
BRITISH COLUMBIA ADMIRALTY DISTRICT

1949

April 19, 20, 21 & 22.

June 7

BETWEEN:

KALAMAZOO PAPER COMPANY and ACER, McLERNON LIMITED, } PLAINTIFFS,

AND

CANADIAN PACIFIC RAILWAY COMPANY and FRANK WATERHOUSE AND COMPANY OF CANADA LIMITED,..... } DEFENDANTS.

AND BETWEEN:

BRITISH COLUMBIA PULP & PAPER COMPANY LIMITED,.... } PLAINTIFF,

AND

CANADIAN PACIFIC RAILWAY COMPANY and FRANK WATERHOUSE AND COMPANY OF CANADA LIMITED,..... } DEFENDANTS.

AND BETWEEN:

QUATSINO NAVIGATION COMPANY LIMITED,..... } PLAINTIFF,

AND

CANADIAN PACIFIC RAILWAY COMPANY and FRANK WATERHOUSE AND COMPANY OF CANADA LIMITED,..... } DEFENDANTS.

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Shipping—Damage to cargo caused by negligence of vessel's officers—Vessel owner relieved from liability—The Water Carriage of Goods Act, 1936, 1 Ed. VIII, C. 49—"Management" of the ship.

In an action by plaintiffs, the cargo owners, for damages alleged to have resulted from injury by sea water done to wood pulp sulphite carried by a steamship owned by defendant Canadian Pacific Railway Company and at the time operated under the terms of an agreement with the plaintiff Acer, McLernon Limited, the Court found that the damage to the cargo in question could have been prevented by reasonable investigation and appropriate action on the part of the vessel's officers and crew. The claim is for damage resulting after the beaching of the vessel due to proper measures not having been taken to safeguard the cargo then undamaged.

Held: That though the failure to pump the water out of the ship efficiently with all the facilities at hand damaged further cargo it was essentially a failure in a matter that vitally affected the management of the ship.

2. That the shipowner is relieved from responsibility by virtue of Article IV, Sec. 2(*a*) of the Schedule to The Water Carriage of Goods Act, 1936, 1 Ed. VIII, C. 49.

ACTION by the cargo-owners for damages resulting from injuries to their cargo while being carried in a steamship owned by the defendant Canadian Pacific Railway Company.

The action was tried before the Honourable Mr. Justice Sidney Smith, District Judge in Admiralty for the British Columbia Admiralty District, at Vancouver.

Alfred Bull, K.C. and *W. J. Wallace* for the plantiffs.

Hon. J. W. deB. Farris, K.C. and *J. A. Wright* for the defendants.

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

SIDNEY SMITH, D.J.A. now (June 7, 1949) delivered the following judgment:

In this consolidated action the plaintiff cargo-owners claim some $100,000 for injury by sea water done to certain of their bales of wood pulp sulphite while being carried from Port Alice, B.C. to Vancouver, B.C. in the steamship *Nootka,* owned by the defendant Canadian Pacific Railway Company and at the time being operated under the terms of an agreement with the second defendant. The defendants

resist the claim on the grounds, firstly, that the damage in question was due to a stranding (for which no blame is attributed to them) and the subsequent unpreventable invasion of water into the ship's forehold, and that all proper measures had been taken to protect the cargo; and, alternatively, that if those on board had in fact been negligent in their duty, such negligence occurred in the "Management" of the vessel and that the defendants were accordingly exempt from liability under Article IV, Sec. 2(*a*) of the Schedule to The Water Carriage of Goods Act, 1936, I Edward VIII C. 49, the terms of which had been incorporated in the relevant Bills of Lading.

