Ottawa
1967
June 6-7
June 23

BETWEEN:

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

AND

CARGILL GRAIN COMPANY LIMITED and SCREATON GRAIN LIMITED (*Plaintiffs*) ..... RESPONDENTS.

AND

BETWEEN:

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

AND

SMITH VINCENT & CO. LIMITED (*Plaintiff*) ..... RESPONDENT.

Shipping—Damage to cargo—Liability of shipowner—Defence of perils of the sea—Water Carriage of Goods Act, R.S.C. 1952, c. 291, Art. IV, r. 2(c)—Negligence of shipowner—Onus of proof.

On December 2nd 1966 defendant's ship with a cargo of grain left Kingston for Goderich. She encountered strong winds the following day, which were to be expected at the time of year, and the water at times went over the hatches. She arrived at Goderich on December 5th to remain for the winter. On December 27th melting snow was observed on No. 7 hatch cover and investigation disclosed that the grain beneath had suffered damage from wetting. The cargo owner sued the shipowner for damages and recovered judgment at trial ([1966] Ex. C.R. 22). Defendant appealed, relying solely on the defence that the damage resulted from perils of the sea, for which it was relieved of liability by Art. IV, r. 2(c) of the Schedule to the *Water Carriage of Goods Act,* R.S.C. 1952, c. 291. Defendant contended that the evidence as to the size and shape of the damaged grain raised an inference that water had gained access to the grain from the deck during the voyage through an aperture in the hatch coaming. The aperture had, however, been sealed with oakum before the hatch was covered and the oakum was still in place when the hatch was opened on December 27th. There was no evidence negativing the possibility of the water having come from sources within the hold, e.g. possibly from a burst pipe.

Held, dismissing the appeal, the evidence did not establish that water gained access by the aperture in question or that the damage arose from a peril of the sea. Even if water did enter by the aperture during the voyage the inference was that it did so because the aperture was inadequately covered, i.e. by reason of negligence, for which the shipowner was responsible, and not from perils of the sea, *viz* dangers from weather which could not be foreseen or guarded

*CORAM: Thurlow, Noël and Gibson JJ.

1967

N. M. PATERSON & SONS LTD. v. CARGILL GRAIN CO. LTD. et al

against, and such inference of negligence was not rebutted by the shipowner. *C. N. Steamships v. Bayliss* [1937] S.C.R. 261; *Keystone Transports Ltd. v. Dominion Steel & Coal Corp. Ltd.* [1942] S.C.R. 495; *Paterson Steamships, Ltd. v. Can. Co-op. Wheat Producers, Ltd.* [1934] A.C. 538; *Albacora S.R.L. v. Wescott & Laurance Line, Ltd.* [1966] Lloyd's Rep., discussed.

APPEAL from judgment of Wells D.J.A.

John J. Mahoney, Q.C. for appellant.

A. S. Hyndman for respondents.

The judgment of the Court was delivered by

THURLOW J.:—This is an appeal from a judgment[1] of Mr. Justice Wells, the District Judge in Admiralty of the Ontario Admiralty District holding the appellant responsible for damage to a cargo of wheat and barley carried in its ship, the *Ontadoc,* on a voyage from Fort William to Goderich and there kept in winter storage until discharged several weeks after the ship's arrival.

The cargo was loaded on December 2nd, 1960, holds 2 and 4 of the ship being filled with wheat and holds 1 and 3 with barley, and the ship proceeded on her voyage that evening. She encountered no exceptional weather or hazard for that season of the year and after an ordinary passage arrived in Goderich on the morning of December 5th. As the ship was to remain there for the winter the crew was paid off and a shipkeeper took charge. No protest was noted. There had, however, been an occasion on December 3rd when what was recorded in the log as being a "strong" south-south-west and south-west wind had been encountered and when water had come over the starboard side in the vicinity of number 3 hold. The Master placed the force of the wind at 20-25 miles per hour and he described the water as being at times as much as a foot deep on the deck and as having at times gone over the hatches. The mate on the other hand referred to it as a little slop having come aboard.

