PARRISH & HEIMBECKER LIMITED AND INSURANCE COMPANY OF NORTH AMERICA (PLAINTIFFS). } APPELLANTS;

AND

BURKE TOWING & SALVAGE COMPANY LIMITED (DEFENDANT).... } RESPONDENT.

1942
* Nov. 24, 25, 26.
1943
* Feb. 23.

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA

Shipping—Bill of lading—Wheat in bulk—Foundering of ship—Loss of cargo—Unseaworthiness—Seaworthiness at beginning of voyage—Severe storm—Peril of the sea—Prima facie liability—Burden of proof—Findings of fact—The Water Carriage of Goods Act, 1936, (D), 1 Edw. VII, c. 49.

The appellants, plaintiffs, seek to recover from the respondent, defendant, the value of a cargo of wheat in bulk delivered to and received by the defendant on board its ship *Arlington* at Port Arthur, Ontario, on April 30th, 1940, for carriage to and delivery at Owen Sound, Ontario. The wheat was shipped under bills of lading issued by the respondent, by the terms of which the shipment was subject to all the terms and provisions and all the exemptions from liability contained in *The Water Carriage of Goods Act,* 1936, 1 Edw. VII, c. 49, and the Rules as provided in the schedule of the Act. The *Arlington* foundered while on Lake Superior on May 1st, 1940, and, with her cargo, became a total loss. The appellants' action for damages was dismissed by the late President of the Exchequer Court of Canada. The trial judge found that the cargo was properly loaded and stored, that the ship was not unseaworthy because she was not provided with either longitudinal bulkheads in the cargo holds or with shifting boards, that the carrier used due diligence to make seaworthy, generally, the ship and her equipment, including the tarpaulins and the equipment for securing them in place and that they were in fact seaworthy at the commencement of the voyage and that the presence of slack water in one of the tanks had no real bearing on the case.

Held, affirming the judgment of the Exchequer Court of Canada, Maclean J., ([1942] Ex. C.R. 159), Davis J. dissenting, that the findings of the trial judge were findings of fact which ought not to be disturbed by this Court and that upon them the shipowner respondent was not liable. The respondent has acquitted itself of the onus put upon it to show the cause of the loss and bring itself within the exceptions: *Gosse Millard* v. *Canadian Government Merchant Marine, Limited* ([1927] 2 K.B. 432, [1929] A.C. 223) and negligence causing the loss has been negatived. There was more than a *prima facie* case of loss by peril of the sea, the evidence disclosing that the storm was a severe one, and the mere fact that none of the other ships in the vicinity suffered in the same way as did the *Arlington* does not detract from this evidence.—The shortness of the time that elapsed between the sailing of the ship and its foundering is a circumstance to be taken into consideration

*PRESENT:—Rinfret, Davis, Kerwin, Hudson and Taschereau.

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in deciding whether the ship was unseaworthy. *Ajum Goolam Hassen and Co.* v. *Union Marine Insurance Company, Limited* ([1901] A.C. 363, at 366); *Lindsay* v. *Klein* [1911] A.C. 194, at 203).

Per Davis J. dissenting. Findings of fact by the trial judge lose much of their weight if the question of the peril of the sea was not the vital point for consideration and such test was in law not the primary test of liability in this case. *Pope Appliance Corporation* v. *Spanish River Pulp and Paper Mills, Limited* ([1929] A.C. 269, at 273). The bald statement of fact that the ship sank within a few hours after leaving port raised by itself the heaviest sort of burden on the respondent to dislodge *prima facie* liability, and the foundering of the ship without any other explanation than the existence of a strong gale puts one on his enquiry as to the seaworthiness of the ship at the beginning of the voyage. There was no peril of the sea, as the weather was what might be expected in the spring on Lake Superior. Upon the evidence, the respondent has not satisfied the burden that lay upon it in the circumstances to show that the ship was seaworthy at the beginning of the voyage or that the loss was not due to its unseaworthiness.

APPEAL from the Judgment of the Exchequer Court of Canada, Maclean J. (1), dismissing the plaintiffs' action with costs.

