Montreal 1967 Apr. 11 Ottawa June 23

BETWEEN:

N. M. PATERSON & SONS LIMITED (*Defendant*) ..... APPELLANT;

AND

ROBIN HOOD FLOUR MILLS, LIMITED (*Plaintiff*) ..... RESPONDENT.

Shipping—Damage to cargo—Second engineer turning on wrong valve—Whether shipowner liable—Water Carriage of Goods Act, R.S.C. 1952 c. 291, arts. III, r. 1, IV, rr. 1, 2(a).

Defendant carried a cargo of wheat for plaintiff from Kingston to Montreal in its ship. Following discharge of part of the cargo in Montreal the ship's second engineer, who was in charge of the engine-room at the time, was instructed to put 20 to 25 inches of water in the ballast tanks of No. 2 hold to trim the vessel to allow the balance of the cargo to be discharged. The second engineer turned on the wrong valve with the result that the water entered No. 2 cargo hold and damaged wheat stored there. Defendant denied liability under Art. IV, r. 2(a) of the Schedule to the *Water Carriage of Goods Act*, R.S.C. 1952, c. 291, contending that the loss was due to error in management of the ship. The second engineer, who held a certificate of qualification issued by the Government of Canada, was engaged at the commencement of the voyage without inquiry as to his previous experience or his familiarity with the type of machinery and piping in defendant's ship, which were in some respects peculiar to that ship; he was not given any instruction as to the ship's peculiar arrangement for flooding the hold, and there was no plan of the engine-room piping system on board.

Held, affirming the judgment of Smith D.J.A. ([1967] 1 Ex. C.R. 431), defendant was liable for the damaged wheat.

Per Thurlow J.: By reason of the second engineer's lack of knowledge and the absence of a plan of the engine-room piping the ship was not properly manned and equipped and was therefore unseaworthy from the commencement of the voyage, and this was the cause of the loss. The evidence supported this conclusion and in the absence of opposing evidence no question arose as to onus of proof of unseaworthiness. In engaging the second engineer solely on the basis of his certificate and without further inquiry as to his experience and competence and instructing him as to those peculiar features of the ship so as to permit him to discharge his duties and to avoid damage to the ship and cargo defendant did not exercise due diligence to secure that the ship was properly manned and equipped as required by Art. IV, r. 1 to be relieved of liability. *Maxine Footwear Co. v. Can. Gov't. Merchant Marine Ltd.* [1959] A.C. 589, referred to.

Per Noël J.: The evidence established that the ship was unseaworthy or was not properly manned and it was therefore incumbent that defendant prove it had exercised due diligence to make the ship seaworthy. (*Maxine Footwear Co. v. Can. Gov't. Merchant Marine Ltd.* [1959] A.C. 589, applied.) The engagement of the second engineer on the sole

*PRESENT: Thurlow, Noël and Gibson JJ.

1967

N. M. PATERSON & SONS LTD. v. ROBIN HOOD FLOUR MILLS, LTD.

strength of his certificate and the failure to provide a plan of the piping did not necessarily constitute such a want of due diligence but failure to instruct the second engineer when he was engaged of the ship's peculiar arrangement for flooding the hold did constitute such a lack of due diligence. Further the damage occurred in trimming the ship to permit the discharge of cargo and was therefore due to negligence in the care and custody of cargo, for which defendant was not entitled to immunity. *Instituto Cubano de Estabilizacion Del Azucar v. Star Line Shipping Co.* [1958] A.M.C. 166; *The Ship "Phryné"* [1965] D.M.F. 408 (Cour de Cassation), applied.

Per Gibson J.: Because the ship was old and her valve arrangements unusual, reliance upon the second engineer's certificate without inquiring as to his qualifications and instructing him about the valve arrangements before the voyage began constituted failure to exercise due diligence, thereby rendering the ship unseaworthy and defendant consequently liable for the loss; but in view of the finding of unseaworthiness the fact that the failure of due diligence concurred with an act of negligent navigation or mismanagement of the ship, *viz* opening a wrong valve, did not result in relieving the shipowner of responsibility for the damage.

APPEAL from judgment of Smith, D.J.A.

Trevor H. Bishop for appellant.

William Tetley for respondent.

THURLOW J.:—This is an appeal from a judgment of Mr. Justice A. I. Smith, District Judge in Admiralty of the Montreal Admiralty District, holding the appellant liable for damage caused by the wetting of a portion of a cargo of wheat belonging to the respondent and carried in the appellant's ship *Farrandoc* on a voyage from Kingston, Ontario, to Montreal, Quebec, pursuant to a memorandum bill of lading incorporating and subject to the provisions of the *Water Carriage of Goods Act*[1].

The wheat was loaded on the *Farrandoc* at Kingston on November 26, 1962, and a portion of it, stowed in Number 2 hold, was found to be wetted when it was being unloaded in Montreal on the morning of November 28, 1962. The learned trial judge found that the wetting was caused by the second engineer, a man named Humble, having opened a valve which admitted sea water into a coffer dam situate between the engine room and Number 2 cargo hold, whence the water, by an open drain, gained access to and flooded Number 2 hold. Shortly before this Humble had

[1] R.S.C. 1952, c. 291.

been ordered to pump 20-25 inches of water into the ballast tanks below Number 2 hold, the purpose of this being, according to the testimony of the first officer, who initiated the order, to weigh down the ship as a measure of security.