The ss. *Nootka,* 251 feet long, 43 feet beam, 2068 tons gross tonnage, sailed from Port Alice for Vancouver at 0:40 a.m. on 29 July, 1947, and about 2 a.m. of the same day, in a dense fog, ran aground on Cross Island, in Quatsino Sound. She remained with her fore part fast aground for approximately one hour and forty minutes, then slipped off on the falling tide, and, in more or less thick weather, made her way to a nearby small bay, also named Quatsino, and tied up to the wharf there at 4:43 a.m. During this period her bilge pump (which could be used for pumping both hold bilges and ballast tanks) was kept in operation and there was evidence that she was making water forward. After lying at the wharf an hour or so the vessel was moved ahead more than once, so that the fore part might take the ground on a mud bank which happened to be conveniently situated there. Her stern remained fast to the wharf.

The *Nootka* contains four holds, two in the fore part and two in the after part. The two forward holds, known as Nos. 1 and 2, form however one common hold, with two hatches leading into it. I refer to this combination hold as the forehold. It consists of lower hold and 'tween-decks. Under the hold are two ballast tanks, known as Nos. 1 and 2 tanks, and at the material times No. 1 tank was half full of fuel oil and No. 2 was quite full of fuel oil, all for the ship's consumption. There had been built into the fore part of the hold, vertically, two fish oil tanks. These were empty. The space forward of the hold was occupied by the fore peak which was also empty except, presumably, for such ship's gear as is usually towed in such places.

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It will be convenient to mention here that plaintiffs' counsel in opening stated that his clients had no complaints of anything that occurred prior to the beaching at Quatsino, that their case was that proper measures had not thereafter been taken to safeguard the cargo then undamaged. He conceded the shipowner's right to limitation of liability under Sec. 649 of the Canada Shipping Act.

The ship was fully laden in all holds with wood pulp sulphite, and during the day of the 29th some of this was removed from the 'tween-decks of the forehold into two scows and the bilge pump was kept going. At eight o'clock that night Captain F. C. Clarke arrived by plane. He represented the cargo underwriters, and his purpose was to give whatever advice and assistance he could in the safeguarding of the cargo. As the case on the facts must stand or fall on the evidence of Captain Clarke, it is not unimportant to notice that he has been a surveyor with the Board of Marine Underwriters of San Francisco for the last 25 years, and of that period has been 18 years senior surveyor at Vancouver, B.C., and is so now. He is a master-mariner and had a useful career at sea for 17 years as officer and master in almost all types of vessel. In addition he had two years' experience in the repair and construction of wooden ships, and another two years in the operation and repair of combustion engines. This capable officer gave his testimony (which I fully accept) in a manner so frank and fair as to be altogether commendable. His views were supported in important technical aspects by other surveyors, notably by Mr. W. D. MacLaren, an expert of acknowledged experience and ability.

On boarding the vessel Captain Clarke noted that she was down by the head considerably, and that the discharge over the side from her bilge pump was not a very heavy one for a vessel in her apparent condition. He was informed by the Master that the forehold was flooded, and that no soundings had been recorded. He then went down into the engine-room and saw the Chief Engineer who when asked whether his pumps were going full speed, replied "Yes, I am taking all I can out of her." Capt. Clarke then examined the bulkhead between the engine-room (or properly, the stokehold) and the forehold, thinking it might

require shoring up. He found it dry but cold, for a distance up of over 13 feet which would be in excess of the 'tween-deck deck level. There was no appreciable bulging. After some further conversation with the chief engineer, in the course of which that officer remarked that he was not able to get the full benefit of the bilge suction pipe on the port side but that he was "doing very well in taking the capacity of his pumps," Captain Clarke returned on deck and examined the condition of the forehold. As to this he found that he had been misinformed. He showed, by the simple expedient of measuring with a lead-line the level of the water inside the hold and outside the ship, that it was a mistaken view that the hold was pierced, giving the sea free access. He found in fact the water in the hold over five feet lower than the surface of the sea. He then again entered upon the topic of pumps and as to what others were available. He was informed that there was a gasoline-driven, portable, air-raid precaution pump of 1½ H.P. on board, and thereupon gave instructions to have the same put into immediate operation in the hold. This was done. This pump had not hitherto been used that day except to pump water from a leaking scow; it was operating within one or two minutes of its installation and "throwing a fairly good flow." At 10 p.m. or thereabouts the water was found to be receding in the hold, and the situation was then and thereafter, under control: This may have been partly the result of some adjustment made by the chief engineer about that time to the bilge pump, the nature and effect of which Capt. Clarke did not know.

