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THE ONTARIO ADMIRALTY DISTRICT

1948
Feb. 2-4, 6, 9
Mar. 15-17
1950
Jan. 24

BETWEEN:

THE COLUMBIA TRANSPORTATION COMPANY,..... } PLAINTIFF;

AND

THE F. P. WEAVER COAL COMPANY LIMITED,..... } DEFENDANT.

*Shipping—Damages—Ship damaged while manoeuvring around corner of dock—Duty of occupier of dock to owners of ships invited to use it—Duty of reasonable care to ensure that dock is reasonably safe for normal and proper use.*

The plaintiff sued for damage to its steamer the *J. R. Sensib*ar incurred while manoeuvring around the north-east corner of the Hamilton Harbour Commission terminal wharf in the course of delivering coal to the defendant at that portion of the wharf of which it was the lessee and occupant.

*Held:* That the occupant of a wharf owes a duty to the owners of vessels which he invites to come to it to take reasonable care to ensure that it is reasonably safe for such vessels for their normal and proper use. There is no warranty that it is safe.

(1) (1876) 93 U.S. 486.

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2. That there is no difference in the duty of the occupant of the wharf or enlargement of its scope by reason of the fact that the occupant was the consignee of the coal which the shipowner was delivering pursuant to a contract to do so.

3. That there was no hidden or unusual obstruction or danger or defect in the condition of the dock prior to the arrival of the *Sensibar* that would make it unsafe for normal and proper use by ships invited to it but, on the contrary, that it was in a safe and proper condition for such use.

4. That the *Sensibar* came to her damage by her own manoeuvring.

ACTION against occupants of a wharf for damage incurred by plaintiff's steamer while manœuvring around a corner of the wharf.

The action was heard before the Honourable Mr. Justice Thorson, President of the Court, at Toronto.

*W. E. McLean K.C.* and *E. Burson* for plaintiff.

*R. C. Holden K.C.* for defendant.

The facts and questions of law raised are stated in the reasons for judgment.

THE PRESIDENT now (January 24, 1950) delivered the following judgment:

In this action the plaintiff sues for damage to its steamer, named J. R. Sensibar, hereinafter called the *Sensibar,* incurred while manœuvring around the north-east corner of the Hamilton Harbour Commission terminal wharf in the course of delivering coal to the defendant at that portion of the wharf of which it was the lessee and occupant.

Certain facts are not in dispute. The *Sensibar* in charge of Captain N. Larsen left Toledo, Ohio, at 8.20 p.m. on May 17, 1944, with a cargo of coal consigned to the defendant and arrived at the defendant's dock at Hamilton at 6.38 a.m. on May 19, 1944. She came in bow first making a broadside landing with the port side next to the north face of the dock. Three men were landed to handle her mooring cables and secure them to the mooring posts or spiles, properly called bollards, on the dock. When she was tied up her stern was about 150 feet north of the north-east corner of the dock. The north face

of the dock, called north for convenience although really west northwest, was 1128 feet long and the over-all length of the *Sensibar* including its fantail 552 feet. Instructions where the coal was to be placed were given by Mr. N. Spauldin, the defendant's dock superintendent. The coal from one compartment was to be landed from the north face of the dock and that from the remaining five compartments from the east face. This meant that Captain Larsen, after unloading the one compartment, had to manœuvre his ship into the slip beside the east face so that he could unload the rest of his cargo from there. He decided to do so by breaking or warping around the north-east corner and then backing into the slip stern first. His first step to this end was to shift the *Sensibar* eastward alongside the north face so that her stern was at the north-east corner. This operation was done exclusively with the ship's mooring cables, also called lines or wires, and her mooring winches without the use of her main engine. There were three lines out, the No. 2 wire from the forward part of the ship towards the after end secured to a bollard near the stern, the No. 3 wire from forward of the stern towards the bow secured to a bollard near the bow, and the No. 4 wire from the same location as No. 3 towards the stern secured to a bollard at the north-east corner. The next move was to shift the *Sensibar* further east. Before this was attempted the stern cable, called the No. 5 or fantail wire, was let out through the stern chock at the port side and secured to a bollard on the east side of the dock about 100 feet south of the north-east corner. When this was done the shift astern was made with the mooring lines and winches, the lines secured to the bollards on the north side of the dock being shortened and secured to bollards further east. When the *Sensibar* had been shifted as far east as Captain Larsen considered safe the next move was to break around the corner. In view of the fact that the wind, which was from the north-east, was on the ship's starboard side there was no need of the No. 2 wire to hold her bow against the side of the dock and its use was dispensed with. This left the bow free to swing out from the dock in an arc while the No. 5 wire pulled the stern into the slip towards the east face. The ship did not come around very fast