On December 27th the shipkeeper observed that snow on the top of number 7 hatch, which was one of three hatches covering number 3 hold, was melting and this led to the opening of the hatch and the discovery that water had at some stage gotten into the barley below it causing the

[1] [1966] Ex. C.R. 22.

barley to heat to the point where a portion of it had become charred and had produced noxious gases which had contaminated and damaged the grain in all the holds. A protest referring to the occasion when water came over the side was then noted.

In defending these actions, which are founded on breach of the contract evidenced by the bills of lading for the carriage and storage of the goods, "and/or of its (the defendants) duty in the premises implied by law" the appellant pleaded several of the immunities provided by Article IV of the Schedule to the *Water Carriage of Goods Act*[2]; but on the appeal to this Court the only one relied on was that provided by Article IV, Rule 2(c) in respect of loss by perils of the sea. With respect to this defence the learned trial judge had found it impossible to say on the evidence when or how the water gained access to number 3 hold and he had therefore concluded that the defence had not been established.

In reaching this conclusion he said:

> In my opinion there is a certain element of exaggeration in describing what occurred when the wind strengthened around 1:00 o'clock p.m. on December 3rd. The evidence of the ship's officers does not convince me of its accuracy.
>
> A great deal of the defendant's evidence was devoted to showing the care that had been taken by the defendants in loading the ship. There is no doubt however that the water at some stage got into the grain under hatch cover No. 7. My difficulty is that I am not certain when it got in or how it got in.

Later he also said:

> . . . The goods having been damaged by a state of affairs, which was discovered slightly over three weeks after the conclusion of the voyage on the 6th December; the defendants have not in my opinion proved that the damage to the grain occurred by the incursion of water on the voyage down. The ship remained at storage for three weeks and a day after that before the real state of affairs was apparent. The water may have gotten in while the ship was in Goderich, it is in my opinion on the evidence impossible to say. It may have been from a peril of the sea, it may have been from some fault in the covering of the hatches during or after the voyage, I do not know. Water however, unquestionably did get in at some time.

The learned judge also expressed a suspicion that the word "strong" and a ditto mark beneath it might have been written into the log book at some time after the discovery of the damage. On the hearing of the appeal counsel for the appellant asked leave to adduce evidence to

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

1967

N. M. PATERSON & SONS LTD. v. CARGILL GRAIN CO. LTD. et al

Thurlow J.

dispel any such suspicion but the Court considering the lack of cross-examination on this point of the witness who made the entries and the statement of counsel for the respondents that it was not part of his case to contend that the word "strong" and the ditto mark were made at a different time from the rest of the entry was satisfied that each of the entries as a whole must be taken to have been made at one time and to have been made when it purports to have been made. The appellant's application was thereupon withdrawn.

It was not suggested by the learned trial judge nor by counsel that the water may have gotten into the hold before the hatch was closed at Fort William and there is no evidence of any occurrence at Fort William which could account for water getting into the hold. Similarly there is no evidence of any occurrence while the ship was tied up at Goderich after the voyage which could account for water getting into the hold. In this connection it seems unlikely that rain water could have seeped in and caused the damage. In this situation the appellant's case was that the shape and size of the pillar of damaged barley under No. 7 hatch indicated that a comparatively small quantity of water was involved in causing the damage and that the water got into the barley at the top and seeped down through it, that this pillar was near one of four small apertures in the hatch coaming provided to accommodate the hatch supporting bars and that in the circumstances it should be inferred that the water had gained access by this particular aperture when there was water on the deck during the course of the voyage. Against this inference however must be weighed the evidence of the sealing of these apertures with oakum and grease before the hatch coverings, consisting of both tarpaper and tarpaulin, were put over them and fastened down and of the inspection thereof made by the mate, together with the evidence of the oakum pad over the aperture, through which the water is supposed to have entered, being in its place when the hatch was opened on December 27th. There is also the absence of evidence of anyone having detected the pungent odour before the hatch was opened. To my mind these facts are scarcely consistent with the water having entered by the aperture in question.