On these facts the defence put forward was that the loss was due to an error of management of the ship for the consequences of which the appellant was absolved by Article IV, Rule 2(a) of the Schedule to the Act. The learned trial judge, however, held that this defence was not available to the shipowner until he had established either that the vessel was seaworthy or that he had exercised due diligence to make her seaworthy for the voyage and to secure that she was properly manned, equipped and supplied and he went on to find as follows:

> In the present case the Court is of the opinion that there was failure on the part of the Defendant to exercise due diligence to make the *Farrandoc* seaworthy for the said voyage in that it did not take the care it should have taken to assure itself of the experience, competence and reliability of the Second Engineer before engaging him and did not equip the vessel with, and make available to ship's personnel, a plan of the engine-room piping system.
>
> The Court finds moreover, that the unseaworthiness of the *Farrandoc* in the respects above mentioned was a cause of the damage complained of.
>
> The Defendant, having failed to establish that it exercised due diligence to make the ship seaworthy for the voyage and to secure that the ship was properly manned, equipped and supplied, must be held responsible for the consequent loss and damage sustained by the Plaintiff.

On the appeal to this Court counsel for the appellant made four main submissions which may be summarized as follows:

1. That the learned trial judge misdirected himself as to the onus of proof of unseaworthiness;
2. that the *Farrandoc* was not in fact unseaworthy as the learned trial judge impliedly found;
3. that even if the *Farrandoc* was unseaworthy in the respects mentioned by the learned trial judge such unseaworthiness did not cause the loss here in question; and
4. that even if such unseaworthiness did cause the loss the exercise of due diligence by the appellant to make the *Farrandoc* seaworthy and to secure that she was properly manned and equipped had been proven.

1967

N. M. PATERSON & SONS LTD. v. ROBIN HOOD FLOUR MILLS, LTD.

Thurlow J.

The *Farrandoc* had arrived in Montreal on November 27 and had discharged part of the cargo between 9:00 and 11:50 that evening. Discharging was resumed at 7:00 the following morning and the order to pump water into the Number 2 bottom tanks was given at 7:10. This order was conveyed to Humble by the wheelsman whose name was Harvey. Humble was on duty alone in the engine room at the time. Some three minutes after conveying the order to Humble, Harvey sounded the Number 2 bottom tanks to see if water had entered them but found them still dry. He reported this to Humble. Five minutes later Harvey sounded again and again found the tanks to be dry. He reported this as well to Humble. The record does not show what, if anything, Humble did on receiving either report. The fact that water had gotten into Number 2 cargo hold was discovered by a stevedore and was reported at 7:45 to the first officer who thereupon gave an order to stop the pump. This however was some thirty-five minutes after the order was first given to pump water into the Number 2 bottom tanks and by this time some 4,266 bushels of the wheat in the Number 2 hold had been wetted. There is no evidence that any water ever did find its way into the Number 2 bottom tanks.

The *Farrandoc* was said to have been built in 1925. She is used in carrying bulk cargo, including grain. She has a gross tonnage of 1,865 tons, is some 257 feet long and some 42 feet wide and is diesel electric powered. The drain from her Number 2 cargo hold into the coffer dam had not been plugged before the loading of the cargo and it was not fitted with a non-return valve to prevent water in the coffer dam from gaining access to the hold. Nor was there either any blank flange in the pipe leading to the coffer dam or any locking device on the coffer dam valve itself. Any one or more of such devices might have served either to prevent the erroneous opening of the valve or to prevent such an error resulting in water being admitted to the cargo hold.

The valve in question had a brass plate on its spindle marked "*coffer dam*" and was situated near an auxiliary diesel engine on the starboard side of the engine room. Some twelve feet from the valve was a manifold of four valves, two leading to each of the fore and aft ballast tanks known as Number 1 and Number 2 on the starboard side

1967

N. M. PATERSON & SONS LTD. v. ROBIN HOOD FLOUR MILLS, LTD.

Thurlow J.

of the ship. Each of these valves as well was appropriately marked with and identified by a brass plate on the spindle and above the wheel by which the valve was operated. A similar manifold of four valves for the ballast tanks on the port side of the ship was located on the port side of the engine room. There was no plan of the engine room piping either in the engine room or elsewhere on the ship.

Humble had joined the ship for the first time and had been taken on as second engineer at Kingston on November 26, 1962. He held at the time what was referred to as "a Third Class Combined Engineer's Certificate No. C-421" issued by the Government of Canada and had previously served in turbo electric vessels but had never previously served in a ship of the *Farrandoc* type. He had not been instructed with respect to the valves or piping arrangements and in particular he had not been told that on opening this coffer dam valve water could be pumped into the coffer dam and that from there it could gain access to Number 2 hold by an open drain. He was not even aware that there was a coffer dam in the ship. Nor was there any plan available to him from which he might have instructed himself even on so short a voyage. Some one he believed to have been the third engineer had showed him around the engine room when he joined the ship but no one had told him of the purpose which the coffer dam valve served. There is evidence that the chief engineer had, however, told him "a few safety rules" and of some things he was not to do and that if there was anything he was not sure of and wanted to know he should come to the chief engineer who would tell him.

Though Humble was called as a witness the record contains no explanation of how he came to open the coffer dam valve or of what, if anything, he did afterwards by way of precaution to ascertain what the effect of opening it had been.

For my part I have found it difficult to believe that in the circumstances described Humble could have been responsible for opening the coffer dam valve. For that reason, coupled with the glib manner in which the fact that he did so was indicated by the evidence, I have had and still have doubt both that the second engineer did open the valve and thus cause the damage or that the cause of the damage has been established. In that event, as

1967

N. M. PATERSON & SONS LTD. v. ROBIN HOOD FLOUR MILLS, LTD.

Thurlow J.

I see it, the appellant would be liable on the basis of the breach of its obligation under Article III, Rule 2, which is to be inferred from the fact of the wheat having become wetted and its failure to prove that the cause of the loss was one for which it was not responsible under the rules[2]. The evidence though sketchy is, however, sufficient in my opinion to support the learned trial judge's finding and the finding has not been challenged. It cannot therefore be set aside and the case thus falls to be decided on the basis that Humble did in fact open the coffer dam valve and thus cause the loss.