The material facts of the case and the questions at issue are stated in the above head-note and in the judgments now reported.

Russell McKenzie K.C. for the appellants.

Frank Wilkinson K.C. and *Ross Dunn* for the respondent.

The judgment of Rinfret, Kerwin, Hudson and Taschereau JJ. was delivered by

KERWIN J.—On April 30th, 1940, Parrish and Heimbecker Limited delivered to Burke Towing & Salvage Company Limited, who received on board its ship *Arlington* at Port Arthur, Ontario, a quantity of wheat in bulk, for carriage to and delivery at Owen Sound, Ontario. Early in the morning of May 1st, 1940, the *Arlington* foundered on Lake Superior and, with her cargo, became a total loss. An action for damages for the loss of the wheat was dismissed by the late President of the Exchequer Court of Canada and the plaintiffs appeal.

The wheat was shipped under bills of lading issued by the respondent, by the terms of which the shipment was subject to all the terms and provisions and all the exemp-

(1) [1942] Ex. C.R. 159.

tions from liability contained in *The Water Carriage of Goods Act*, 1936, chapter 49. By force of section 2, the Rules relating to bills of lading, as contained in the schedule to the Act, apply to this shipment and section 3 enacts:

3. There shall not be implied in any contract for the carriage of goods by water to which the Rules apply any absolute undertaking by the carrier of the goods to provide a seaworthy ship.

Clause 1 and 2 of article 3 of the Rules provide:

1. The carrier shall be bound, before and at the beginning of the voyage, to exercise due diligence to

(*a*) make the ship seaworthy;

(*b*) properly man, equip, and supply the ship;

(*c*) 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.

2. Subject to the provisions of article IV, the carrier shall properly and carefully load, handle, stow, carry, keep, care for and discharge the goods carried.

Clauses 1 and 3 and the relevant part of clause 2 of article 4 are as follows:

1. 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.

2. 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 in the management of the ship;

(*c*) perils, danger, and accidents of the sea or other navigable waters;

(*q*) any other cause arising without the actual fault and privity of the carrier, or without the fault or neglect of the agents or servants of the carrier, but the burden of proof shall be on the person claiming the benefit of this exception to show that neither the actual fault or privity of the carrier nor the fault or neglect of the agents or servants of the carrier contributed to the loss or damage.

3. The shipper shall not be responsible for loss or damage sustained by the carrier or the ship arising or resulting from any cause without the act, fault or neglect of the shipper, his agents or his servants.

The corresponding British *Carriage of Goods by Sea Act*, 1924, was considered by Wright J., as he then was, in

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Gosse Millard v. *Canadian Government Merchant Marine, Limited* (1), and he pointed out at page 435 that in a bill of lading case such as this, the carrier

> has to relieve himself of the *prima facie* breach of contract in not delivering from the ship the goods in condition as received.

The judgment of Wright J. was reversed by the Court of Appeal but was restored by the House of Lords (2), where at page 236 Lord Sumner expressed the same idea in different language. The primary duty of the respondent, therefore, being to properly and carefully load, handle, stow, carry, keep, care for and discharge the wheat, the onus was upon it to show the cause of the loss and bring itself within one of the exceptions. The shortness of the time that elapsed between the sailing of the *Arlington* from Port Arthur and its foundring is a circumstance to be taken into consideration in deciding whether the ship was unseaworthy. *Ajum Goolam Hossen and Co.* v. *Union Marine Insurance Company, Limited* (3). *Lindsay* v. *Klein* (4).

Bearing in mind these considerations, I agree with the conclusions of the learned trial judge. Although two or three inaccuracies in his judgment were pointed out, they do not at all affect the result. He preferred to believe the evidence of the crew as to the loading of the cargo in preference to that of Mr. German, the naval architect. I agree with him on this point, particularly when viewed in conjunction with these facts; that the *Arlington* had, on its immediately preceding voyage, carried a cargo of approximately the same quantity; that it would appear, from the free board allowed, that the ship was practically fully loaded; and that, notwithstanding the agreement of counsel as to the "capacity plans", there is nothing to indicate, after the lapse of so many years since the ship was constructed, that alterations had not taken place by which the capacity of no. 1 hold was altered. It has not been overlooked that it was as to no. 1 hold that Mr. German testified and that the latter did not leave the matter at large as stated by the trial judge.