Nor is there evidence which negatives the possibility of the water having come from sources within the hold. There is, for example, no evidence that there was no ship's piping passing through the hold at the material point which could have been the source of the water and which might have burst during the voyage or, if not properly drained, might have frozen and burst at Goderich after the ship was tied up. Taken as a whole therefore on a balance of probabilities the evidence leaves me unsatisfied that the water gained access by the aperture in question or that the damage arose from a peril of the sea.

In view of this conclusion it is unnecessary to consider what the result might be if it were determined that the damage arose as a result of water entering by that aperture during the course of the voyage but as opinions on the effect of the evidence on this point may differ and as the matter was argued by counsel at length and with great care I should add my view with respect to it.

On this point the material facts as I see them are that the presence of the opening was well known as was also the need to have it caulked in order to prevent water washing over the deck from getting into the hold, that there was nothing out of the ordinary about water washing over the deck of such a ship in weather conditions of the kind to be expected at the particular season and that no extraordinary weather was encountered on the voyage. There is also the fact that the type of caulking applied to seal these apertures was apparently sufficient in the case of all the other such apertures during this voyage, including the other aperture on the same side of hatch number 7. On these facts an inference appears to me to arise that the caulking of the particular aperture was inadequately or insufficiently carried out and that if it had been adequately and sufficiently carried out there ought to have been no leaking through the aperture. This is therefore not a case of the ship having encountered dangers from weather which could not be foreseen or which could not have been guarded against. On the contrary the situation may be compared in these respects with the much more severe conditions described in *Canadian National Steamships v. Bayliss*[3] where Duff C.J. in delivering the judgment of the court said at page 263:

[3] [1957] S.C.R. 261.

1967

N. M. PATERSON & SONS LTD. v. CARGILL GRAIN CO. LTD. et al

Thurlow J.

Counsel for the appellant accepted the definition of "perils of the sea" given in the last edition of Scrutton on Charter Parties (p. 261) as follows:

> Any damage to the goods carried, by sea-water, storms, collision, stranding, or other perils peculiar to the sea or to a ship at sea, which could not be foreseen and guarded against by the shipowner or his servants as necessary or probable incidents of the adventure.

His main contention was that the appellants having established at the trial a *prima facie* case of loss by a peril of the sea within this definition, the burden of proving negligence consequently rested on the respondent on the authority of *The Glendarroch* (1894) Prov. 226. At the trial the defence raised under this head was that the heavy seas that were encountered after leaving Hamilton and before the discovery of the loss and damage on the following morning were of such a character as to bring the damage within the words quoted above, that is to say,

> damage caused by . . . storms . . . or other perils peculiar to the sea or to a ship at sea which could not be foreseen and guarded against by the ship owner or his servants as necessary or probable incidents of the adventure.

The issue raised by this defence was, of course, an issue of fact and *it was incumbent upon the appellants to acquit themselves of the onus of showing that the weather encountered was the cause of the damage and that it was of such a nature that the danger of damage to the cargo arising from it could not have been foreseen or guarded against as one of the probable incidents of the voyage.* The trial judge and the Court of King's Bench have unanimously held that this issue must be decided against the appellants on the ground that, upon the evidence, the proper conclusion is that the dangers arising from such weather as the ship encountered could be guarded against and that they ought to have been foreseen. There is no satisfactory reason for impeaching these concurrent findings of fact and they must, therefore, stand. They constitute a complete answer to the contention that the appellants have brought themselves within the exception "perils of the sea".

(italics added)

The *Bayliss* case arose on the provisions of the Barbados *Carriage of Goods by Sea Act,* 1926 which incorporated the Hague Rules[4] as does the present Canadian *Water Carriage of Goods Act.* The effect of this case appears to me to be that in the case of a claim on a bill of lading for damage to cargo the onus upon a shipowner seeking immunity under Rule 2(c) of Article IV is to show that the loss occurred by a peril (of the sea) of a kind which could not have been foreseen and guarded against by the exercise of reasonable care.[5]

The definition quoted by the Court in the *Bayliss* case appears at page 224 of *Scrutton on Charterparties and*

[4] *British Shipping Laws,* Vol. 3, p. 1630.