On the other hand accepting this as established makes it necessary to consider what inference is to be drawn as to how it occurred. There is no evidence that it was due to inadvertence and nothing in the evidence suggests that it was an act of inadvertence. On the contrary it seems probable that the act was deliberate but due to Humble's inexperience in such a ship and to his lack of knowledge both of the engine room piping and of the fact, which was a peculiarity of the ship, that the opening of that valve could result in water being admitted to Number 2 hold. To my mind therefore the evidence leads to the inference that Humble did not have sufficient knowledge to be in charge of the engine room on such a ship and that in that respect the ship was not properly manned. With this is I think to be considered the additional fact that there was no plan of the engine room piping available to Humble from which he might have instructed himself. The ship as I see it was therefore unseaworthy in this respect and unfit for the proper carriage and preservation of her cargo. This was the situation at the beginning of the voyage and it remained the situation at the time when the damage was incurred. While the learned trial judge did not expressly state a finding to that effect such a finding appears to me to be implicit in what he did say and is in any event the conclusion to which I think the evidence points.

Turning now to the four submissions put forward on behalf of the appellant as there was evidence before the learned trial judge upon which he might conclude that Humble was not competent to be in charge of the engine

---

[2] *Vide* Wright J. in *Gosse Millard v. Canadian Government Merchant Marine* (1927) 2 K.B. 432 at 434-35 *seq.* and Scrutton L.J. in *Silver v. Ocean Steamship Company Ltd.* (1929) D.L.R. 74 at 77.

room on such a ship and that there was no plan of the engine room piping available for his use and that in these respects the *Farrandoc* was not properly manned and equipped and was to that extent unseaworthy, and as there was no evidence to the contrary, as I see it, nothing turned on the onus of proof and no question of misdirection (if what the learned trial judge said can be so regarded—as to which I express no opinion) arises.

In this connection particular emphasis was directed to the passage in the reasons of the learned trial judge when he said:

> It is well established however, that before such a defence becomes available to the shipowners the latter must have established either that the vessel was seaworthy or that it (the shipowners) exercised due diligence to make the ship seaworthy for the voyage and to secure that the ship was properly manned, equipped and supplied. Unless, therefore, the Defendant has discharged this burden of proof the immunity provided by the said article of the *Water Carriage of Goods Act* does not apply in the Defendant's favour.

While as a matter of first impression this might be taken to indicate that the learned trial judge was of the opinion that in a case of this kind the onus of proof on the issue of seaworthiness is on the shipowner I do not think that that is what it imports. The meaning is I think to be gathered from the nature of the case with which the learned judge was dealing and in particular from the next succeeding paragraph in which he said:

> The question therefore which the Court is required to determine is that of whether the Defendant was successful in proving it had exercised due diligence to make a ship seaworthy and to secure that the ship was properly manned, equipped and supplied for the voyage.

It appears to me that the learned trial judge was not at this stage discussing the question of seaworthiness and that in the context what the impugned paragraph means is simply that there were two ways of discharging the onus of proof of the exercise of due diligence, (1) to prove that the ship was in fact seaworthy—which would necessarily destroy any case based on unseaworthiness and render proof of the exercise of due diligence unnecessary—or (2) to prove the exercise of due diligence.

The second submission in my view is concluded against the appellant by the finding, which, as already mentioned, is, I think, implicit in the learned trial judge's reasons and which to my mind is not merely sustainable on the evi-

1967

N. M. PATERSON & SONS LTD. v. ROBIN HOOD FLOUR MILLS, LTD.

Thurlow J.

dence but is the conclusion I myself would reach on it, that the *Farrandoc* was unseaworthy in not being properly manned and equipped in the respects mentioned.

With respect to the third question it is I think apparent that this unseaworthiness was a cause of the respondent's loss and this I think is what the learned trial judge was referring to and meant when he said that "the unseaworthiness of the *Farrandoc* in the respects above-mentioned was the cause of the damage complained of". The respects so referred to were, as I read the learned judge's reasons, (1) that the second engineer was not competent in that he did not know the engine room piping system and the peculiarities of the ship and (2) that there was no plan of the engine room piping system available to the ship's personnel from which the engineer might have instructed himself.

This brings me to the fourth question which appears to me to raise the most important point in the appeal. Section 3 of the *Water Carriage of Goods Act* relieves the carrier of any implied absolute undertaking to provide a seaworthy ship. In place of any such undertaking Article III, Rule 1, provides that:

> 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.

Next Rule 2 of Article III provides:

> 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.

One of the provisions of Article IV to which the obligation imposed by Rule 2 is expressly made subject is Article IV, Rule 1 which provides:

> 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.

The result of these provisions is that the carrier is liable for loss or damage to cargo caused by unseaworthiness or improper manning or equipping of the ship only if he has failed to exercise due diligence to make the ship seaworthy and to secure that she was properly manned and equipped and such failure has been a cause of the loss or damage. But the onus is upon him to satisfy the Court that due diligence was exercised. With respect to the duty to exercise due diligence imposed by Article III, Rule 1, Lord Somervell of Harrow said in *Maxine Footwear Co. Ltd. v. Canadian Government Merchant Marine Ltd.*[3]:

> Logically, the first submission on behalf of the respondents was that in cases of fire article III never comes into operation even though the fire makes the ship unseaworthy. All fires and all damage from fire on this argument fall to be dealt with under article IV, rule 2(*b*). If this were right there was at any rate a very strong case for saying that there was no fault or privity of the carrier within that rule, and the respondents would succeed.
>
> In their Lordships' opinion the point fails. Article III, rule 1, is an overriding obligation. If it is not fulfilled and the non-fulfilment causes the damage the immunities of article IV cannot be relied on. This is the natural construction apart from the opening words of article III, rule 2. The fact that that rule is made subject to the provisions of article IV and rule 1 is not so conditioned makes the point clear beyond argument.

