

CANADIAN NATIONAL RAILWAY COMPANY (<i>Defendant</i>)	}	APPELLANT;
AND		
E. & S. BARBOUR LIMITED (<i>Plain- tiff</i>)	}	RESPONDENT.

1963
*June 6
June 24
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ON APPEAL FROM THE SUPREME COURT OF NEWFOUNDLAND
(ON APPEAL)

Shipping—Loss of cargo—Unseaworthy vessel—Due diligence not exercised by owner to make ship seaworthy—Water Carriage of Goods Act, R.S.C. 1952, c. 291, Sched., Article IV, Rules 1, 2(a).

The plaintiff brought an action in respect of certain goods shipped by it from St. John's, Newfoundland, to Square Island, Labrador, and being carried by the defendant's motor vessel *Henry Stone* when that vessel sank in Goose Bay, Labrador, on November 19, 1959. The vessel, which at the time of the voyage in question was unseaworthy for navigation in ice, encountered ice conditions on her arrival at the entrance to Goose Bay. After the ship got through this ice, reports started to come from the engine room that she was leaking and within approximately one hour she sank. The judgment at trial allowing the plaintiff's claim was affirmed on appeal. With leave of the Court of Appeal an appeal was brought to this Court.

Held: The appeal should be dismissed.

The defendant, whose defence was based primarily on Article IV, Rule 2(a) of the Schedule to the *Water Carriage of Goods Act*, R.S.C. 1952, c. 291, failed to discharge the burden of proving that the loss of the ship resulted from an "act, neglect, or default of the master . . . in the navigation or in the management of the ship". In any event, as the loss was occasioned by the fact that the *Henry Stone* was unseaworthy and unfit to encounter the ordinary perils of the voyage at the particular season in question, the exemption contained in Article IV, 2(a) could not be invoked to relieve the shipowner from responsibility. *Smith, Hogg & Co. v. Black Sea and Baltic General Insurance Co.*, [1940] A.C. 997, referred to.

The *Henry Stone* was not dispatched on an "ice free" voyage but rather on a voyage during which it was expected that she would be navigated in ice conditions which the master did not consider "unfavourable". The event proved that the vessel was unseaworthy for navigation even under such conditions and as no steps were taken by the defendant between the date of the steamship inspection and the date of the loss to fit the *Henry Stone* "to be navigated in ice" it could not be said that "the carrier" had discharged "the burden of proving the exercise of due diligence" to make the ship seaworthy, so as to claim exemption from liability under Article IV, Rule 1 of the Schedule to the Act.

APPEAL from a judgment of the Supreme Court of Newfoundland (on appeal)¹, affirming a judgment of Furlong C.J. Appeal dismissed.

*PRESENT: Taschereau C.J. and Abbott, Martland, Judson and Ritchie JJ.

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P. J. Lewis, Q.C., and *J. W. G. MacDougall, Q.C.*, for the defendant, appellant.

W. G. Burke-Robertson, Q.C., and *D. Hunt*, for the plaintiff, respondent.

The judgment of the Court was delivered by

ITCHIE J.:—This is an appeal brought with leave of the Supreme Court of Newfoundland (on appeal) from a judgment of that Court¹ affirming a judgment of Furlong C.J., and allowing the respondent's claim in respect of certain goods shipped by it from St. John's, Newfoundland, to Square Island, Labrador, and being carried by the appellant's motor vessel *Henry Stone* when that vessel sank in Goose Bay, Labrador, on November 19, 1959.

The goods in question were delivered to the coastal office of the appellant at St. John's, Newfoundland on November 6, 1959 and were consigned to B. W. Powell, one of the respondent's customers at Square Island aforesaid, in accordance with the provisions of bills of lading which were subject to the provisions of the *Water Carriage of Goods Act*.

It had originally been intended that the respondent's goods would be carried on the S.S. *Burgeo* but owing to the lateness of the season and the large quantity of freight awaiting shipment, the M.V. *Henry Stone* was pressed into service and it was thus that the respondent's goods were shipped by that vessel instead of the *Burgeo*.

The *Henry Stone* was a 17-year-old wooden vessel of 264.8 gross tons which had undergone extensive but not permanent repairs in the spring of 1959, and which was, at the time when she started on the voyage in question, operating with a temporary inspection certificate issued by the Department of Transport, good only until December 1959 and subject to the following limitations:

To operate as non-passenger ship on home trade Class 2 voyages; within the limits of the Canadian East Coast Atlantic Coastal Waters as far north as Chidley, Labrador. *Not to be navigated in ice.* (The italics are mine.)