[5] See also *Colonial Steamships Ltd. v. The Kurth Malting Co. et al.* [1954] S.C.R. 275.

1967

N. M. PATERSON & SONS LTD. v. CARGILL GRAIN CO. LTD. et al

Thurlow J.

Bills of Lading, 17th Edition where reference is made to a footnote which states as follows:

> (*t*) Collected from the judgments in *Thames and Mersey Insurance Co. v. Hamilton* (1887) 12 App. Cas. 484; *The Xantho, ibid.* 503; *Hamilton v. Pandorf, ibid.* 518. But though the phrase "perils of the sea" has the same meaning in both classes of document, it does not follow that in all cases where the goods owner can succeed against the cargo underwriters for a loss by perils of the sea the shipowner would be able to sustain a defence of "perils of the sea", since the shipowner may be precluded from relying upon the defence on proof that the perils of the sea were brought into operation by negligence (*The Glendarroch* [1894] P. 226) or (possibly) that unseaworthiness was a contributory cause: *Smith, Hogg v. Black Sea & Baltic* [1940] A.C. 997 and n. (r), p. 91, *ante.* Rule 7 in Sched. I to the *Marine Insurance Act,* 1906, provides as follows: "The term 'perils of the seas' refers only to fortuitous accidents or casualties of the seas. It does not include the ordinary action of the winds and waves." Loss or damage by the incursion of sea-water when a ship is intentionally scuttled by her crew does not constitute loss by "perils of the sea" under a policy of marine insurance: *Samuel v. Dumas* [1924] A.C. 431. See also *The Christel Vinnen* [1924] P. 208 (C.A.).

In *Canada Rice Mills, Ltd. v. Union Marine et al.*[6], a case which arose on a policy of insurance against perils of the sea and thus did not involve any question of negligence, Lord Wright, however, defined the meaning of perils of the sea somewhat more broadly when he said at page 68:

> Where there is an accidental incursion of seawater into a vessel at a part of the vessel, and in a manner, where seawater is not expected to enter in the ordinary course of things, and there is consequent damage to the thing insured, there is prima facie a loss by perils of the sea. The accident may consist in some negligent act, such as improper opening of a valve, or a hole made in a pipe by mischance, or it may be that sea water is admitted by stress of weather or some like cause bringing the sea over openings ordinarily not exposed to the sea or, even without stress of weather, by the vessel heeling over owing to some accident, or by the breaking of hatches or other coverings. These are merely a few amongst many possible instances in which there may be a fortuitous incursion of seawater. It is the fortuitous entry of the sea water which is the peril of the sea in such cases. Whether in any particular case there is such a loss is a question of fact for the jury. There are many deck openings in a vessel through which the seawater is not expected or intended to enter and, if it enters, only enters by accident or casualty. The cowl ventilators are such openings. If they were not closed at the proper time to prevent seawater coming into the hold, and seawater does accidentally come in and do damage, that is just as much an accident of navigation (even though due to negligence, which is immaterial in a contract of insurance) as the improper opening of a valve or other sea connection. The rush of sea water which, but for the covering of the ventilators, would have come into

[6] [1941] A.C. 55.

1967

N. M. PATERSON & SONS LTD. v. CARGILL GRAIN CO. LTD. et al

Thurlow J.

them and down to the cargo was in this case due to a storm which was sufficiently out of the ordinary to send seas or spray over the orifices of the ventilators.

This exposition of the meaning of the expression "perils of the sea" was adopted by the Supreme Court of Canada in *Keystone Transports Ltd. v. Dominion Steel & Coal Corporation Ltd.*[7], a bill of lading case, where Taschereau J. (as he then was) speaking for the majority of the Court said at page 505:

> From these authorities it is clear that to constitute a peril of the sea the accident need not be of an extraordinary nature or arise from irresistible force. It is sufficient that it be the cause of damage to goods at sea by the violent action of the wind and waves, when such damage cannot be attributed to someone's negligence.
>
> . . .
>
> I believe that the appellant has succeeded, and the trial judge has so found, in establishing that there has been a peril of the sea. There is even more than a mere *"prima facie* case". It was then upon the respondent to disprove it, by proving negligence causing the loss—in this, it has totally failed.