Next morning at breakfast Captain Clarke suggested "cracking" a certain water-tight door situated between the forehold and engine-room. This door operated vertically and was opened and shut from above by means of a screwed shaft. It thus in effect corresponded to the old type of sluice valves constructed at the bottom of water-tight bulk-heads which, when opened, allowed the water to run from the bilge of one compartment to that of the next, or into the engine-room. The idea put forward was that this door should be raised a fraction of an inch from the floor level, and so afford a free run of water from the hold into the engine-room and thus into the bilges, where it would be available for immediate pumping overboard. This was

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done with caution, under Capt. Clarke's supervision. A good stream of water flowed into the engine-room bilges and was apparently got rid of by the bilge pump without difficulty. This promptly further lowered the water in the hold; during the afternoon the vessel, being again afloat, was pulled back alongside the wharf. Later that day a salvage vessel arrived; a diver was sent down and reported the stem twisted, buckled plates, some loose and missing rivets, some spaces between plate facings, but no fractures. He performed some temporary wedging and plugging of these spaces, and next morning the ship proceeded back to Port Alice, and some days later to Vancouver where the damaged cargo was in due course salvaged and sold.

There was a good deal of vagueness about the pumping equipment of the vessel. Capt. Clarke found no one on board who could give him any information about the capacity of the bilge-pump. From the documents filed it would seem that the crew members in the deck department consisted of the Master, three officers and thirteen seamen. Only the Master and chief officer testified upon the trial. The engine-room members consisted of three engineers, three oilers and four firemen. None of these appeared to give me the benefit of his evidence on the pumping equipment of the ship or, more particularly, on the pumping measures taken during that critical period of 15 hours between 4:43 a.m. when the ship reached the wharf at Quatsino and the advent of Capt. Clarke at 8 o'clock that same evening. But I think it clear enough that the bilge pump was the only one employed; and at that, was running short of capacity, whether due to choked strum boxes in the hold bilges, or to some other cause, the evidence does not disclose.

In addition to the bilge pump and the A.R.P. pump, the vessel had another, called a fish oil pump, used for pumping oil out of the two oil tanks in the forehold. The compartments which, on account of damage, contained sea-water were the forehold, the No. 1 ballast tank and the fore-peak. The evidence indicates that this pump might have been serviceably employed in reducing the water in the fore-peak. No such attempt at any time was made.

Finally, in the pumping category, there was the circulating pump, to which was fitted the usual bilge injection. The circulating pump is used in conjunction with the condenser, whose function is to condense the exhaust steam from the engine back into water again. The steam is caused to pass among a multitude of horizontal metal tubes through the interior of which cold water drawn from outside the ship is pumped constantly. The pump which passes the sea water from the sea through the condenser tubes and back overboard is known as the circulating pump, and has a large pumping capacity. The water enters through an aperture in the ship's side known as the main injection. But inside the ship, in the engine-room bilges, there is another injection, known as the bilge injection. In an emergency, such as the flooding of the engine-room, the main injection may be closed and the bilge injection opened, which will result in the water inside the engine-room being pumped through the tubes of the condenser and thence discharged overboard. This may be an immediate and effective way of ridding an engine-room of water. But it has many disadvantages which were dwelt upon by defendants' witnesses and which concern the circumstances prevailing in the particular engine-room (and indeed throughout the ship) at the given time: to mention one such risk only: the clogging of the condenser tubes to such an extent as might put the whole condenser, and with it all steam-driven machinery out of action. Capt. Clarke and at least one other surveyor thought it could and should have been used in the present case; that the water from the forehold, released into the engine-room through the partially opened water-tight door in the bulkhead, could have been speedily disposed of by its function. While I accept this view, I do so without enthusiasm. I would not like to say anything that might weaken the conception of gravity of danger which alone is taken to justify the use of the circulating pump on the bilge injection. That gravity of danger had not been reached here. When Capt. Clarke arrived the damage had been done and he speedily showed that the available pumps, apart altogether from the circulating pump, could control the inflow of such water as invaded the vessel, and reduce the quantity in the hold. Moreover