The appellant's marine superintendent, who appears to have been responsible for sending the *Henry Stone* on this voyage, quite frankly admitted that, due to the lateness of the season and his knowledge of the conditions at Goose

¹ (1963), 37 D.L.R. (2d) 72.

Bay, he anticipated that ice would be encountered and he describes the steps which he took to guard against this danger as follows:

The *Henry Stone* was the first available vessel and contemplating the ice due to the lateness of the season I had consulted with the Captain of the *Burgeo* and the Captain of the *Henry Stone* and arranged with them that in the event of meeting any conditions, unfavourable ice conditions at Goose Bay, that the *Henry Stone* would come to Cartwright and make contact with the *Burgeo* and the *Burgeo* would come and take the freight from him, and in no event was the *Burgeo* to leave the coast without seeing that the *Henry Stone* had completed her work.

The master of the *Henry Stone*, Captain John Tobin, gives the following account of these instructions:

A. Yes, I had instructions from Mr. Healey before we left St. John's. He was sending us out on this trip and it was up in November and as usual you would be expecting ice conditions for that time of the year. So he told me the *Burgeo* was enroute to Goose Bay and to keep in contact with the *Burgeo*, and if conditions at Goose Bay were unfavourable for the *Henry Stone* to go to Goose Bay, for the *Henry Stone* to go to Cartwright and the *Burgeo* would come to Cartwright and take the freight and deliver it.

Q. And tranship the freight? A. That's right.

Q. That is if ice conditions in Goose Bay were such that—. Who was making the decision—you? A. Well, I wouldn't—I guess I was responsible for the *Henry Stone*. I guess it would be my decision. If I went in to Cartwright before we got down there, well, I'd have to—. Whoever I was talking to up there on ice conditions I would have to go by what they tell me.

Q. All right. Yes, but I just want to get the facts now. You did have instructions before you left? A. That's right.

Q. That you were to keep in contact or in communication with the Master of the *Burgeo*? A. That's right.

Q. And if ice conditions were such in Goose Bay that you think you shouldn't enter, then the *Burgeo* would tranship the freight for you from Cartwright. Is that the position? A. That's right.

It is apparent also from Captain Tobin's evidence that he thought that the direction "not to be navigated in ice" which was contained in the certificate applied only to heavy arctic ice and that it did not include such ice as he encountered at Goose Bay. The appellant's marine superintendent indicated on direct examination that he shared this opinion and although he qualified this evidence considerably on cross-examination, there is no indication that he ever explained to Captain Tobin the kind of ice that was to be treated as "unfavourable".

After a rough but not hazardous voyage, which included calls at one port of loading (Carbonnear) and three ports of discharge, the vessel, while en route to Goose Bay,

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encountered the government icebreaker *Ernest Lapointe*, whose master reported on the Goose Bay ice conditions saying "Ice conditions were not bad; there was three or four inches of ice there but he did not think we would have any difficulty getting up through there". In addition to obtaining this information, Captain Tobin kept in constant touch with the *Burgeo* which was then at Goose Bay. On arriving at Sandy Point, which is at the entrance to Goose Bay, at 3:00 a.m. on November 19, the *Henry Stone* waited until daylight and at about 7:45 entered the channel leading to the bay. The conditions in the channel are described by the master as follows:

A. It was level ice, but it wasn't a hard ice; it was a tough sort of ice, but it was moving out from the Bay. You see it was—I guess where—wherever the boats came down probably it was broke off or something like that, because it was moving out; because we eventually got through the ice you see—got in clear water. The day before that they broke; the ice was right in to Goose Bay you see. It was slow going, but with the ice coming out now, well, that made it so much slower you see; because we were cutting ice. Well, we weren't covering the ground, that we were cutting the ice—say it that way. The ice was moving but it wasn't heavy ice; it was tough to get through. It was this kind of soft tough ice.

After the vessel got through the ice at about 10:30, reports started to come from the engine room that she was leaking, and it soon became apparent that the pumps were unable to cope with the mounting water. Between 11:30 and 12:00 o'clock, or a little later, the ship sank.