I have already quoted the finding of the learned trial judge that the appellant had failed to exercise due diligence to make the ship seaworthy for the voyage in that the appellant had not taken sufficient care to assure itself of the experience, competence and reliability of the second engineer and did not equip the vessel with and make available to the ship's personnel a plan of the engine room piping system. In reaching this conclusion the learned trial judge referred to the apparent fact that Humble had been engaged solely on the basis of his holding a second engineer's certificate and that no evidence had been given that any enquiry had been made as to his previous experience or record or whether he was familiar with the type of engine room machinery and piping on board the *Farrandoc*. After citing a passage from the judgment of

[3] [1959] A.C. 589 at page 602.

1967

N. M. PATERSON & SONS LTD. v. ROBIN HOOD FLOUR MILLS, LTD.

Thurlow J.

Hewson J. in *The Makedonia*[4] which dealt with the inadequacy of enquiries to discover the record and competence of a chief engineer and the duty of the shipowner to exercise proper care in the appointment of both the chief and the second engineer Smith D.J.A. expressed himself as being of like opinion concerning the engagement of Humble as second engineer on the *Farrandoc*. The learned judge was, therefore, unsatisfied that the necessary steps had been taken or that the necessary enquiries had been made to discover the record and competence of Humble or that the appellant had otherwise exercised proper care in his appointment.

The evidence leaves me as well unsatisfied that due diligence was exercised. It was agreed by counsel that Humble in fact held a certificate. But the person who engaged him was not called and there is no evidence of any enquiry having been made either of Humble or of anyone else to ascertain the extent of his knowledge or experience or suitability for the post. What the rule requires is that the carrier see that the ship is properly manned and equipped so far as the exercise of due diligence can serve to secure it. To my mind a person taking reasonable care for his own ship or cargo or seeking to discharge this obligation even when told that the person to be employed in a position involving responsibility held a qualifying certificate would scarcely fail to make further enquiries as to his ability and experience. Even after making such enquiries he would, in my opinion, enquire how far the man's experience fitted him for service in the particular ship and take steps to see that the man was adequately instructed with respect to any features of the particular ship with which it was necessary for him to be familiar to properly discharge the duties of his position and to avoid damage to the ship and its cargo. Here it was not established that any such enquiries were made or that any sufficient steps were taken to ensure that Humble would be adequately instructed. In my opinion therefore no ground has been shown for disturbing the learned trial judge's finding.

The appeal accordingly fails and should be dismissed with costs.

---

[4] [1962] Lloyd's Rep. 316.

1967

N. M. PATERSON & SONS LTD. v. ROBIN HOOD FLOUR MILLS, LTD.

NOËL J.:—This is an appeal from the decision of Smith J., District Judge in Admiralty of the Quebec Admiralty District, maintaining plaintiff's action and condemning the defendant, N. M. Paterson & Sons Limited to pay the plaintiff the sum of $8,777.29 with interest and costs for damage caused by wetting to 4,266 bushels of its shipment of wheat carried from Kingston, Ontario, to Montreal on board the defendant's vessel the *Farrandoc*. The wheat was loaded on board the vessel at Kingston, Ontario, on November 26, 1962, and the damaged wheat stowed in No. 2 hold was found to be wetted when unloading in Montreal on November 28, 1962.

The learned trial judge found that the damage to the wheat was caused by the second engineer of the *Farrandoc*, Richard Humble, who on the morning of November 28, when the ship was in the process of discharging its cargo in Montreal, opened by mistake the wrong valve with the result that water, instead of entering the ballast tanks, went into the coffer-dam located between the engine room and No. 2 hold and from the coffer-dam gained entry through an open drain to No. 2 hold where the damaged wheat was located.

The evidence disclosed, and the learned trial judge held, that Humble's opening of the wrong valve happened in the following circumstances. At 0710 hours on November 28, 1962, the first officer of the *Farrandoc*, Gignac, instructed the wheelman, Harvey, to order the engineers to put 20 to 25 inches of water in the double-bottom tank of No. 2 hold. Harvey immediately conveyed these instructions to second engineer Humble who, at the time, was in charge of the engine room. After waiting approximately three minutes, Harvey sounded No. 2 bottom tanks to verify that water had entered but found that they were still dry. He reported this to the second engineer and understood that the matter was being attended to. However, about five minutes later, when Harvey again sounded the said tanks, he found them to be still dry and immediately reported this to the second engineer who apparently went to check the situation.

At approximately 0730 hours the presence of water on the forward tank top No. 2 hold was noted and discharging from that hold was discontinued.

1967

N. M. PATERSON & SONS LTD. v. ROBIN HOOD FLOUR MILLS, LTD.

Noël J.

The evidence also discloses that the instructions given by the master of the ship, Gignac, to put water in the double-bottom tank of No. 2 hold was for the purpose of trimming the vessel after some of the cargo had been discharged and also, it may be inferred, for the purpose of allowing the balance of the cargo to be properly discharged.

The learned trial judge then held that the defendant had failed to exercise due diligence to make the *Farrandoc* seaworthy for the voyage in that it did not take the care it should have taken to assure itself of the experience, competence and reliability of the second engineer before engaging him and did not equip the vessel with and make available to the ship's personnel, a plan of the engine room piping system.

The defence relied on the fact that the damage herein was caused or brought about by an error in the navigation or management of the ship for which it could not be held responsible by virtue of art. IV, paragraph 2(a) of the *Water Carriage of Goods Act*, 1952 R.S.C., chapter 291, which provides that:

ARTICLE IV

. . .

