
THE ALGOMA CENTRAL AND
HUDSON BAY RAILWAY COM-
PANY and PARRISH HEIM-
BECKER LIMITED
(*Plaintiffs*)

APPELLANTS;

1965
*Nov. 30
*Dec. 1, 2
1966
Jan. 25

AND

MANITOBA POOL ELEVATORS
LIMITED and LAKEHEAD
HARBOUR COMMISSIONERS
(*Defendants*)

RESPONDENTS.

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA,
ONTARIO ADMIRALTY DISTRICT

*Shipping—Damages—Negligence—Ship grounded while taking on cargo
at Lakehead Harbour.*

The plaintiff, The Algoma Central and Hudson Bay Railway Company, sued the defendants for damages sustained by its vessel *Algoway* through grounding while taking on a cargo of wheat at the dock of the defendant, Manitoba Pool Elevators Ltd., within the limits of the Lakehead Harbour. A chart of the harbour, No. 2314 of the Canadian Hydrographic Survey, which was on board, showed a depth alongside the dock of 19 feet, which, when adjusted to conform with the hydrographic survey gauge, became 18½ feet. The ship also carried a document entitled "By-Laws and General Information" issued by the Lakehead Harbour Commissioners, which showed a mean water depth of 21.2 feet at the same berth. Upon reaching the point where the ship

* PRESENT: Abbott, Judson, Ritchie, Hall and Spence JJ.

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was drawing 19 feet 8 inches forward, it was decided that she should be shifted forward so as to load additional grain in the after hatches. Before ordering the ship to be moved forward, the mate, who seemed to have been in charge of the loading, stated that he called out to a man on the dock who turned out to be the superintendent of the elevator in question, asking whether there was "lots of water" and received an affirmative reply. The ship was then winched ahead, grounded and was damaged. The trial judge dismissed the claim of the ship as well as the claim of the other plaintiff, the owner of the wheat cargo which was damaged. The plaintiffs appealed to this Court.

Held: The appeal should be dismissed. There was no negligence on the part of either defendants which was causative of the grounding and consequent damage.

As to the appeal against the Lakehead Harbour Commissioners. There was no evidence of any obstructions in the berth, and the nature of the lake bottom was such as to be anticipated in the area in question. There was no reason to question the finding of fact made by the trial judge that there was no believable evidence which would tend to show that the ship believed or acted upon the pamphlet issued by the Lakehead Harbour.

As to the appeal against the Manitoba Pool Elevators Ltd. There was no danger in the berth in question until the ship rested on the bottom, and the short conversation between the mate and the superintendent could not be treated as a warranty. The motivating concern in the mind of those in charge of the ship was to load as much wheat as her winter draft would allow, and the possibility of the ship taking ground was a secondary consideration.

It was not necessary to consider the question of whether the Lakehead Harbour Commissioners was an agency of the Crown to which the provisions of s. 11 of the *Public Authorities Protection Act*, R.S.O. 1960, c. 318, would apply.

Navigation—Dommages—Négligence—Échouage d'un bateau alors qu'il prenait une cargaison au port de la Tête des Lacs.

La demanderesse, Algoma Central and Hudson Bay Railway Company, a poursuivi les défendeurs pour dommages subis par son bateau *Algoway* lorsqu'il s'est échoué en prenant une cargaison de blé au quai de la défenderesse, Manitoba Pool Elevators Ltd., situé dans les limites du port de la Tête des Lacs. Une carte du port, n° 2314 du Canadian Hydrographic Survey, qui était à bord, montrait une profondeur de 19 pieds le long du quai, laquelle, lorsqu'elle était ajustée pour se conformer à l'indicateur du relevé hydrographique, devenait 18½ pieds. Le bateau avait aussi à bord un document intitulé "By-laws and General Information" émis par les Commissaires du port de la Tête des Lacs, qui montrait une moyenne de profondeur de 21.2 pieds à ce même endroit. Ayant atteint le point où le bateau tirait 19 pieds 8 pouces en avant, on a décidé qu'il devait être avancé pour charger la cale arrière de grains additionnels. Avant d'ordonner que le bateau soit avancé, le second officier, qui semblait être en charge du chargement, a déclaré qu'il a demandé à un homme qui se tenait sur le quai et qui était le surveillant de l'élévateur en

question s'il y avait de l'eau en quantité, ce à quoi l'autre a répondu affirmativement. Le bateau a alors été avancé par treuil, échoua et fut endommagé. Le juge au procès a rejeté la réclamation du bateau ainsi que celle de l'autre demanderesse, la propriétaire de la cargaison de blé qui avait été endommagée. Les demanderesses en ont appelé devant cette Cour.

Arrêt: L'appel doit être rejeté. Il n'y a eu aucune négligence de la part des défendeurs qui ait causé l'échouage et le dommage qui en est résulté.