I also agree that the ship was not unseaworthy because she was not provided with either longitudinal bulkheads in the cargo holds or with shifting boards. The trial

(1) [1927] 2 K.B. 432.
(2) [1929] A.C. 223.
(3) [1901] A.C. 363, at 366.
(4) [1911] A.C. 194. at 203

judge's findings that the carrier used due diligence to make seaworthy the hull, decks, bilges, engines, machinery, tanks, cargo holds, bulkheads, hatch covers, and generally the ship and her equipment, including the tarpaulins and the equipment for securing them in place and that they were in fact seaworthy at the commencement of the voyage, should be sustained for the reasons given by him.

These are questions of fact. *Paterson Steamships, Limited* v. *Canadian Co-operative Wheat Producers, Limited* (1). They were there determined adversely to the carrier by the trial judge, whose judgment was affirmed by the Court of King's Bench for Quebec and upheld by the Judicial Committee of the Privy Council. In the case at bar, I find myself in entire agreement with the President of the Exchequer Court of Canada.

I further agree that water entered into the cargo holds through the tarpaulins and hatch covers of at least two of the hatches and that there was no negligence on the part of the respondent or its agents or servants. As to the time the list developed, the trial judge preferred to believe the witnesses from the *Arlington,* and not only can I not say that he was wrong in so doing but on the record I arrive at the same conclusion. The presence of slack water in one of the tanks has no real bearing on the case.

Did the loss arise or result from a peril of the sea? The manner in which the trial judge put to himself the question for decision on this point:

> was there such a peril of the sea as that against which the insured undertook to indemnify the carrier,

is explained by his reference shortly thereafter to the case of *Canada Rice Mills, Limited* v. *Union Marine and General Insurance Company, Limited* (2). That action was on an insurance policy but, as Lord Wright pointed out, the House of Lords in *The Xantho* (3) had already decided the same meaning is to be ascribed to the expression "perils of the sea" in a bill of lading as in policies of marine insurance. It was when Lord Herschell in *The Xantho* case (3) was considering marine policies that he stated at page 509:

> I think it clear that the term "perils of the sea" does not cover every accident or casualty which may happen to the subject-matter of

(1) [1934] A.C. 538, at 543.

(2) [1941] A.C. 55.

(3) (1887) 12 App. Cas. 503.

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the insurance on the sea. It must be a peril "of" the sea. Again, it is well settled that it is not every loss or damage of which the sea is the immediate cause that is covered by these words. They do not protect, for example, against that natural and inevitable action of the winds and waves, which results in what may be described as wear and tear. There must be some casualty, something which could not be foreseen as one of the necessary incidents of the adventure. The purpose of the policy is to secure an indemnity against accidents which may happen, not against events which must happen. It was contended that those losses only were losses by perils of the sea, which were occasioned by extraordinary violence of the winds or waves. I think this is too narrow a construction of the words, and it is certainly not supported by the authorities, or by common understanding.

With respect to the interpretation of the words "perils of the sea", these remarks are just as applicable to and in fact appear in a bill of lading case. The results, of course, are not necessarily the same since negligence is immaterial in an insurance case.

In the case at bar, there was more than a *prima facie* case of loss by perils of the sea, and negligence causing the loss was negatived. The evidence discloses that the storm was a severe one and the mere fact that none of the other ships in the vicinity suffered in the same way as did the *Arlington* does not detract from this evidence. The respondent has acquitted itself

> of the onus of showing that the weather encountered was the cause of the damage and that it was of such a nature that the danger of damage to the cargo arising from it could not have been foreseen or guarded against as one of the probable incidents of the voyage.

Canadian National Steamships v. *Baylis* (1), where the carrier did not acquit itself of the onus, while in *Keystone Transports Limited* v. *Dominion Steel and Coal Corporation, Limited* (2), it did.