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;

Before mentioning the manner in which the learned trial judge dealt with the immunity provided by the above article, it may be useful to describe shortly the changes effected by the adherence of Canada to the Hague Rules with respect to the responsibilities and liabilities of the carrier by means of the adoption of the *Water Carriage of Goods Act* which has changed the liability of a shipowner at common law in several respects. Lord Justice Denning in *Anglo-Saxon Petroleum Co. Ltd. v. Adamastos Shipping Co. Ltd.*[5] summed up the purpose of the Act as follows:

> . . . Shipowners used to insert clauses in bills of lading exempting themselves from all liability, no matter how much they or their servants were at fault. The purpose of the Hague Rules, speaking broadly, was to prevent shipowners from availing themselves of all these wide exceptions and to render them liable for want of due diligence to make the ship seaworthy and other matters:

[5] [1957] 2 Q.B. 233 at 266, reversed [1959] A.C. 133.

It appears that in shipping contracts, under the *Water Carriage of Goods Act* there is no longer an absolute duty upon the owner of the vessel to provide a seaworthy ship and although he is still bound by certain statutory obligations to the shipper, he will have a defence to an action for their breach if he can prove due diligence in providing a seaworthy ship before and at the beginning of the voyage. As a matter of fact, the main point of difference between liability under the statute and at common law is that under the *Water Carriage of Goods Act* the shipowner's liabilities are not as onerous but they cannot be contracted out of. This appears from a reading of both sections (1) and (8) of art. III of the *Water Carriage of Goods Act.* Article III(1) of the Act reads as follows:

ARTICLE III

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.

The learned trial judge stated that it was well established that before a defence becomes available to a shipowner under art. IV(2)(*a*) of the *Water Carriage of Goods Act,* the latter must have established either that the vessel was seaworthy or that the shipowner exercised due diligence to make the ship seaworthy for the voyage and to secure that the ship was properly manned, equipped and supplied as required under art. III(1)(*a*) and (*b*) of the Act and that, otherwise, he cannot avail himself of the immunity provided by art. IV(2)(*a*) and (*b*) of the said Act.

He then, after examining the manner in which the second engineer was engaged (in that no proper or any measures had been taken before engaging him, to enquire into his competence, reliability or familiarity with the vessel's engine room, piping and machinery), and the lack of plans in the engine room of the vessel, concluded that the defendant had not succeeded in establishing that it had exercised due diligence to make the ship seaworthy and to

1967

N. M. PATERSON & SONS LTD. v. ROBIN HOOD FLOUR MILLS, LTD.

Noël J.

insure that the ship was properly manned, equipped and supplied for the voyage and, therefore, it could not avail itself of the immunity provided under art. IV(2)(*a*) for "an act, neglect, or default" in the navigation or management of the ship.

The submission of the appellant herein appears to be as follows: (1) the plaintiff had the burden of establishing the unseaworthiness of the vessel herein and did not discharge such burden and, therefore, there was no necessity for the defendant to establish that its vessel was seaworthy or that it had exercised due diligence to make it seaworthy and, in any event, (2) it had exercised due diligence and the trial judge was wrong in relying on the evidence he did rely on to conclude that the defendant had not established that it had shown due diligence to make the ship seaworthy and to insure that it was properly manned, equipped and supplied for the voyage.

It may be useful here to set down the manner and the order in which I believe the burden of proof should be discharged in a common law action as distinct from a statutory action (with particular regard to the decision of the Privy Council in *Maxine Footwear Company, Ltd. and Morin v. Canadian Government Merchant Marine, Ltd.*[6] of which I will say more later) in the case of a claim for loss or damage to cargo shipped on a vessel. The cargo owner must, firstly, prove damage or loss to his cargo and as the primary obligation of the owner of the vessel is to deliver to destination the goods of the plaintiff in like good order and condition as when shipped, once damage or loss of the goods so shipped is established, the owner of the vessel becomes *prima facie* liable to the cargo owner for the damages. This liability is, however, subject to any exception clause contained in the bill of lading such as that the loss or damage arises or results from an "act, neglect or default . . . in the navigation or in the management of the ship". If the shipowner establishes the cause of the damage or loss and that he falls within the conditions of the above exception, the owner of the cargo, in order to succeed, must then prove some other breach of the contract of carriage to which the exception clause provides no defence such as the unseaworthiness of the vessel for instance and then the

[6] [1959] Lloyd's Rep. 105 at 113.

owner of the ship may establish, that notwithstanding such unseaworthiness, he is still protected by the exception clause because (1) unseaworthiness does not give rise to a cause of action unless it consists of unfitness at the material time (which must be at the commencement of the voyage) and damage to the cargo must have been caused thereby and that such unseaworthiness occurred after the commencement of the voyage or it did not cause the loss or damage.

From the above it appears that it is for the cargo owner to establish the damage to its goods, and in the event the shipowner establishes that he is entitled to an immunity provided for in the bill of lading, it should then become incumbent upon the cargo owner to establish affirmatively (a) that the ship was unseaworthy and (b) that that unseaworthiness caused the damage unless the shipowner has already proven unseaworthiness in order to establish that he falls within the conditions of the exception he is claiming.

It appears from the second sentence in art. IV(1) of the *Water Carriage of Goods Act* that even in a statutory action no different onus is cast on the shipowner. In the event the shipowner has not proven unseaworthiness in the process of establishing that he falls within an exception, it is indeed only after proof has been given by the other party that the damage has resulted from unseaworthiness that the shipowner must establish due diligence. The above sentence reads as follows:

> 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.

This appears also to be the decision of the Supreme Court of Canada in *Western Canada Steamship Co. Ltd. v. Canadian Commercial Corporation et al.*[7] although this case is not on all fours with the present case as it deals with a general average contribution claim by the carrier against the cargo owner. Ritchie J. states at p. 641 as follows:

> It seems to me that the distinction between the statutory burden of proof imposed by art. IV, Rule 1 and the burden which falls on a party to a collision who is required to rely upon "inevitable accident" by way of defence is that in the latter case the issue to be determined

[7] [1960] S.C.R. 632.