Quant à l'appel contre les Commissaires du port de la Tête des Lacs. Il n'y avait aucune preuve d'obstruction à l'endroit en question, et la nature du lit du lac était telle qu'elle devait être anticipée à l'endroit en question. Il n'y avait pas lieu de mettre en question la conclusion sur les faits du juge au procès à l'effet qu'il n'y avait pas de preuve croyable tendant à démontrer que les officiers du bateau avaient cru ou s'en étaient rapportés à la brochure émise par les Commissaires.

Quant à l'appel contre la Manitoba Pool Elevators Ltd. Il n'y avait aucun danger dans l'endroit en question jusqu'à ce que le bateau ait touché le fond, et la courte conversation entre le second officier et le surveillant ne pouvait pas être considérée comme étant une garantie. L'intérêt primordial dans l'esprit de ceux qui étaient en charge du bateau était de charger autant de blé que son tirage d'hiver le permettait, et la possibilité que le bateau pourrait s'échouer était une considération secondaire.

Il n'était pas nécessaire de considérer la question de savoir si les Commissaires du port de la Tête des Lacs était une agence de la Couronne à qui les dispositions de l'art. 11 du *Public Authorities Protection Act*, R.S.O. 1960, c. 318, devait s'appliquer.

APPEL d'un jugement du Juge Wells, du district d'amirauté de l'Ontario¹. Appel rejeté.

APPEAL from a judgment of Wells D.J.A. for the Ontario Admiralty District¹. Appeal dismissed.

F. O. Gerity, Q.C., and S. G. Fisher, for the appellant, Algoma Central and Hudson Bay Ry. Co.

J. Mahoney, for the appellant, Parrish and Heimbecker Ltd.

P. B. C. Pepper, Q.C., and A. S. Hindman, for the respondent Manitoba Pool Elevators Ltd.

B. Jas. Thomson, Q.C., for the respondent, Lakehead Harbour Commissioners.

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The judgment of the Court was delivered by

RITCHIE J.:—This is an appeal from a judgment of Mr. Justice Dalton C. Wells sitting in his capacity as District Judge in Admiralty for the Ontario Admiralty District of the Exchequer Court of Canada¹ whereby he dismissed a claim by The Algoma Central and Hudson Bay Railway Company (hereinafter called “Algoma”) for damage sustained by its vessel *Algoway* through grounding whilst taking on a cargo of wheat at a dock and grain elevator known as Manitoba Pool No. 2 owned and operated by the respondent Manitoba Pool Elevators Limited (hereinafter called “Manitoba”) and situate within the limits of the Lakehead Harbour as the same are defined in s. 4 of c. 34 of the the Statutes of Canada 1958, by which Act the respondent, Lakehead Harbour Commissioners (hereinafter called “Lakehead”) was incorporated.

By the same judgment the learned District Judge dismissed the claim of the appellant Parrish & Heimbecker Limited (hereinafter referred to as “Parrish”) the owner of the wheat cargo carried on board the *Algoway* at the time of its grounding which was damaged as the result of the incursion of water resulting therefrom.

On November 29, 1961, the *Algoway* having already loaded some 94,000 bushels of wheat at the Thunderbay elevator which is also within the Lakehead Harbour, was directed to a berth at Manitoba Pool No. 2 about $1\frac{3}{4}$ miles to the northward, at which latter position the master and mate intended to load sufficient wheat to bring the *Algoway* to her mean winter draft of $19' 9\frac{1}{2}''$. The master of the *Algoway* was unfamiliar with the berth to which he was directed but had on board for his guidance the official Canadian Hydrographic Survey Chart # 2314 as well as a Great Lakes Pilot (U.S. Lake Survey) and a sketch of the harbour which was incorporated in a pamphlet entitled “Bylaws and General Information” issued by Lakehead. Chart # 2314 shows a maximum depth of 19 ft. at the Manitoba Pool No. 2 berth, which, when adjusted to conform with the hydrographic survey gauge at Port Arthur, would read $18' 6''$ whereas information contained in the

¹ [1964] Ex. C.R. 505.

Lakehead pamphlet under the heading "Working data—Port Arthur Harbour" shows a mean water depth of 21.2 ft. at the same berth.

On reaching Pool No. 2, the *Algoway* was secured at the west side of the berth and loading was commenced in the forward hatches, but upon reaching the point where the ship was drawing 19' 8" forward and 18' 3" aft it was decided that she should be shifted forward so as to load additional grain in the after hatches in order to trim the vessel to her winter marks. Before ordering the ship to be moved forward, the mate, who appears to have been in charge of loading on board the *Algoway* at the time, states that he called out to a man on the dock who turned out to be the superintendent of the Manitoba Pool Elevator No. 2, asking whether there was "lots of water" and received the reply that there was lots of water and that boats were loaded there at a draft of 21 and 21.6 ft. Upon receiving this assurance the *Algoway* was winched ahead by the use of its own winches and it was found that she had taken ground and that water was coming in No. 1 starboard tank. Subsequent examination revealed that, as might have been anticipated, when the heavily laden forward section of the ship was thus brought forcibly in contact with the rough bottom of the Lake, a hole was punctured in one of the starboard plates and five other plates were damaged.