The appeal should be dismissed with costs.

DAVIS J. (dissenting).—The ship *Arlington,* loaded with about 98,000 bushels of grain of a value of about $87,000, the property of the appellant Parrish & Heimbecker Limited, left Port Arthur, Ont., on Lake Superior, April 30th, 1940, to deliver the grain to Owen Sound, Ont. Within a few hours and at a distance of somewhere around 100 miles from Port Arthur, the ship, having developed in the meantime a heavy list, turned over and sank, with the total loss of her cargo. There is no suggestion that she met with

(1) [1937] S.C.R., 261 at 263. (2) [1942] S.C.R. 495.

any collision or struck any obstruction. I should have thought that the bald statement of fact itself raised the heaviest sort of burden on the ship owner, the respondent, to dislodge a *prima facie* liability to the shipper and owner, who sued for the loss of the cargo. The defence was that the ship was lost due to a peril of the sea, but the weather on Lake Superior at the time was normal for the spring season of the year, when gales of greater or less intensity frequently occur. The *Arlington* had already made one return trip that spring from Port Arthur to Owen Sound, and other cargo ships on the day of the accident were plying up and down the lake with apparently little inconvenience. A strong gale did come up on the lake at the time but the foundering of the *Arlington* without any other explanation at once puts one on his inquiry as to the seaworthiness of the ship at the beginning of the voyage.

The appellant is faced in this Court at the outset with the formidable difficulty that all the findings of the trial judge are against it. But it is not only the right but the duty of an appellate court to carefully review the evidence and to come to its own conclusion, giving all due weight to the findings of the trial judge. I cannot escape from the thought that the trial judge, Maclean J., the late President of the Exchequer Court of Canada, was greatly impressed at the trial with the statement in the then very recent judgment of the Privy Council in the *Canada Rice Mills* case (1), to the effect that losses by perils of the sea were not confined to losses occasioned by extraordinary violence of the winds or waves (a statement which could not be and of course was not questioned), and failed to approach the consideration of this case as one raising at once on its simple facts the primary issue of the unseaworthiness of the ship at the beginning of the voyage.

The late President in an early part of his judgment stated that he regarded the question of the peril of the sea to be " the most vital point for consideration " in the case and later expounded the test which he directed to himself, thus:

> The question of the degree of a storm at sea is not of importance, nor does it afford ground for the inferences which the plaintiffs ask me to draw. The question is was there such a peril of the sea as that against which the insured undertook to indemnify the carrier. To say there was no peril of the sea because the weather was what might be

(1) [1941] A.C. 55.

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normally expected on such a voyage in the spring of the year on Lake Superior, or that there was no weather bad enough to bring about what happened here, appears to me to be not a true test.

The learned judge then cites and refers to the *Canada Rice Mills* case (1).

If that was not the vital point for consideration and the test was in law not the primary test of liability in this case, then the findings lose much of their weight. *Pope Appliance Corporation* case (2).

Moreover, this is a straight bill of lading case; not a marine insurance case; and the trial judge was in error in stating in the above quoted passage from his judgment that

> The question is, was there such a peril of the sea as that against which the insured undertook to indemnify the carrier.

The point in the case, as I see it, is that the weather was what might be normally expected on such a voyage in the spring of the year on Lake Superior and that the ship would not have capsized in such a gale as there was if the ship had been in a condition to encounter the gale. The test seems to me to be whether the ship failed to qualify as a seaworthy ship within the rule laid down by Lord Cairns in *Steel* v. *The State Line Steamship Company* (3):

> * * * the ship should be in a condition to encounter whatever perils of the sea a ship of that kind, and laden in that way, may be fairly expected to encounter * * *

The mere sinking of a ship due to the incursion of water may or may not constitute a defence of peril of the sea and therefore calls for an investigation of the facts and surrounding circumstances in each case and the application of the appropriate principles of law to arrive at a justifiable conclusion. What was in substance the cause is the fact to be determined.