1967

N. M. PATERSON & SONS LTD. v. ROBIN HOOD FLOUR MILLS, LTD.

Noël J.

is confined to "the cause" of the collision whereas in the former "unseaworthiness" must have already been determined to be a "cause" of the loss before any burden is cast upon the carrier at all.

When, as in the present case, unseaworthiness has been shown to be the cause, the burden then arising under art. IV is limited to that of "proving the exercise of due diligence to make the ship seaworthy before and at the beginning of the voyage". Notwithstanding the views expressed by Davey J.A., this language does not, in my view, serve to shift to the carrier the onus of proving either the cause of the loss or the cause of unseaworthiness and should not be treated as going so far "as to make him prove all the circumstances which explain an obscure situation" such as the one here disclosed (see *Dominion Tankers Limited v. Shell Petroleum Company of Canada Limited* ([1939] Ex. C.R. 192 at 203; [1939] 3 D.L.R. 646; 50 C.R.T.C. 191) per Maclean J.).

The Privy Council in 1959 decided that art. III(1) of the *Water Carriage of Goods Act* (which deals with the carrier's obligation to exercise due diligence to make the ship seaworthy, properly man it and make the holds fit and safe for the reception carriage and preservation of the goods) was an overriding obligation in *Maxine Footwear Company, Ltd. and Morin v. Canadian Government Merchant Marine Ltd. (supra)* where Lord Somervell of Harrow stated at p. 113:

> In their Lordships' opinion the point fails. Article III, Rule 1, is an overriding obligation. If it is not fulfilled and the non-fulfilment causes the damage, the immunities of Art. IV cannot be relied on. This is the natural construction apart from the opening words of Art. IV, Rule 2. The fact that that Rule is made subject to the provision of Art. IV and Rule 1 is not so conditioned makes the point clear beyond argument.

Now that the exercise of due diligence is an overriding obligation in the sense that once unseaworthiness at the material time is proven as having caused the damage the carrier or shipowner cannot avail himself of the exception, unless he fulfils the above obligation, cannot be contested. That the carrier or shipowner must establish unseaworthiness (within its extended meaning under section III of the *Water Carriage of Goods Act*) and then that the lack of proper manning of the vessel was not due to lack of diligence on his part as a condition precedent to his right to avail himself of the immunities of art. IV, (unless he must do so in order to establish that he falls within the conditions of the exception he is claiming) is however, not so clear although I do feel as a practical matter that rigid adherence to the rule that ordinarily the person relying on unseaworthiness, i.e., the charterer or cargo-owner, must

prove it, would often exempt the shipowner from liability as the facts of such unseaworthiness are nearly always within his sole knowledge. It is not, however, necessary to determine this matter here because, although the evidence herein with regard to what took place is not as complete or satisfactory as it could have been, it was sufficient to establish that the ship was unseaworthy or was not properly manned and it therefore became incumbent upon the defendant to establish that it had exercised due diligence to make it seaworthy for the voyage. I should add that in most cases, the shipowner in the process of establishing, as he must do, the cause of the damage or loss and that he falls within the exception which gives him immunity (on the basis that one who claims an exception or exemption must also establish that he falls within its conditions) will, particularly in the case of an error of navigation or an error in the management of the ship at the same time establish facts which disclose that his ship was unseaworthy (within its extensive meaning under section III of the *Water Carriage of Goods Act*) and this appears to be what happened in the present case.

I now come to the second attack made by the appellant herein in that it did exercise due diligence and that the trial judge was wrong in relying on the evidence he did rely on to conclude that the defendant had not established that it had shown due diligence to make the ship seaworthy and to insure that it was properly manned, equipped and supplied for the voyage.

I should state at the outset that insofar as the evidence was not dependent on findings of credibility, this Court in appeal can draw inferences and arrive at conclusions differing from those of the trial judge if such a course of action appears to be justified and required.

It is with this in mind that I now turn to the facts relied on by the trial judge in holding that the defendant had failed to exercise due diligence to make the vessel seaworthy for the voyage in that it did not take the care it should have taken to assure itself of the experience, competence and reliability of the second engineer before engaging him and did not equip the vessel with, and make available to the ship's personnel, a plan of the engine room piping system.

1967

N.M. PATERSON & SONS LTD. v. ROBIN HOOD FLOUR MILLS, LTD.

Noël J.

Before, however, going into this matter, it may be useful to point out here that the valve opened by Humble had a brass plate "on the end of the spindle underneath the nut that holds the wheel on it" marked coffer-dam and was situated near a diesel engine on the starboard side of the engine room used for generating auxiliary electrical power for the ship. A manifold of four valves, two leading to each of the fore and aft ballast tanks known as No. 1 and No. 2 on the starboard side of the ship, was situated some twelve feet from the coffer-dam valve. The above valves were those Humble should have opened and were also marked and identified by a brass plate on the spindle above the wheel by which the valve was operated. Furthermore, there was no plan of the engine room piping available on board the vessel. That Humble did open this valve which was clearly marked coffer-dam indicates, I believe, that he was totally ignorant of its purpose and location and of its connection with the cargo hold and that is why and how the mistake was made.

Failure in the appointment of second engineer Humble was found by the trial judge in that there was no evidence to show that any inquiry was made as to this man's previous experience or record, nor as he added, does it appear that he was questioned as to whether or not he was familiar with the type of engine room machinery and piping on board the *Farrandoc* which, as pointed out by the trial judge, were in some respects peculiar to that ship or at least not generally met with.

Indeed, Stanley E. Moore, the chief engineer on the *Farrandoc,* at the time of the damage, stated at p. 70 of the transcript that "there are not many other ships that have the peculiar arrangement of flooding the hold through a coffer-dam" and this is probably the peculiarity referred to by the trial judge.