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or "as lively as it had done before at this dock," which Captain Larsen attributed to the force of the wind holding her bow, and he decided to assist the breaking around the corner by using the main engine. He first worked it slow astern, which increased the tension on the No. 5 wire and tended to swing the ship in more rapidly. After six to eight revolutions the engine was stopped and the wheel put in a hard right position to bring the bow to starboard and the stern to port. The main engine was then worked slow ahead for six to eight revolutions. This use of the engine was to aid the winches in bringing the ship around. Captain Larsen then alternated the slow astern on a midship rudder and the slow ahead on a hard right rudder for about six to eight revolutions each time, the No. 3 and No. 4 wires holding the ship on the corner and the No. 5 wire pulling the stern nearer the dock. These alternations continued until the hull was parallel with the east face. This completed the breaking around the corner. The *Sensibar* was then shifted back into the slip exclusively with the mooring lines and winches. The use of the No. 5 wire was dispensed with and the No. 3 and No. 4 wires were used to pull the ship as far back into the slip as was necessary to unload the coal where Mr. Spauldin had directed. The *Sensibar* was then tied to the east face in a manner similar to that in which she had been tied to the north face. Her bow was then about 300 to 400 feet south of the north-east corner. The unloading of the rest of the coal then began.

As the *Sensibar* was being shifted back into the slip and while her bow was still about 100 feet north of the north-east corner Captain Larsen who was on the bridge had his attention called to the corner by his third mate and saw what appeared like a sharp corner or projection about six or nine inches above the water level. After the ship was tied up and following a conversation with his third mate and his first mate he went down and looked at the port side of his ship. He noticed a heavy scoring in her plates from near the stern and extending forward about the length of seven plates, about 200 feet, all in the same horizontal plane about six or eight inches from the water. The scoring was about two inches wide with a maximum depth of half an inch. Where it had passed over rivets it had cut

the heads right off. The scoring was a partial cut through the steel and deeper at the frames than in between, but otherwise it was about the same in all the plates. Between the frames the plates were bent as well as scored. It was later shown that some of the ship's frames were also buckled.

A description of the dock may be given briefly. It was built by the Department of Public Works of Canada in 1940 and turned over to the Department of Transport and came under the administration of the Hamilton Harbour Commission. The defendant became a lessee of the north-east part in 1942. The dock consisted of concrete walls around an area filled with gravel and crushed rock. The north-east corner—as also the north-west corner—was chamfered or bevelled off with a face of three feet across the bevel making an angle of about 135 degrees with the north and east faces. On top of the walls there were cast iron bollards about 50 feet apart set in the concrete for use as mooring posts. The walls were 28 inches wide at the top with a bevel of about an inch at the outside edge to save mooring cables from being cut by a sharp edge. The faces of the dock including the bevel at the corners were vertical. In all of them 80 pound steel rails had been embedded into the concrete 30 inches from the top and flush with the face except that the rounded part protruded approximately a quarter of an inch. The rails in the long faces were fastened together with standard plates and bolts and so held rigidly in line. There were no connecting plates where the rail in the bevelled face at the north-east corner met the rails in the north and east faces, the ends being mitred to bring them close together. The rails were anchored every two feet by steel U-shaped tie rods seven feet long passed through holes burned through the web of the rail and then twisted and spread and embedded in the concrete. There were two such tie rods in the three-foot rail in the bevelled face each about six inches from the end. There was thus a continuous line of rails around the whole dock a little above the water level which served as a fender to protect the concrete faces against damage.