There is some suggestion in the reasons for judgment of the learned trial judge that the sinking may have been due to a leak occurring before the vessel entered the ice which resulted in water being penned up in the forward hold, but I agree with counsel for the appellant that the two and three-quarter hour run through the ice at Goose Bay was by far the most likely cause of the sinking which occurred because of the fact that the vessel was unseaworthy for navigation in ice.

Before this Court, the appellant based its defence primarily on Article IV, Rule 2(a) of the Schedule to the *Water Carriage of Goods Act*, which reads as follows:

Neither the carrier nor the ship shall be responsible for loss or damage arising or resulting from

- (a) act, neglect, or default of the master, mariner, pilot or the servants of the carrier in the navigation or the management of the ship;

It was contended on behalf of the appellant that the master was negligent in entering the approaches to Goose Bay with the ice conditions as they were on November 19, and that it was this negligence which caused the loss.

The marine superintendent who was "in complete charge of the operating and overall supervision of the steamship operations" for the appellant in Newfoundland deliberately dispatched the vessel on this voyage to a destination where it was "usual" for ice to be encountered in the month of November and in so doing he left the master with the impression that he was to be guided by information which he received from persons on the spot and particularly from the *Burgeo* in deciding whether or not ice conditions were unfavourable for the *Henry Stone* at Goose Bay.

As I interpret the evidence, the master carried out these instructions as best he could and, in my opinion, the appellant has failed to discharge the burden of proving that the loss of the ship resulted from an "act, neglect, or default of the master in the navigation or in the management of the ship".

In any event, as I find that the loss was occasioned by the fact that the *Henry Stone* was unseaworthy and unfit to encounter the ordinary perils of the voyage at the particular season in question, I am of opinion that the exception contained in Article IV, 2(a) cannot be invoked to relieve the shipowner from responsibility. In this regard, I refer to what was said by Lord Wright in *Smith, Hogg & Co. v. Black Sea and Baltic General Insurance Co.*¹ In that case, there was a clause in the charterparty providing that the shipowner would not be liable for loss or damage resulting from unseaworthiness unless caused by want of due diligence on the part of the shipowner to make the vessel seaworthy; and also that the shipowner should not be responsible for loss or damage arising from (amongst other things) act, neglect or default of the master in the navigation or management of the ship . . . The trial judge held that the accident there in question took place not by reason of the unseaworthiness of the ship but by reason of the acts of the master, which he found to have been wrong in the circumstances, and that the shipowner was entitled to succeed by reason of the above exception.

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In the course of his reasons for judgment, Lord Wright, in reversing the trial judge, said at p. 1004:

I think the contract may be expressed to be that the shipowner will be liable for any loss in which those other causes covered by exceptions co-operate, if unseaworthiness is a cause, or if it is preferred, a real, or effective or actual cause.

Having found that the loss of the *Henry Stone* was occasioned by unseaworthiness, it remains to be determined whether due diligence was exercised by the owner to make the ship seaworthy. Article IV, Rule 1 of the Schedule to the *Water Carriage of Goods Act*, reads as follows:

Neither the carrier nor the ship shall be liable for loss or damage arising or resulting from unseaworthiness unless caused by want of due diligence on the part of the carrier to make the ship seaworthy, and to secure that the ship is properly manned, equipped and supplied, and to make the holds, refrigerating and cool chambers and all other parts of the ship in which goods are carried fit and safe for their reception, carriage and preservation in accordance with the provisions of paragraph 1 of Article III.

Whenever loss or damage has resulted from unseaworthiness, the burden of proving the exercise of due diligence shall be on the carrier or other person claiming exemption under this section.

The *Henry Stone* was not dispatched on an "ice free" voyage but rather on a voyage during which it was expected that she would be navigated in ice conditions which the master did not consider "unfavourable". The event proved that the vessel was unseaworthy for navigation even under such conditions and as no steps were taken by the appellant between the date of the steamship inspection and the date of the loss to fit the *Henry Stone* "to be navigated in ice" I do not think that it can be said that "the carrier" has discharged "the burden of proving the exercise of due diligence . . ." which rests on it under this rule. For these reasons, I would dismiss this appeal with costs.

Appeal dismissed with costs.

Solicitor for the defendant, appellant: P. J. Lewis, St. John's.

Solicitors for the plaintiff, respondent: Halley, Hickman, & Hunt, St. John's.