The evidence discloses that Humble, who was 38 years of age, had joined the ship for the first time when he had been taken on as second engineer at Kingston, on November 26th, the day the vessel left for Montreal. He was signed off the vessel on December 4, 1962, at Fort Waller. Charles Thomas Beaupré, the defendant's marine superintendent, explained that Humble was sent to the vessel in accordance with the contract the defendant had at the time with the Officers' Union who when requested, sent a

properly qualified man to the vessel. Beaupré further stated that Humble, sent over by the Union, was given no tests as he had a qualification certificate and was properly qualified by the Government of Canada.

He added that the engineer normally instructs a new man in the different phases of the equipment. As far as the instructions to Humble are concerned, they were, however, restricted to Moore's answer as follows at p. 46 of the transcript:

> Well, we went around and looked at different things but if you tell a man too much, you get him mixed up. He told him ". . . just a few rules, what to look for" . . . and "if he wasn't sure of anything, he would come up and I would tell him".

Humble at the time of his engagement by the defendant held "a third class combined engineer's certificate No. C-421" issued by the Government of Canada and had previously served in turbo-electric vessels but had never previously served on a ship such as the *Farrandoc*. Had the decision of the trial judge that the defendant was liable herein because it had not established due diligence in accepting Humble on the sole strength of his certificate, without questioning him as to his past experience and had that been the sole basis on which a lack of due diligence could be predicated, I would have had considerable difficulty in reaching such a conclusion. I believe that it is reasonable to accept such officers bearing certificates from a public body, particularly when such certificates are issued only after a proper examination and after the candidate establishes by satisfactory evidence his "sobriety, experience, ability and general good conduct on board ship", and is "subject to suspension or cancellation" in the event of misconduct as appears from section 131 of the *Canada Shipping Act*, R.S.C. 1952, vol. 1, chapter 29, which reads as follows:

> 131. (1) The Minister may grant to an applicant for a certificate as master or mate who is duly reported by the examiners to have passed the examination satisfactorily, and to have given satisfactory evidence of his sobriety, experience, ability and general good conduct on board ship, such a certificate of competency as the case requires.
>
> (2) The Minister may, upon the like report of examiners, approved by the Chairman, grant to an applicant therefor a certificate of competency as an engineer; the examiner shall transmit his report of the examination of such an applicant, with the evidence of his sobriety, experience, ability and general good conduct on board ship, to the

1967

N. M. PATERSON & SONS LTD. v. ROBIN HOOD FLOUR MILLS, LTD.

Noël J.

Chairman, who shall thereafter communicate his approval or disapproval of such report to the Minister; the certificate shall specify the grade for which the applicant is qualified and be a certificate for life; it is, however, subject to suspension or cancellation pursuant to the provisions of this Act.

I would think that Humble, being 38 years of age, and holding the above certificate from a public body could be engaged without any question on the strength of his certificate and although I would see no harm in questioning him further with regard to his past experience or conduct, I do not think that the fact he was not questioned, would, in the particular circumstances of the present case, constitute a want of due diligence on the part of the owner of the vessel or even that any questioning or investigating would have disclosed anything useful in determining whether he would be adequate to fulfill the not too exacting duties of a second engineer on board the vessel.

I should also add that I do have considerable difficulty also in arriving at the conclusion that the lack of a plan of the piping on the vessel could also be considered as a lack of due diligence which would lead to a finding of unseaworthiness because had plans been available, in view of the manner in which Humble was instructed upon his arrival on the ship, it is doubtful that he would have seen them and had he examined them, it is doubtful he would have appreciated the location, nature or purpose of the coffer-dam if the latter were not explained to him.

This, however, does not mean that the appellant herein has discharged the burden of establishing due diligence at the beginning of the voyage to make its ship seaworthy because, in my view, it appears to me from a reading of the evidence that the only valve in the engine room of the *Farrandoc* which a new man should have been told about, was the one which operated the "coffer-dam". This, indeed, was the only one which, if opened, could damage the cargo. The others all operated ballast tanks. There was further reason to tell him about this because, as already mentioned and admitted by Moore, the chief engineer of the vessel, the vessel had a peculiar arrangement of flooding the hold through the coffer-dam and he had never been on a vessel of this type before. The evidence discloses that he did not know the piping arrangements and that he was not even aware that there was a coffer-dam. He thought the third

engineer had showed him around the engine room when he joined the ship but no one had told him about the coffer-dam.

The chief engineer had merely told him "a few safety rules" and some things he was not to do and suggested that if there was anything he was not sure of and wanted to know, he should ask him.

The question here is whether the lack of proper instructions should go back to a time prior to the voyage when the second engineer's services were retained or should be considered merely as having not been given when the master gave instructions to fill the ballast tanks in Montreal when the ship was unloading the cargo.

If the lack of instructions goes back to a time prior to the voyage, it then can be held that the ship was not properly or efficiently manned at that time and the defendant could not avail itself of the immunity provided by art. IV(2)(*a*) of the Act. On the other hand, if the lack of instructions should be considered within the period immediately prior to the instructions to fill the ballast tanks in Montreal after the voyage, then such an error could be one of management and the defendant would be protected by the clause.

The point is a fine one, but one which may have, depending upon how it will be decided, serious consequences for the parties.

Although I do so with some hesitation, I would think that the lack of instructions here goes back to the time of the engagement of the second engineer when he was shown the engine room prior to the departure of the vessel in Kingston even if he could have been instructed later or immediately prior to the opening of the valve which flooded the No. 2 hold. It was at the time of his engagement that he was ignorant of the coffer-dam and its valve and inefficient and he remained so during the whole voyage up to the very instant when he opened up the wrong valve.