There is no doubt that water did come into the holds, but the ship was very low-set (with a freeboard of only 3 feet $5\frac{1}{2}$ inches) as many of the upper lake carriers are, and if she had not developed a heavy list I do not think she would have taken in the water.

I shall not endeavour to detail the evidence but I should like to point to three witnesses who dealt with three different aspects of the case, and whose evidence was dis-

(1) [1941] A.C. 55.
(2) [1929] A.C. 269, at 273.
(3) (1877) 3 App. Cas. 72, at 77.

regarded by the trial judge. There was the evidence of Thomson, Assistant Controller of the Meteorological Service, who proved the Dominion Government Weather Records. The official records disclosed the velocity and the direction of the winds. He described the storm as typical, "such as occurs frequently along this route." He said that the weather was not abnormal at all—the winds were high, but they have high winds regularly.

> It is the type of weather which is characteristic at this time of the year, as shown by the standard practice of meteorology to anyone experienced in these records.

In the learned judge's lengthy review of the evidence he does not mention the evidence of Thomson though I should have thought the Government records were a fairly safe measure with which to test the conflicting evidence on weather conditions of other witnesses.

Then there was the evidence of Brais—he was a wheelsman on the *Collingwood,* another ship that was going down Lake Superior from Port Arthur at the same time as the *Arlington,* and at a distance of about half a mile apart. Brais went on watch on his ship around one o'clock in the morning of the day of the accident and he said that shortly after going on watch he noticed "a bad list" on the *Arlington.* He told the mate and the mate got the captain (i.e., of the *Collingwood*) and the captain told Brais not to lose sight of her (i.e., the *Arlington*). He kept the *Arlington* in sight—the list seemed to be on the port side. It was the *Collingwood* that subsequently rescued the crew of the *Arlington.* Callam, a wheelsman on the *Arlington,* had said that the *Arlington* acquired a list after midnight. Asked if he were able to fix the time of the list, he replied:

> No, I would not say exactly, because it was dark in the wheel house and I was not looking at the clock, but it was somewhere in the neighbourhood of half-past three or a quarter to four.

The time the *Arlington* capsized was fixed by the trial judge at about five-thirty o'clock in the morning. Brais on the *Collingwood* was obviously struck by the fact that the *Arlington* was listing and to such an extent that he reported it. The *Collingwood* was owned by a different shipping company; at the time of the trial the captain who had been on that ship was dead; and Brais, who was then in the Canadian Navy, was brought to the trial by

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subpoena. Yet the trial judge preferred the evidence of members of the crew of the *Arlington* as to when the listing first occurred, saying that he thought Brais was speaking without having any clear or reliable idea as to the time he observed the listing of the *Arlington*.

The third and last witness to whom I shall refer is Mr. German, a naval architect whose qualifications, both by academic training and practical experience, were of a high order. He attributed the list of the *Arlington* to two causes. One was the effect of slack water in no. 3 tank. The capacity of the tank was somewhat over 200 tons and it was only about half full at the time. He said that such tanks should be either empty or full and that a 200-ton tank half full was "decidedly to be avoided," observing that a list should not be confused with the roll of a ship. A list to one side or the other means, he said, that it submerges that side of the ship and thereby is a reduction in the safety factor. Further, Mr. German estimated that there was an empty space of at least 7,118 cubic feet which would have accommodated about 5,694 more bushels of grain, and in his opinion there was "decidedly" room to create a list. Having regard to the stowage of the grain and the slack water in no. 3 tank, the *Arlington* at the time she commenced her voyage was, in Mr. German's opinion, "definitely unseaworthy."

It cannot in my opinion be said on the evidence that the respondent satisfied the burden that lay upon it in the circumstances to show that the ship was seaworthy at the beginning of the voyage or that the loss was not due to its unseaworthiness.

I should allow the appeal, set aside the judgment below and direct judgment to be entered in favour of the appellant, Insurance Company of North America, for the amount claimed, with costs throughout.

Appeal dismissed with costs.

Solicitors for the appellants: *Montgomery, McMichael, Connors & Howard.*

Solicitors for the respondent: *Wright & McMillan.*