Supreme Court of Canada
Furness, Withy & Co. v. Ahlin, (1918) 56 S.C.R. 553
Date: 1918-06-10

Furness, Withy and Company (Plaintiffs) Appellants;

and

Karl A. Ahlin (Defendant) Respondent.

1918: May 22, 23; 1918: June 10.

Present: Sir Charles Fitzpatrick C.J. and Davies, Idington, Anglin and Brodeur JJ.

ON APPEAL FROM THE SUPREME COURT OF NOVA SCOTIA.

Bailee for hire—Warehouseman—Storage of goods on wharf—Defective piles—Negligence—Reasonable care.

Goods stored under contract in a warehouse on a wharf built on piles in the harbour of Halifax were destroyed or damaged in the collapse of the wharf. In an action by the owners of the wharf and warehouse for wharfage and for work and labour performed in salving the goods there was a counterclaim for damages.

Held, affirming the judgment of the Supreme Court of Nova Scotia (51 N.S. Rep. 291), that as it was proved that the collapse of the wharf was caused by the piles having become wormeaten and unable to support the superstructure, and that the life of a pile in Halifax harbour is about ten years; and as it was not proved that the piles had been properly inspected or renewed during the sixteen years of the existence of the wharf; the warehousemen had not exercised the reasonable care required of a bailee for hire and were responsible for the loss and injury to the warehoused goods.

APPEAL from a decision of the Supreme Court of Nova Scotia[1], reversing the judgment at the trial in favour of the plaintiffs.

The facts of the case are sufficiently stated in the above head-note.

Jenks K.C. for the appellants.

W. A. Henry K.C. for the respondent.

THE CHIEF JUSTICE:—There can, I assume, be no doubt about the law which governs the relations of

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the parties to this case. At the argument, both parties agreed that the wharfinger stands in the position of an ordinary bailee for hire and is therefore not an insurer of the safety of his dock. But he is under an obligation to use reasonable care to keep it in a safe condition.

[1] 51 N.S. Rep. 291; 35 D.L.R. 150.

The whole controversy here turns upon the condition of the dock at the time the appellants (the owners) and warehousemen agreed to discharge, pile and re-load the cargo of the "Cammo," a Belgian relief ship which put into Halifax harbour for repairs. The bare fact of the accident may not be sufficient to cause a presumption or permit an inference of negligence; but that fact taken in connection with the physical cause or causes of the accident may shew that the responsible human cause of the particular accident in question was a fault of commission or omission on the part of the defendant.

Ritchie J. gave judgment for the plaintiffs (appellants) for $7,107.64 and dismissed the counterclaim. He said:—

> There is danger about every wharf, because as soon as the supporting piles are driven the worms attack them—the failure of one pile may cause a collapse. The plaintiffs, no doubt, were fully alive to the danger of worms. The question is whether or not, having regard to the danger, they used reasonable care as prudent men in the maintenance of the wharf. The evidence of the witnesses called by the plaintiffs has convinced me that they did use such care.

The late Chief Justice Sir Wallace Graham, with whose opinion Russell and Chisholm JJ. concurred, said:

> The company cannot claim that this was a case of inevitable accident or that the defect in the piles was a latent defect so far as they were concerned. It was either known to the company or would have been known to them, if they had used proper care in examination and in renewing the piles which had been ravaged by the worms.

He quotes at length from the testimony in respect to the cause of the breaking of the piles and the

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opportunity of knowing the condition of the defective piles.

The wharf was constructed in 1899 and the evidence is that in Halifax the average life of piles is 10 years. The Chief Justice says:—

> If 10 years is the life of a pile, the company in the course of 15 years would, at least, be expected to have renewed all the piling under this wharf. There is no evidence to that effect. As a fact, a majority had not been replaced.

I entirely agree in the conclusions reached by the court *en banc.* The diver, who was in the best position to give evidence as to the conditions under the water, was not produced as a witness and no explanation is given for his absence. His name is not mentioned and

therefore the respondent had no opportunity to discuss his competence. Ample opportunity existed on the other hand to check the accuracy of the statement made by Mr. Jefferson Davis and in the absence of any attempt to contradict him I am disposed to accept the conclusion he reached. If, as appears to be admitted by both sides, the life of a pile in Halifax harbour is 10 years and the wharf was over 16 years old, every original pile put in had outlived its usefulness at the time of the accident and the omission to prove that the piling had been renewed or properly inspected taken with the fact of the accident is sufficient to permit an inference of negligence.

The appeal should be dismissed with costs.

DAVIES J.—This was an appeal from the judgment of the Supreme Court of Nova Scotia holding the defendant, appellants, liable for the damages caused to the respondent's goods warehoused on their wharf by the defendants.

The wharf collapsed after the goods were so warehoused, the underpinning piles of the wharf giving way

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and many of them breaking off about at or below low-water mark. The evidence shews I think clearly that a number of the supporting piles of the wharf had been eaten almost through by worms and that they had in consequence become unable to give the necessary support to sustain the weight placed in the warehouse of the plaintiffs' goods, and had not been replaced by sound and strong piles.