It indeed seems to me that a due regard to the safety of the ship and cargo would have required that every member of the crew (and particularly Humble who was responsible for the engine room) likely to use this coffer-dam valve, should, before the voyage had commenced, have been fully instructed as to its proper use and fully informed as to the

1967

N. M. PATERSON & SONS LTD. v. ROBIN HOOD FLOUR MILLS, LTD.

Noël J.

danger to be avoided, as the best equipped ship may become unseaworthy if her crew or those in charge of her appliances are unacquainted with their purpose and proper use.

It therefore follows that this ship equipped as she was, with Humble the second engineer in charge of the engine room, ignorant as he was of the existence of the cofferdam, was in fact improperly manned and the defendant has failed to show that due diligence was exercised to man her properly.

Having thus failed, it follows that the defendant cannot avail itself of the immunity of art. IV(2)(*a*) of the *Water Carriage of Goods Act*.

There is another issue with which I should deal and which was raised by the respondent in argument in that the damage to the cargo was not the result of an error in management of the vessel but was due to negligence in the care and custody of the cargo. If the damage was the result of negligence in the care and custody of the cargo, the vessel owner would have no immunity and would be liable for the resulting damages.

The distinction between the two causes cannot always be found with legal precision. However, it would seem that it can be generally said that when there is fault in the manipulation of equipment in connection with the ship mainly, and only incidentally in connection with the cargo, the fault is then an error in management; where, however, the manipulation of the ship's equipment is primarily for the cargo and only incidentally connected with the ship, then the fault is an error in the care and custody of the cargo.

The facts here reveal that although the filling of the ballast tanks ordered by the master was for the purpose of trimming the vessel, it was done during the discharge of the cargo and for the purpose of allowing the balance of the cargo to be discharged at dock. Furthermore, three minutes after Humble had turned on the wrong valve, he was told by Harvey that no water was going into the ballast tanks and he was again informed of this five minutes later. Notwithstanding these admonitions, no corrective action was then taken by Humble to either check

the coffer-dam or to close its valve and thus prevent the water from rising sufficiently in the coffer-dam to reach and damage the cargo in the hold. It may, therefore, be said here that Humble's mistakes and omissions were errors made in the care and the custody of the cargo for which, of course, there would be no defence.

In a very similar situation in *Instituto Cubano de Estabilization Del Azucar v. Star Line Shipping Co. Inc.*[8] where molasses carried on board ship from Cuba to Louisiana was damaged by water entering from a ballasted tank into the hold where the molasses was stored, because of the mistake made by a member of the crew in ballasting, it was held that:

> . . . The unsealed cargo valve (ultimate cause of the loss) was an error in care and custody of the cargo outweighing error in management in improper ballasting. Vessel held liable for loss.

There is also the decision of the French Cour de Cassation of March 11, 1965, in the case of the ship *Phryné*[9] when wine was damaged through faulty ballasting of the ship and where it was held that the damage was caused by a *"faute commerciale"* (which corresponds somewhat to error in care and custody of the cargo) rather than by a *"faute nautique"* (or error in management of the ship).

The headnote of the above decision reads as follows:

> I.—Au cas d'avarie au vin transporté par mer en vrac, par l'introduction d'eau dans une cuve contenant du vin au cours d'opérations de ballastage du navire, au cours du déchargement, la faute imputable au transporteur maritime réside, non dans la manœuvre elle-même, mais dans l'erreur commise dans son exécution. Dans ces conditions, bien que l'opération en elle-même soit nautique, la faute commise est commerciale lorsque l'opération en soi a été correctement exécutée, mais qu'il a été par erreur introduit, sans vérification préalable, de l'eau de mer non dans une citerne vide mais une partie du navire destinée à la cargaison de vin.

It therefore follows that whether the error committed by Humble, the ship's second engineer, is one of management or one of care and custody of the cargo, the appellant cannot, in any event, succeed and I would dismiss the appeal with costs.

---

[8] [1958] A.M.C. 166.

[9] (1965) D.M.F. 408—Cour de Cassation (Phryné, 11 mars 1965).

1967

N.M. PATERSON & SONS LTD. v. ROBIN HOOD FLOUR MILLS, LTD.

GIBSON J.:—The facts are set out in the Judgments of Noël J. and Thurlow J. and need not be repeated.

I should like, however, to say three things:

Firstly, that in relation to every issue in respect to which the plaintiff and the defendant had the burden to adduce evidence, each respectively did so in a most unsatisfactory manner, making the most flimsy proof.

Secondly, that in some cases, it may be exercising due diligence, within the meaning of the Hague Rules, to prove that a ship's officer, such as the second engineer in this case, was chosen solely on the basis that he held a duly accredited certificate issued by the Department of Transport, Canada, without making any further investigation of his qualifications or without giving him any specific instructions about the features of a particular ship; but that in other cases, this may not be sufficient, and in such cases more detailed investigations as to qualifications and also specific instructions may have to be made and given —each case depending on its facts; and that in reference to the facts of this case, the former was insufficient, in that the *Farrandoc* was an old ship with rather unusual valve arrangements about which it was probable that this new second engineer would not know; and from this it follows therefore that the neglect of the ship's owners or representatives to enquire more fully into this new ship's officer's qualifications and to adequately instruct him about the valve arrangements at the material time before the voyage began, constituted failure to exercise due diligence, thereby rendering this ship unseaworthy.

Thirdly, that this failure to exercise due diligence concurred with an act of negligent navigation in causing the loss (that is the damage to the grain), namely, the error in opening a valve which admitted sea water in the cofferdam situated between the engine room and no. 2 cargo hold from which the water by an open drain gained access to and flooded no. 2 hold; but in consequence of the finding of unseaworthiness proof of this excepted peril of bad seamanship (or mismanagement of the ship) does not result in avoiding responsibility for the damage to the cargo.

In my opinion, the appeal should be dismissed with costs.