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when the water-tight door had at last been slightly raised the bilge pump sufficed to handle the water that thereby escaped from hold to engine-room. There would seem then to be no occasion for accepting the added risk attendant upon the operation of the circulating pump on the bilge injection. When Capt. Clarke suggested this course to the chief engineer, he declined. I think he was right, as matters then stood, in so declining. But I think he was wrong in not earlier making use of the water-tight door in the manner and to the extent later exemplified by Capt. Clarke.

Capt. Clarke examined the vessel's hull on 12th August when in dry-dock at Vancouver, for the express purpose of ascertaining the area of leakage. He found that the sum of all the apertures in the vessel's plating did not exceed four square inches. Giving full consideration to the evidence adduced in support of the likelihood of a larger total aperture, I accept this finding. On the basis of his observations and conclusion Captain Clarke made some interesting calculations which showed that when the ship reached Quatsino, and was there beached in the mud some two hours after her release from Cross Island, she then had only 79 tons of sea water in her fore part (i.e. hold, ballast tank, fore-peak). The water then reached only a short distance above the tank-tops. His calculations demonstrated that if the water had been held there and then, and not allowed to gain in the hold as it did, only 32 per cent of the damaged cargo would have been affected. In his figures he made allowances for human re-action time which I thought generous. I have no reason to doubt his conclusions. Nor have I reason to doubt that if the competent and resolute measures taken by Capt. Clarke to clarify the ship's position and clear the forehold of water had been taken by her own officers when first beached, the result would have been the same; the rise of water in the hold checked and reduced by greater pumping achievement and 68 per cent of the damaged cargo saved. I adopt the language of Mr. MacLaren when he said that ". . . here was a case of a vessel grounding. The first job is to look after the ship . . . After she was put on the beach, at Quatsino I felt that the pumping should have been the dominant consideration." That is my view. Therein they failed.

I have a good deal of sympathy with the Master. I certainly did not form any over-all unfavourable opinion of him as a ship-master. He had just been through a trying ordeal and had successfully brought his ship to safety. In his opening, plaintiffs' counsel had no criticism of him in this regard. Nor have I: I think he then did well. He must have been under severe nervous reaction at Quatsino. He did not appear to have received any outside assistance or guidance as to cargo preservation prior to the arrival of Capt. Clarke; and none, save his, subsequent thereto. But then it was all too late. Moreover I think he may have put too much confidence in his chief engineer in the matter of the pumping arrangements. Be that as it may, the result was that here the damage to the cargo in question could have been prevented by reasonable investigation and appropriate action; and for that damage, to the extent indicated, the shipowner, unless relieved under the terms of The Water Carriage of Goods Act, must be held responsible. This must now be considered. I have not found it easy.

The relevant provisions of the Schedule to this Act read as follows:

Article III Sec. 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.

Article IV Sec. 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.

It is evident (and has been often remarked) that viewed in one aspect any default of those on board which results in damage to cargo might well be regarded as a default in the shipowner's obligation to "carry, keep, care for" the goods; while viewed in another aspect the same default might equally well be looked upon as a "default . . . in the management of the ship" thus relieving the shipowner from the breach of his obligation. It follows that in every case most careful consideration must be given to what should be the determining factors in any decision on

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whether Art. III 2 or Art. IV 2 (*a*) is the governing provision. Everything depends on the particular circumstances, as put by Romer L.J. in *Rowson* v. *Atlantic Transport Company Ltd.* (1).

> I think it is difficult, if not practically impossible, to attempt successfully to lay down any general principles as to how any particular case should be dealt with. I think one must look at the facts of each case as it arises, and on those facts determine upon which side of the line the case falls.