The scoring of the plates on the *Sensibar* was on the same horizontal level as the line of rails along the faces

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of the dock and it is in respect thereof that the plaintiff claims damages in the sum of $13,982.58. No evidence of quantum other than that already referred to was given, it being understood that a reference to the registrar for an enquiry as to damages would be ordered if judgment went in favour of the plaintiff.

The plaintiff's allegations of the cause of the damage to its ship and its cause of action against the defendant appear in the amended statement of claim as follows:

8 Around the entire face of the Defendant's wharf, embedded in the concrete near the water line, there existed a fender consisting of a horizontal "I" shaped metal rail. At and near the corner where the East face of the said wharf meets the North face, the concrete had broken away, exposing the said fender from 1 to 1½ inches In the alternative, if the concrete had not broken away exposing the said fender or rail as aforesaid at the commencement of the shifting of the Sensibar referred to in Paragraph 7, the concrete about the said fender or rail had become so cracked and/or deteriorated that it broke away during the said shifting exposing said fender or rail as aforesaid. Such cracking and/or deterioration of the concrete was caused by the ordinary and usual user of said corner by ships coming to and using said wharf by reason of the character of the construction of said corner and by the action of the elements and otherwise and such exposure was something which was likely to occur in the ordinary and usual user of said corner by ships.

9 In the process of shifting the Sensibar, as stated in paragraph 7 hereof, the port side was brought into contact with the exposed fender or with said fender or rail exposed by reason of the breaking away of the concrete as referred to in Paragraph 8, seriously scoring the port side from a point abreast the engine room forward a distance of approximately 100 feet, thereby causing grievous damage thereto.

10. By inviting or allowing the *Sensibar* to occupy and use the said wharf, the Defendant impliedly warranted that the same was in safe and proper condition for all ordinary purposes, including the manner of shifting the Sensibar resorted to by the Master thereof The Defendant caused a breach of the said warranty by failing to keep and maintain the face of the wharf in a safe and proper condition, in consequence whereof the Sensibar sustained damage as aforesaid.

11 Alternatively, the Defendant failed to take reasonable care to ensure that the wharf was in a safe and proper condition for the use that was made of it by the Plaintiff, and failed to prevent the unusual danger created by the exposed fender or the exposure of the said fender or rail, referred to in Paragraph 8 hereof.

12 The Defendant failed to warn those in charge of the Sensibar that the said wharf was not in a safe and proper condition for the use which the Defendant should have expected would be made of it.

While there are no decisions directly on the question of liability for damage to a ship by reason of contact with the face of a wharf I see no reason why the principles applied in the so-called "foul" berth cases should not be

applicable. The law is, I think, correctly stated in Roscoe's Admiralty Practice, 5th edition, at page 85, as follows:

> Harbour and dock authorities owe a duty to the owners of the vessels which they invite to enter and make use of the harbours, docks and berths under their control, to use reasonable care to ensure that such harbours and berths are reasonably safe for the vessels which they invite to them, or to give warning of any defect not known to the shipowner, or that they have not taken the steps necessary to satisfy themselves that the berth is safe, so as to negative the representation implied in the invitation to the vessel to make use of the berth * * *
>
> A like duty is owed by a wharfinger to the vessels which he invites to make use of his wharf, although the berth at which vessels lie whilst alongside the wharf is not subject to his control. The duty extends to the occupier of a wharf, and to a wharfinger who receives no direct benefit from the use of his wharf; in the latter case it is sufficient that he should enjoy some indirect advantage, such as the receipt of freight for the land carriage of goods discharged at his wharf * * *
>
> The duty is not an absolute duty in the nature of a warranty, but is limited to the taking of reasonable care to ensure the safety of the vessel.

The duty has been recognized in a great many cases, from as early as *The Lancaster Canal Company* v. *Parnaby* (1); and *The Mersey Docks Trustees* v. *Gibbs* (2); and including such cases as *The Moorcock* (3); *Tredegar Iron and Coal Company* v. *Owners of Steamship "Calliope"* (4); *The Bearn* (5); *The Devon* (6); *The Grit* (7); *The Lisa* (8); and *The Andelle* (9). *Vide* also *Steamer Livingstonia Co., Ltd.,* v. *Dominion Coal Co., Ltd.* (10); and *Owners of ss. Panagiotis Th. Coumantaros* v. *National Harbours Board* (11). Nor is there any reason for finding that there is any difference in the duty of the occupant of the wharf or enlargement of its scope by reason of the fact that the occupant was the consignee of the coal which the shipowner was delivering pursuant to a contract to do so.