The chief negligence alleged against Lakehead by both appellants is that the pamphlet entitled "Bylaws and General Information" published by it was inaccurate and misleading and reflected a failure on the part of Lakehead to ascertain the actual depths of water at the various berths where ships were invited to dock, and it is further alleged that Lakehead, as the corporation having jurisdiction over the Harbour in question, was under a duty to warn those in charge of the *Algoway* of the actual condition of the berth to be used by it including the presence of any obstructions and the depth of the water to be expected therein.

I agree with the learned trial judge that there is no evidence as to any obstructions in the berth and that the nature of the lake bottom was such as to be anticipated in the area in question. Counsel for both appellants, however, rested their case against Lakehead primarily on the fact

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that those in charge of the *Algoway* were entitled to rely on the representations as to the depth of water in Manitoba Pool No. 2 made in the pamphlet which has been referred to above.

With respect to the contention that the damage was caused as the result of those in charge of the *Algoway* having relied on this pamphlet, the learned trial judge said:

... there is no believable evidence in my opinion which would tend to show that they did believe or act on it.

I see no reason to question this finding of fact which is so clearly based on the credibility of the witnesses who testified at the trial.

The safety of the ship is primarily the concern of its captain who is charged with navigating safely at all times, and if those in charge of the *Algoway* had relied on the Lakehead pamphlet they would have been ignoring the information which was clearly indicated on the Canadian Hydrographic Survey Chart # 2314 which, at the very least, should have put them on their guard against loading to the ship's winter marks at the berth to which they were directed.

The evidence is clear, however, that when the ship berthed at Manitoba Pool No. 2, the captain retired to his cabin and left the responsibility of loading to the mate who says that before moving the ship forward he relied, not on the Lakehead pamphlet, but upon the assurance of the superintendent of the Manitoba Pool No. 2 who happened to be on the dock, that there was enough water to load to the ship's winter draft.

The assurance so given to the mate is now relied on as forming the basis of the claim of both appellants against the respondent Manitoba and is alleged to have constituted an express warranty given by that Company as to the depth of water at its berth, and it is contended that Manitoba improperly invited or allowed the *Algoway* to come into and occupy a berth operated by it at a time when it knew or ought to have known that it was not safe for her to do so.

There was no danger in the berth in question until the ship rested on the bottom and I do not think that the short

conversation between the mate speaking from the deck and the superintendent from the dock, can be treated as a warranty or that it constituted any assurance upon which the mate was entitled to rely in exposing the ship to the serious risk of grounding in these waters.

In reading the mate's evidence it occurs to me that he was not very much concerned as to whether the ship touched ground or not. In direct examination he was asked:

Q. In the meantime, when you have been loading at the Lakehead, is it usual or unusual to touch ground from time to time?

A. I have loaded at elevators where we have rubbed the bottom.

And later in cross-examination he gave this evidence:

Q. Were you at all anxious or apprehensive as to the depth of water you might find there?

A. I wasn't unduly concerned.

Q. You don't sound sure. You were somewhat concerned?

A. I was somewhat concerned.

And later:

Q. You had no difficulty getting the ship into that position where she could load?

A. She was rubbing the bottom and we didn't try to move her.

Q. Before you started completing your loading she was rubbing the bottom?

A. Yes.

Q. Where—forward or aft?

A. Forward.

Q. When you say the ship stopped herself, what do you mean by that?

A. She came to a stop herself because the winch was having too much power.

Q. You didn't have to use your engines after she had gone forward?

A. No.

Q. Were you surprised she had gone aground forward?

A. Not necessarily.

On consideration of all the evidence I have reached the opinion that the motivating concern in the minds of those in charge of the *Algoway* was to load as much wheat as her winter draft would allow and that the possibility of the ship taking ground in the process was a secondary consideration.

As I agree with the learned trial judge that no reliance was placed on the inaccurate data supplied in the Lakehead pamphlet and as I am of opinion that the conversation between the mate and the superintendent was of too casual

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a nature to justify moving the *Algoway* into a position where it should have been known to those in charge that she was likely to be resting on the rocky bottom of the lake, I can find no negligence on the part of either of the respondents which was causative of the grounding and consequent damage.

In view of the conclusion which I have reached on the evidence, I do not find it necessary to consider the question of whether Lakehead was an agency of the Crown to which the provisions of s. 11 of the *Public Authorities Protection Act*, R.S.O. 1960, c. 318 apply and nothing herein contained is to be treated as adopting the reasoning of the learned trial judge in that regard.

I would accordingly dismiss this appeal with costs.

Appeal dismissed with costs.

Solicitors for the appellant, Algoma Central and Hudson Bay Ry. Co.: McMillan, Binch, Stuart, Berry, Dunn, Corrigan & Howland, Toronto.

Solicitor for the appellant, Parrish & Heimbecker Ltd.: John J. Mahoney, Toronto.

Solicitors for the respondent, Manitoba Pool Elevators Ltd.: Holden, Hutchison, Cliff, McMaster, Meighen & Minnion, Montreal.

Solicitors for the respondent, Lakehead Harbour Commissioners: Haines, Thomson, Rogers, Macaulay, Howie & Freeman, Toronto.