It seems to me the observation in Scrutton on Charter Parties, 14 Ed., p. 288, is very right, namely that the authorities are not in a very satisfactory condition, but that in view of the vagueness of the words to be construed this is hardly surprising. Apart from the decisions my own view would be that the statute was not designed to excuse a ship-owner for direct breach of an obligation towards the cargo, but that it did excuse him if he could show that the breach was solely and necessarily a breach in the management of the ship as a whole and could not be looked upon in any other light quite regardless of whether cargo was or was not on board. The authorities do not, I think, go quite that far.

The leading case on the meaning to be attached to the words "in the management of the ship" is *Gosse, Millerd Ltd.* v. *Canadian Government Merchant Marine* (2). In that case the ship, en route from ports in England to Vancouver, B.C., collided at Liverpool with a pier and damaged her stern; this necessitated drydocking there for repairs to her tail shaft. No. 5 hatch was opened to permit passage of workmen and materials to the damaged shaft. During a rainstorm no tarpaulins were spread over this hatch, with the result that rain water entered the hold and damaged a shipment of tin plates. The shipowner claimed immunity from liability for this cargo damage under Rule 2 (*a*) of Article IV of the Schedule, but this plea did not prevail. Mr. Justice Wright (afterwards Lord Wright) decided in favour of the plaintiff cargo-owners. His decision was reversed by a majority of the Court of Appeal, Greer L.J. dissenting, but was restored by the House of Lords.

(1) (1903) 2 K.B. 666 at 676. (2) (1929) A.C. 223.

The dissenting judgment of Greer L.J. (1) was approved and the following passage from it on page 743 is of value in the present case:

Further, I think it is incumbent on the Court not to attribute to Art. IV, r.2 (*a*). a meaning that will largely nullify the effect of Art. III, r.2, unless they are compelled to do so by clear words. The words "act, neglect or default in the management or navigation of the ship," if they are interpreted in their widest sense, would cover any act done on board the ship which relates to the care of the cargo, and in practice such an interpretation, if it did not completely nullify the provisions of Art. III, r.2, would certainly take the heart out of those provisions, and in practice reduce to very small dimensions the obligation to "carefully handle, carry, keep, and care for the cargo," which is imposed on shipowners by the last-mentioned rule. In my judgment, a reasonable construction of the Rules requires that a narrower interpretation should be put on the excepting provisions of Art. IV, r.2 (*a*). If the use of any part of the ship's appliances that is negligent only because it is likely to cause damage to the cargo is within the protection of Art. IV, r.2 (*a*), there is hardly anything that can happen to the cargo through the negligence of the owner's servants that the owner would not in actual practice be released from. To hold that this is the effect of Art. IV, r.2 (*a*), would reduce the primary obligation to "carefully carry and care for the cargo during the voyage" to a negligible quantity. In my judgment, the reasonable interpretation to put on the Articles is that there is a paramount duty imposed to safely carry and take care of the cargo, and that the performance of this duty is only excused if the damage to the cargo is the indirect result of an act, or neglect, which can be described as either (1) negligence in caring for the safety of the ship; (2) failure to take care to prevent damage to the ship, or some part of the ship; or (3) failure in the management of some operation connected with the movement or stability of the ship, or otherwise for ship's purposes.

In the House of Lords the Lord Chancellor, Lord Hailsham, used much the same language (2):

If the principle is clearly borne in mind of distinguishing between want of care of cargo and want of care of vessel indirectly affecting the cargo, as Sir Francis Jeune puts it, there ought not to be very great difficulty in arriving at a proper conclusion.

The plaintiffs' case is that at Quatsino Bay the ship was "safe", that the failure to keep down the water in the forehold reacted upon the cargo only, and had no effect upon anything that concerned the ship as a whole; in other words that the rising water as it inched itself to higher levels damaged ever more cargo, but with the ship "safe" in a safe berth, albeit aground forward and afloat aft, the same rising water, and the failure to stop it and reduce it, could not be said to affect the safety of the ship or any operation

(1) (1928) 1 K.B. 717. (2) (1929) A.C. at 233.