The issue in this case is thus one of fact, namely, whether there was any breach by the defendant of its duty to use reasonable care to ensure that its dock was reasonably safe for use by the *Sensibar* in the course of delivering her cargo of coal. The onus of proof of breach of duty rests on the plaintiff.

(1) (1839) 11 Ad. & E. 223.
(2) (1866) 1 H.L. 93.
(3) (1889) 14 P.D. 64.
(4) (1891) A.C. 11.
(5) (1906) P.D. 48
(6) (1923) 16 Asp. (N.S.) 268.
(7) (1924) P. 246.
(8) (1933) 46 Ll.L. Rep. 320
(9) (1938) 62 Ll.L. Rep. 260.
(10) (1925) Ex.C.R. 151.
(11) (1942) S.C.R. 450.

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The first thing to ascertain is whether there was anything wrong with the condition of the wharf prior to the arrival of the *Sensibar* that would make it unsafe for normal and proper use by her. If there was not the plaintiff's case falls.

There is no suggestion of any under-water or hidden obstruction. The plaintiff's sole complaint is against the condition of the dock at its north-east corner, that is to say, the condition of the concrete around the rail in the bevelled face of the corner. This is what is complained of in paragraph 8 of the statement of claim. There was no evidence that any concrete had broken away or that the rail or fender was exposed prior to the *Sensibar* breaking around the corner. Nor was there any evidence of any cracking or deterioration of the concrete about the rail or fender prior to her manoeuvre. In fact no evidence as to the condition of the dock prior to the arrival of the *Sensibar* was adduced on behalf of the plaintiff. The existence of the conditions alternatively alleged was left to be inferred from the nature of the damage to the ship and the condition of the corner after the accident.

There is a sharp divergence in the evidence on this point. Captain Larsen said that after he had examined the ship and noticed the scoring of her plates he went up to look at the corner. He looked down and noticed a projection or obstruction and that the concrete immediately around the rail in the bevelled face of the corner had been broken away at both ends for about six or eight inches away from it both above and below but no concrete was broken away at the centre. There was no loose broken concrete or pieces, and no flakes or indication that the dock had been recently broken. It had a darkened appearance of having been weathered. The rail was exposed at the north-west end but was otherwise intact. Except for the breaking away of the concrete at the mitre joints it was not pulled out or disturbed. The evidence of Captain V. Koski, the first mate, was to the same effect. The concrete was broken on both sides of the rail exposing it but was otherwise not disturbed from its normal condition. S. P. King, the third mate, said that after the ship had passed the corner he noticed that

the concrete had broken loose near each corner of the bevelled face exposing the point and had called it to Captain Larsen's attention.

The evidence of the defendant's witnesses was quite different. Mr. N. Spauldin, its dock superintendent, said that after the *Sensibar* had got in the slip and he had spotted her and they had started taking out the second part of the coal the mate called him over and told him that they had trouble getting around the corner and had damaged the boat and also the dock and had lost a cable. After he viewed the damage on the boat he walked to the corner and saw the damage that had been done. The corner piece of rail, that is, the rail on the bevelled face of the corner, had been struck and the north-west point of it was sticking out approximately three inches beyond the rail along the north face. There was damage to the concrete above and below it. It had been broken away and above the rail was flaky and loose and still hanging. The rail was not sticking out at the end near the east face. The damage to the concrete was definitely new damage. There was no discoloration of the broken parts. After looking at the corner Mr. Spauldin went back and saw Captain Larsen. They looked at the damage to the ship together and then went back to the corner together. Later Mr. Spauldin phoned Captain R. A. Bell, the harbour manager and port master, and the two of them viewed the damage. A few days afterwards a small part of the rail was cut off at the north-west end. The tie rod near the corner, which had been pulled out, was straightened and the rail was pushed back into position flush with the face. Mr. Spauldin did not see this work being done but saw what had been done half an hour after the repairs were made. Mr. Spauldin was vigorously cross-examined but his evidence remained unshaken. The rail was not bent but pulled out straight so that at the north-west end it was sticking out three inches from its former position. The concrete was disturbed both above and below the rail for its whole length, broken away for at least an inch above the rail and cracked above that right up to the top of the face. There was no disturbance on the east face of the dock but some of the rail along it was projecting out. Mr. Spauldin's evidence was substantially confirmed by Captain R. A.