There is no doubt that the plaintiffs took great pains to keep that part of their wharf which was above low water in good order and repair. Reasonably constant inspections of this part of the structure were made from time to time and if anything in this case depended upon the discharge by the appellants of their duty in that regard I should have for one been prepared to say that they appeared to have fully and fairly discharged that duty.

But it does not appear to me that the full discharge by the appellants of their duty in respect of the superstructure of the wharf down to low water affects the question whether they discharged their duty with respect to the piling below low water on the strength and soundness of which the whole superstructure depended. The appellants were, it is true, as warehousemen only bailees for hire of the goods warehoused and as such had a limited liability. They were not insurers but were obliged to take reasonable care of the goods and

chattels warehoused by them. In the case of *Searle* v. *Laverick*[2], Blackburn J., in delivering the judgment of the court, says:

> The obligation to take reasonable care of the thing intrusted to a bailee of this class (amongst which he had previously mentioned warehousemen as included) involves in it an obligation to take reasonable care that any building in which it is deposited is in a proper state so that the thing deposited may be reasonably safe in it.

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The question in this case is thus reduced to the single one whether the appellants did take such reasonable care with respect to their warehouse on their wharf. Reasonable care necessarily, of course, required such care of the underpinning of the wharf on which the warehouse rested.

Did the appellants prove reasonable care in that respect? I think not. They, it is true, employed a diver to make the necessary examination of the underpinning below low water on which the safety of the whole structure above depended. But this diver was not shewn to be a competent person for the task assigned him, nor was he called at the trial, nor evidence given shewing that his presence could not be had. As far as I can gather, his name was not even given or his absence from the trial explained, or his qualifications for the important duties assigned him shewn. It is true that it was proved a diver had been employed to make the necessary inspection and Mosher's evidence is to the effect that wherever this diver told him a new supporting pillar should be placed in lieu of the one destroyed by the worms, he, Mosher, placed it.

On this crucial and necessary point of the competency of the diver employed to discharge the duties assigned to him either by his own evidence or by other evidence the appellants failed to shew they had discharged their duty and their obligation to take reasonable care of the goods entrusted to them.

The proper inference to be drawn from the collapse of the wharf and the warehouse and the examination of the supporting and broken piles made after the collapse in the absence of any direct evidence on the point is that the diver was not a competent man for the important duty entrusted to him and failed to discharge it.

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On this ground I hold that the appeal must be dismissed with costs.

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[2] L.R. 9 Q.B. 122.

Idington J.—I do not think the evidence adduced on behalf of the appellants at the trial satisfies the requirements of the law imposed upon them as the result of the unexplained reason for the collapse of the wharf in question in face of the assurances given the respondent to induce him to unload his vessel.

I think the appeal should be dismissed with costs.

ANGLIN J.—I have not been convinced that the conclusion reached by the majority of the learned judges of the court *en banc* is erroneous. The evidence makes it reasonably certain that the cause of the collapse of the defendants' wharf was the weakening of supporting piles due to the action of limnoria, rendering it incapable of sustaining the weight of the cargo of the "Camino," which, as placed on the dock, averaged 311 lbs. to the square foot, with a possible maximum weight of 413 lbs. to a square foot at some points. It was well known that wooden piling of wharves in Halifax harbour is exposed to this cause of deterioration. Adequate inspection at reasonably frequent intervals, followed by such repairs and replacements as such inspection discloses to be necessary, is admittedly the proper means that should be taken to guard against this danger. Under the circumstances of this case the onus was upon the defendants to establish that they had taken these means. In my opinion they failed to discharge that burden satisfactorily. The evidence and absence of evidence which warrants this conclusion has been fully stated by the late learned Chief Justice of Nova Scotia and no good purpose would be served by again detailing it.

I would dismiss the appeal.

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BRODEUR J.—It is common ground that it was the duty of the appellant company to exercise reasonable care that the condition of the wharf was such that the vessels using it would not be exposed to injury. That principle of law placed upon the appellants the burden of proof that reasonable care was taken to avoid accidents.

There is no doubt that the wharf collapsed on account of the piles being defective and wormeaten. The evidence shews that after the accident the piles were examined and found to be in that condition.

The appellants claim, however, that they had during the previous year the wharf examined and repaired. The report of their inspector shews, in fact, that he had examined a certain

part of those piles; but he could not say himself whether or not the part which was covered by water at that time had been duly inspected.

The appellants claim that a diver had been sent to examine that part covered by water; but they failed to bring the diver in evidence to shew that he was a competent man and that he had duly performed his work. It was the duty of the appellants under these circumstances to adduce such evidence; and having failed in that respect to shew that they had exercised reasonable care of their property they should be held liable for the accident which has destroyed the cargo of a vessel of which the respondent was the master.

For these reasons, the appeal should be dismissed with costs.

Appeal dismissed with costs.

Solicitor for the appellants: W. H. Fulton.

Solicitor for the respondent: W. A. Henry.