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which could properly be regarded as being referable to the management of the ship, *qua ship*, as distinguished from the care of the cargo. On the authorities this cannot be regarded as a sound argument.

It is true that the Master agreed that the vessel, when beached, was "safe." It was quite the natural response to make to the question asked. But clearly the Captain did not regard the term as one that should be taken in any absolute sense. He meant no more than that she was then safe from sinking, the prevention of which, till then, had been uppermost in his thoughts and the objective of all his actions. But from the time of arrival at Quatsino Bay there was another anxiety pressing upon him, namely the safety of the bulkhead, and the question whether it would withstand the increasing pressure of the rising water and the swelling bales of pulp. This, too, was Captain Clarke's first concern when he stepped on board. He at once went below and examined the bulkhead, thinking it might require shoring up. But he found little or no bulging, and concluded shoring was not then necessary. I quite agree with the Master of the ship when he said that the giving way of the bulkhead "would have been a major (disaster)."

How different are the circumstances here from those in the *Gosse, Millerd* case (*supra*): There the rain, apart from damaging the cargo, made not one whit of difference to any conceivable operation of the ship, as a ship. This is made very clear by Viscount Sumner, a passage of whose speech at p. 240 reads as follows:

> What did the damage was misuse of the tarpaulins. Now the tarpaulins were used to protect the cargo. They were put over the hatch, as they always are, to keep water out of cargo holds. They should have been so arranged, when the hatch boards were taken off, as to prevent water from getting to the cargo. It was not a question of letting light into the 'tween decks. They were lit by electricity. There is no evidence that an amount of water entered that would have done any harm to an empty hold or to the ship as a ship. Water sufficient when soaked into the wood of the boxes to rust the tinplates in the course of a voyage through the tropics, might well have been harmless if it merely ran into the bilges. There is neither fact nor finding to the contrary. I think it quite plain that the particular use of the tarpaulin which was neglected, was a precaution solely in the interest of the cargo. While the ship's work was going on these special precautions were required as cargo operations. They were no part of the operations of shifting the liner of the tail shaft or of scraping the 'tween decks.

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In the present case the facts are, in the view I feel bound to take, the exact opposite. What I think tends to obscure the real issue here is the circumstance that the rising water had such an immediate damaging effect on the cargo, and only what might be relatively regarded as a remote effect on any ship operation. But that cannot matter. Had soundings been taken on arrival at Quatsino Bay (or before) and the ship's actual condition ascertained and appreciated, and the water then in the ship pumped out or reduced in volume (as I have found it could and should have been with the vessel's facilities then available) the ship would again have come to life; she would once more have become a going concern; might even perhaps have found it possible to get under way and move under her own power to Port Alice, 12 miles distant, for survey and temporary repairs. The failure to pump efficiently with all facilities at hand most certainly damaged further cargo, but it was essentially a failure in a matter that vitally affected the management of the ship, viewed in the light of the authorities. It was a "want of care of vessel indirectly affecting the cargo"; or so it seems to me.

I have adopted *supra* a passage from *Rowson* v. *Atlantic Transport Company Ltd.*, but in my view, with the greatest respect, the decision in that case must now be regarded as unsound. It is inconsistent with the reasoning of Viscount Sumner in the *Gosse, Millerd* case. See also the comments of Wright J. (afterwards Lord Wright) in *Foreman and Ellams Ltd.* v. *Federal Steam Navigation Co. Ltd.* (1). Moreover (and with the like respect) it seems to me that Holmes J. went much too far in favour of the cargo owner in *The Germanic* (2) (cited in *Gosse, Millerd supra*).

The action will be dismissed. In the exercise of my discretion I think it right to make no order as to costs.

Judgment accordingly.

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(1) (1928) 2 K.B. 424 at 443. (2) (1904) 196 U.S. 589.