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Bell. He said that the north-west end of the piece of rail in the bevelled face of the corner had been sprung out about three inches beyond its original position. The other end was still embedded in the concrete. The projecting end was forced out. Captain Bell also gave evidence that there was a large crack along the top of the wall of the bevelled corner extending in a jagged curve near the east wall widening to about 12 to 14 inches at the centre and then narrowing to between three and four inches at the corner near the north face. There was breakage of concrete below and above the rail. The damage looked new. The crack on top of the wall was a new one. The evidence of Mr. W. G. Burnside, the chief of the Hamilton Harbour patrol, was to the same effect. After the accident he went to see the corner. He could see that the rail was sticking out at the north-west corner of the bevelled face. The concrete where the rail had pulled out had broken away. It was a fresh crack. There was also a crack on the top of the dock across the bevelled corner. The rail was still in position at the south-east end of it.

I have no hesitation in accepting the evidence of Mr. Spauldin, Captain Bell and Mr. Burnside as to the condition of the corner after the accident rather than that of Captain Larsen and the two mates.

Moreover, the defendant's witnesses gave evidence of the condition of the dock prior to the arrival of the *Sensibar*. That of Mr. C. C. Jeffrey, the senior assistant engineer at Toronto of the Department of Public Works, who designed the dock and supervised its construction, was of a general nature. He said that it was a very substantially built, strong wharf, that it was the strongest dock in the Toronto District and that he did not think there was a stronger one on the Great Lakes. The outer corners were chamfered or bevelled off to save the concrete from chipping off as the result of alternate freezing and thawing. This was sound construction. The steel rail was used to protect the dock and was much better than the horizontal wooden fenders that had previously been used. The berths provided for ships at the faces of the dock were safe. In his opinion, no better mooring could be provided. There was also strong particular evidence that there was nothing wrong with the

north-east corner prior to the *Sensibar* breaking around it but that it was in good condition. Mr. Spauldin said that the dock was a good safe one to berth boats. He also stated that the damage which he saw after the *Sensibar* was tied up was definitely new damage, that the broken parts of the concrete were not discolored, that the rail had not been sticking out prior to May 19, that he went around the dock at least once a day and walked along the top of the revetment wall and that if there had been any damage or defect in the face of the wall he would have noticed it if it had been obvious. There was also the evidence of Captain A. R. Bell, that he walked around the docks in the Hamilton Harbour two or three times a week and as far as he was aware the defendant's dock was in perfect condition. He never noticed anything wrong with it. The last time he looked at it prior to the accident it was in good condition. If this was the only evidence as to the condition of the north-east corner it might not be wholly convincing, but it is supported by the clear cut and positive statement of Mr. Burnside. He and his men patrolled the harbour in a boat three times a day one of which patrols he made himself. He went out himself on the evening of May 18. It was one of the duties of the patrol to light the lamps on the outer corners of the dock in question and on this evening he did so himself. One of these lights was at the top of the dock at the north-east corner. He climbed up the north face near the corner by way of a recess in the wall where the light had formerly been. He saw the condition of the corner. I quote portions of his evidence:

Q. Well, did you see the bevelled corner that evening before, Mr. Burnside?

A. Yes, I keep my eyes on the dock, all the way, on all our own docks especially, all the way around.

Q. Well, can you say in what condition that north-east corner and this bevelled part at the corner were that evening before?

