was wrong in finding that the capsize of the barge was due to appellant's negligence. On the contrary, I am of opinion that the unfortunate accident is due to the insufficient and imprudent loading instructions given by respondent's representatives.

Captain Plester admitted that when he instructed Beale and Kovlaske on the loading of the V.T. 150 and V.T. 151 he did not have all the information he needed for formulating written instructions to control the loading procedure. He explained:

After all what we were trying to establish was the characteristics of the barge, both when loading and at sea, and you cannot go and issue a bunch of instructions until you are sure of what you are saying.

Being thus ignorant of the characteristics of the barge and, as we have seen, under a complete misapprehension of its relative stability, he nevertheless insisted on having full loads when the prudent thing to do would have been to load no higher than two feet less.

In my view, what is clearly established is that respondent took the risk of putting the barge in service without ascertaining its stability characteristics. Haphazard instructions were then verbally given and full loads required when appellant would rather not have loaded so heavily. This did not leave an adequate margin of safety and the result of so trying to establish the characteristics of the barge when loading was that it capsized. It is true that there was some minimal margin of safety and that theoretically the mishap might have been avoided, but this is not evidence of negligence because one cannot expect from the others more than reasonable care, not such extreme care as might avert the consequences of one's own negligence or lack of due diligence.

I, therefore, conclude that the judgment of the Court of Appeal of British Columbia should be reversed and the judgment of the trial judge re-established with costs throughout against the respondent.

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SPENCE J.:—I have had the advantage of reading the reasons for judgment of my brothers Ritchie and Pigeon and I find it desirable to express some of my own views on this very complicated litigation. It will be unnecessary, however, for me to refer extensively to the evidence as both of my brethren have referred to or recited the portions thereof which are relevant to my consideration.

With respect, I adopt the view of Ritchie J. that the obligations of the appellant and respondent are fixed by the terms of the contract between the parties dated April 26, 1962, and that under the circumstances the bill of lading is merely a receipt. The particular terms of the said contract as to loading are as follows:

7. Loading

(a) All pulp chips shall be loaded and trimmed by Shipper solely at the expense of the Shipper, PROVIDED ALWAYS that Carrier shall bear any costs occasioned as a result of faulty equipment supplied by Carrier.

(b) Scows shall be loaded and trimmed in accordance with loading instructions provided by Carrier to Shipper from time to time.

(c) Loading shall be deemed to be completed when any loaded scow has been examined and accepted by the master of the tug.

(d) Shipper shall load each scow to capacity with all reasonable despatch.

It is the view of my brother Ritchie that under the said clause 7 the respondent had a right to give instructions as to the loading of the scow but the respondent was under no duty to do so. Ritchie J. quotes *Canadian Transport Co. Ltd. v. Court Line Ltd.*⁸ citing Lord Atkin at p. 937. The charterparty which governed the rights and liabilities of the shipper and owner in that case by clause 8 provided that "the charterers are to load, stow and trim the cargo at their expense under the supervision of the captain ...". With respect, I am of the opinion that a decision under the circumstances in that case as to the proper meaning of those words is not applicable to the situation in the present case. It would appear to me that the words of clause 7 (b) of the agreement in this case "scows shall be loaded and trimmed in accordance with loading instructions provided by carrier to shipper from time to time" imply a duty on the carrier to give such instructions to the shipper and not a mere right to give such instructions. It must be

⁸ [1940] A.C. 934.

remembered that the V.T. 150 series of barges had never been used to load chips prior to the present contract and that no matter what experience in loading other vessels the superintendent of the appellant company had it was necessary in order for the shipper, the appellant, to carry out its contract to have proper loading instructions from the carrier, the respondent, applicable to the particular and unique type of vessel to be used in carrying out this particular contract. Even on Ritchie J.'s view that clause 7 of the agreement between the parties gave the respondent a right to issue instructions as to loading but did not create a duty to do so, it must be noted that the respondent did issue instructions as to loading. As Ritchie J. states in his reasons, if the carrier does so, its instructions must be such as not to endanger the safety of the scow or cargo. I am of the opinion that even with this limited view of the respondent's responsibility it must be found to have been in breach of such responsibility. The present case does exhibit some of the exceptional features which were present in *Standard Oil Co. of New York v. Clan Line Steamers Ltd.*⁹ and which are not present in the ordinary case of a vessel with well-established potential for receiving loads and carrying them being loaded by a shipper. In the *Clan Line* case, as Lord Merriman said in *The "Hildina"*¹⁰, at p. 258, this was a "turret ship" so that the water ballast had to be retained at all costs under all conditions, and the failure of the owner to pass on to the master such instructions permitted the master in the perfectly normal course of his duties to pump out that ballast so that the ship rolled over. In the present case, the design of the barges to take a load of and to carry such a large quantity of chips resulted in the scow being very "tender" during loading, and if the list reached three feet then very quickly the list would go beyond three feet, the heeling momentum would overcome the stabilizing momentum and the scow would capsize. It is true that the characteristic could only have been discovered by the careful measurement and calculation carried out by marine architects, which was done after the event which, in my view, should have been done before the event.

As Pigeon J. points out, the failure to carry out that careful investigation by marine architects in order to

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⁹ [1924] A.C. 100.

¹⁰ [1957] 2 Lloyd's Rep. 247.

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arrive at exact loading instructions caused the respondent to rely on advice given by Captain Brown, the principal surveyor for the Marine Surveyors of Western Canada, whose advice given to Captain Plester, the officer of the respondent, was passed on by him to the superintendent for the appellant and to the actual foreman in charge of the loading, Kovlaske. Captain Brown, no matter what his practical qualifications were, was certainly not a marine architect and was quite incapable of carrying out the complicated engineering calculations made prior to the trial, but of course after the disaster, by Mr. German and Professor Baier. His advice as to loading, which in short was not to permit a list of more than three feet, did allow loading up to the exact point where disaster would occur if the list went even a little bit beyond the three-foot limit. In other words, as Pigeon J. points out, there was no margin for safety whatsoever, and there being no margin for safety the instructions were not proper in that they were not practical. There must always be a margin for safety in any operation entailing the acts of human beings or subject to being affected by outside causes.

It is true that on the five previous occasions this scow or its fellow had been loaded with no more than a three-foot list and disaster had not occurred. It is also true that for five hours on the previous weekend this barge had stood with a three-foot list and had not capsized; but on none of those occasions had the list exceeded three feet and on none of those occasions had such extraneous forces as wind appeared to upset the hazardous balance of the scow. In my view, those circumstances simply show that the loadings were lucky on the previous occasions and the luck ran out on the occasion when the capsizing occurred. It is Pigeon J.'s opinion that the springing up of a wind of considerable force may well have contributed to the disaster but my brother does not find it necessary to so find nor do I do so. The loading instructions were not practical because they permitted listing up to the very maximum and, therefore, subjected the safety of the scow and its cargo to any extraneous danger.

Ritchie J. points out that the scows were approved by a representative of Marine Surveyors of Western Canada in accordance with the provisions of clause 3(a). With respect, in my view, that is not relevant to the problem concerned

with the discharge of what I have found to be the respondent's duty to issue proper instructions under clause 7 (b). I am in accord with the view of Pigeon J. that it was the breach of that duty which created the occasion for the capsize of the scow and that, therefore, the appeal should be allowed and the judgment of the learned trial judge restored. The appellant is entitled to its costs throughout.

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*Appeal allowed with costs and trial judgment restored,
ABBOTT and RITCHIE JJ. dissenting.*

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*Solicitors for the defendant, respondent: Russell &
DuMoulin, Vancouver.*