A. Just as good as the day it was put in there.

He was also asked as to the position of the rail and whether any concrete was broken away and gave this evidence:

Q. Can you say what the position of the rail was that evening before?

A. It was in perfect shape to my way of thinking. I could not see anything the matter with it.

Q. Do you know if there was any concrete broken away above or below that rail that evening before?

A. There was not.

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The inspection made by Mr. Burnside was between 8.00 and 9.00 o'clock. The night was calm and the visibility good. It was fairly light, just before dusk. I was favourably impressed with Mr. Burnside and have no hesitation in accepting his evidence. In my opinion, it is conclusive that there was nothing wrong with the north-east corner the evening before the accident, that no concrete was broken away from the rail in the bevelled face of the corner and that the rail was not exposed. In my view, Mr. Burnside's evidence completely disposes of the plaintiff's complaint as to the condition of the corner, as mainly alleged, and there is no evidence at all to warrant the alternative allegation of cracking or deterioration of the concrete.

There is further evidence of the safe condition of the dock in the fact that many ships, including the *Sensibar,* had previously broken around the corner without damage to themselves or to the dock. Exhibit D is a list of the ships that traded into the portion of the dock occupied by the defendant since it became an occupant early in 1942 and the evidence is that many of them broke around the corner. The list includes three ships almost as large as the *Sensibar* that came in April, 1944, loaded with more than one kind of coal and probably broke around the corner. In any event, it is relevant that prior to May 19, 1944, no report of any damage to a ship or to the dock had ever been made to Mr. Jeffery, Mr. Spauldin, Captain Bell or Mr. Burnside.

There was some suggestion that the defendant had been negligent in failing to put a cluster of piles at the north-east corner to protect ships from damage while breaking around it. Captain Larsen said that in most places this was done and that if there had been such protective piling his ship would not have been damaged. Captain Patterson also suggested that there should have been such protection. There was, in my opinion, no duty on the part of the defendant to provide any such piling. The corner was safe without it for any normal or proper use. Moreover, the evidence is against Captain Larsen's statement that most docks had clusters of piles at the corners. Mr. Jeffery said that of the hundreds of docks under his jurisdiction he did not know of one that had such clusters,

except that such clusters were driven at the corners of the dock in question after the accident. Captain W. E. Pringle said that most docks do not have such clusters and Captain J. Stephens said that it was the exception rather than the rule to have them. The only spring piling that he knew of except that put in at the defendant's dock after the accident was at the ferry dock in Toronto. He could not recall clusters of piles at the corner of concrete docks elsewhere. Captain Bell explained that clusters of piles were put in at the corners after the accident at his request to protect the dock against a similar accident. Mr. Jeffery gave the same explanation. I accept their statements.

There was no need to warn the plaintiff of the presence of the railing in the faces of the dock. Captain Larsen had frequently come to the dock with the *Sensibar* prior to the accident and was familiar with it. The railing was visible and Captain Larsen knew that it was there. He had frequently broken around the corner without damage to his ship or the dock. There was nothing unusual about the use of such railing in a concrete dock. While its purpose was to protect the face of the dock from damage and not designed for the breaking of ships around the corner it was perfectly safe for such use if the weather conditions were suitable and the ship was properly handled.

Nor is there any merit in the criticism that the corner was defective in that the rail in the bevelled face was not fastened to the rails in the north and east faces with plates and bolts but that the ends were merely mitred to bring them close together. I find no defect in the manner of securing the short piece of rail. It was embedded in the concrete and strongly held by the two tie rods near the ends as already described.

On the evidence, I find that there was no hidden or unusual obstruction or danger or defect in the condition of the dock prior to the arrival of the *Sensibar* that would make it unsafe for normal and proper use by ships invited to it but, on the contrary, that it was in a safe and proper condition for such use. There was no breach of duty on the part of the defendant and no basis for the plaintiff's claim against it.

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This finding is sufficient for the dismissal of its action, but there is a further reason why it should not succeed. In my view, the evidence supports the conclusion that the *Sensibar* came to her damage not through any fault of the defendant but by her own manoeuvre. Counsel for the defendant submitted that the rail in the bevelled face of the corner was flush with the concrete and in perfect condition until the *Sensibar* got into difficulty while struggling to break around the corner in unfavourable weather, that she cracked and broke some of the concrete on the face right up to the top, that she was on the corner with such weight and pressure that she forced the short piece of rail out at one end and that it then acted as a blunt instrument that did the scoring and in so doing assisted in pulling it out further. There is plenty of evidence to warrant this explanation of how the damage happened.

There is no doubt that the weather conditions made Captain Larsen's manoeuvre a difficult one. His evidence was that they had a north-easterly wind, moderate to fresh, about 20 miles per hour, blowing directly against the starboard side of the ship. Later, he said that it was strong onto the dock. And Captain Koski, when asked whether there was anything unusual about the manoeuvre that morning, said that it took them quite a while longer than at other times. They had wind but while they had had wind on other occasions he would not say it was as strong as they had on this one.

The evidence is conclusive that the *Sensibar* had difficulty in breaking around the corner. Normally, the whole manoeuvre of shifting from one face to another took about half an hour, but this time it took about an hour. When the *Sensibar* started to break around the corner she did not come around very fast. Her bow had swung out into the bay only 10 or 20 degrees. She had gone a lot slower than ordinarily which Captain Larsen attributed to the wind holding her bow. He and Captain Koski determined that the use of the main engine was necessary. I have already described the alternate use of the main engine, first slow astern and then slow ahead. When it had been used previously in breaking around the corner ordinarily six alterations were sufficient but this morning more alterations were required. This was because of the wind.

And there is the further fact that the *Sensibar* lost one of her cables while she was breaking around the corner. I find this fact notwithstanding the denials by Captain Larsen and Captain Koski. I accept the evidence of Mr. Spauldin and Captain Bell on this point. I have already referred to Mr. Spauldin's statement that the mate called him over and told him that they had trouble getting around the corner and had damaged the boat and also the dock and had lost a cable. The mate in question must have been the third mate in view of Captain Koski's and Captain Larsen's denials that they had had any such conversation. Mr. Spauldin said that the mate had a couple of men trying to get the cable that was in the slip. One end of it, the eye, was on a bollard on the east side of the dock and the rest of it was in the water in the slip. Mr. Spauldin got a truck that was nearby to pull the cable out of the water, which it did after unhooking the eye from the bollard. Later, he saw it taken aboard the *Sensibar*. Captain Bell also said that as he was walking down to the north-east corner of the dock he saw a motor truck with the eye of a cable attached to the back pulling it out of the water, and was told by one of the ship's men that it came off the ship, came off the winch and fell into the water. The cable was in the east slip. He did not see what subsequently happened to it. I have no hesitation in believing Mr. Spauldin's and Captain Bell's statements, and it is not unreasonable to think that the loss of the cable contributed to the difficulty of the manoeuvre.

The evidence as to the state of the concrete on the bevelled face of the corner supports counsel's submission. I am unable to accept the view that the *Sensibar* was always held tight on the corner. The breaking of the concrete, which was of the strength of 3000 pounds to the square inch, and the cracking of the wall right up to the top could not have happened if the ship had been kept steadily on it. There must have been great pressure against it to cause the damage that was done. It is, I think, a reasonable inference that the *Sensibar* rocked against the corner and hit it with such force as to crack and break the concrete and force the rail out.

Moreover, the nature of the injury to the ship is against the theory that it was the exposure of the rail as the result of breaking of concrete away from it that caused the damage. That would not explain how the rail with the long tie

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rod by which it was secured came to be forced straight out of the strong concrete at one end. The scoring of the plates by a rail that was exposed as the plaintiff's witnesses said it was could not have done that. It was sharp and strong pressure by the ship against the wall that forced the rail out. That there was such pressure is strongly indicated by the damage done to the ship other than the scoring of her plates. In addition to such scoring the plates were buckled. And some 45 frames, that is to say, ribs, which are strength members, were also more or less buckled. This could not have happened except as the result of great pressure. I am satisfied that the *Sensibar* in the course of her difficulty in breaking around the corner because of the wind surged and rocked against it. It seems to me that only some such inference can explain both the manner in which she pulverized the concrete on the face of the corner and cracked the wall right up to the top and also the buckling of her plates and frames. In my judgment, the evidence points to the conclusion that the *Sensibar* was herself the author of the damage she sustained.

That being so, the defendant should not be held liable for it. This raises the question whether Captain Larsen's manoeuvre was a proper one under the weather conditions that existed. This was not the only manoeuvre that was open to him. It did not matter to the defendant whether the *Sensibar* came to the north face first or to the east face, or whether she landed port side to or starboard side to, or how she was moved from one face to the other, or whether she backed into the slip or came in bow first. These were matters of navigation for which Captain Larsen was solely responsible. The choice of manoeuvres was exclusively his. There is no doubt that he decided upon the one he made because it would give him the advantage of having his ship headed out after he had finished unloading. He had frequently made a similar manoeuvre previously and there is general agreement that it would have been in accordance with good marine practice under suitable weather conditions. But the north-east wind made it difficult and it certainly proved to be dangerous.

There was a sharp difference of expert opinion as to whether under the circumstances the manoeuvre was a

proper one in view of the fact that several other less difficult and safer courses were open. Captain H. A. Patterson said that it was accepted practice to break around the corner as Captain Larsen had done and thought that he had done an exceptionally good job. He was against the suggestion that he should have brought the *Sensibar* into the slip bow first. She had a 56-foot beam and the slip was only 110 feet wide. With the north-east wind at twenty miles per hour and in such a narrow channel a high boat like the *Sensibar* would, in his opinion, "set" over against the shoal on the other side of the slip and down on the corner and do more damage to the wall than would be done otherwise. It would be a chance he would not take. In his opinion, it was safer to go in stern first as Captain Larsen did than it would have been to go in bow first. The value of Captain Patterson's opinion is greatly reduced by the fact that the slip was not 110 feet wide, as Captain Larsen estimated, but 150 feet. This was the evidence of Mr. Jeffery and Captain Bell, confirmed in effect by Captain Koski. He said that when the *Sensibar* had been shifted east of the north-east corner preparatory to breaking around it the corner was abreast or just forward of the after cabin. According to the ship's measurements this was 140 feet from her stern. It was then, as Captain Koski said, 15 feet west of the black stake that marked the eastern boundary of the dredged channel that formed the slip. This would bring the width of the slip to 155 feet. Nor was I favourably impressed with Captain Patterson's statement that Captain Larsen had done an exceptionally good job. What would the extent of the damage have been if it had been badly done?

I prefer the expert opinion of Captain W. E. Pringle. In his view, the *Sensibar* would not have been subjected to any danger or had any difficulty in going into the slip bow first. It would have been better if she had done so and then backed out and broken around the corner and shifted back along the north face with the starboard side next to it. By so doing she could have taken full advantage of the 150 foot width of the slip for the outward swing of the bow without risk of damage to it, whereas such full advantage was not open to Captain Larsen in his manoeuvre by reason of the necessity of keeping a margin of safety between the ship's

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stern and the submerged bank that formed the eastern limit of the slip to prevent the propeller from hitting it. Moreover, the north-east wind would have assisted such a manoeuvre for it would have been against the longer part of the ship on the port side and helped to bring her stern close to the north face so that she could be shifted along it to the desired position with the mooring lines and winches. There would thus have been much less pressure against the north-east corner. There can, in my judgment, be no doubt that the course suggested by Captain Pringle would have been safer than that which Captain Larsen took. There was a second course that was open to him. If he had decided to go to the north face first it would have been better if he had landed there with the starboard side next to the face and then broken around the corner bow first for this would have enabled him to put the bow right up close to the bank, leaving less of the ship exposed to the wind. Moreover, it would be possible to dispose the mooring lines so as to have better control of both ends of the ship and swing her in the necessary arc more easily than Captain Larsen had been able to do. This would have put less pressure on the pivotal point at the corner. Finally, it was Captain Pringle's opinion that in view of the wind it would have been better if Captain Larsen after unloading part of his cargo from the north face had gone out into the bay and come into the slip bow first. He should have done so even after he began breaking around the corner when he discovered that he could not make the bow swing out any further than 10 or 20 degrees. But instead of doing so he chose to struggle around the corner with the use of the main engine. If he had taken any of the courses suggested by Captain Pringle he would have saved his ship and the dock from damage. It seems plain to me that the plaintiff's loss resulted from his failure to do so.

For the reasons given the plaintiff's action is dismissed with costs.

*Judgment accordingly.*