As applied to a claim on a bill of lading, where negligence is material, as opposed to a claim on a policy of insurance where negligence is not material Lord Wright's exposition of what is meant by the expression "perils of the sea" in the *Canada Rice Mills Ltd.* (*supra*) case must, I think, be read against the background of his own description of the two aspects of a shipowner's responsibility to a cargo owner under the common law to be found in *Paterson Steamships, Ltd. v. Canadian Co-operative Wheat Producers, Ltd.*[8] at page 544:

> It will therefore be convenient here, in construing those portions of the Act which are relevant to this appeal, to state in very summary form the simplest principles which determine the obligations attaching to a carrier of goods by sea or water. At common law, he was called an insurer, that is he was absolutely responsible for delivering in like order and condition at the destination the goods bailed to him for carriage. He could avoid liability for loss or damage only by showing that the loss was due to the act of God or the King's enemies. But it became the practice for the carrier to stipulate that for loss due to various specified contingencies or perils he should not be liable: the list of these specific excepted perils grew as time went on. That practice, however, brought into view two separate aspects of the sea carrier's duty which it had not been material to consider when his obligation to deliver was treated as absolute. It was recognized that his overriding obligations might be analysed into a special duty to exercise due care and skill in relation to the carriage of the goods and a special duty to furnish a ship that was fit for the adventure at its inception. These

[7] [1942] S.C.R. 495.

[8] [1934] A.C. 538.

have been described as fundamental undertakings, or implied obligations. If then goods were lost (say) by perils of the seas, there could still remain the inquiry whether or not the loss was also due to negligence or unseaworthiness. If it was, the bare exception did not avail the carrier.

In the concise words of Willes J. (in *Notara v. Henderson* (1872) L.R. 7 Q.B. 225, 235): "the exception in the bill of lading . . . only exempts him (the shipowner) from the absolute liability of a common carrier, and not from the consequences of the want of reasonable skill, diligence, and care . . ." Willes J. is there referring to what may be called the specific excepted perils. The position is thus summed up by Lord Sumner in *F. C. Bradley & Sons, Ld. v. Federal Steam Navigation Co., Ld.* ((1927) 27 Ll. L. Rep. 395, 396): "The bill of lading described the goods as 'shipped in apparent good order and condition' . . ., it was common ground that the ship had to deliver what she received as she received it, unless relieved by excepted perils. Accordingly, in strict law, on proof being given of the actual good condition of the apples on shipment and of their damaged condition on arrival, the burden of proof passed from the consignees to the shipowners to prove some excepted peril which relieved them from liability, and further, as a condition of being allowed the benefit of that exception, to prove seaworthiness at Hobart, the port of shipment, and to negative negligence or misconduct of the master, officers and crew with regard to the apples during the voyage and the discharge in this country."

But negligence and unseaworthiness of the carrying vessel might generally, by British law, be excepted by express words; in such a case, though the exception of perils of the sea (to take an instance) might not per se for the reasons stated on the facts, avail the carrier, yet he could rely on the exception of negligence or of unseaworthiness, as the case might be, when negligence or unseaworthiness had caused or contributed to the loss. One important object of the Acts under consideration was to limit the use of these general exceptive clauses.

The aspects of a shipowner's duty with respect to unseaworthiness and negligence referred to by Lord Wright appear to me to resemble the responsibility of a person undertaking for reward to do something requiring the supply of adequate equipment for the purpose or the exercise of a particular kind of skill. Where it is the breach of the responsibility to provide such equipment or to exercise such skill that is relied on as a basis of liability for loss or damage the onus of establishing such breach is no doubt on the person alleging the breach. But when for the purpose of defeating a cargo owner's claim based on the breach of the shipowner's obligation under Article III, Rule 2, to properly and carefully carry and care for the cargo, which is to be inferred from its delivery in a damaged condition, the shipowner, in leading evidence to show that the loss was caused by perils of the sea, incidentally establishes, whether directly or inferentially, that the cause of the loss was one that could have been guarded against by the

1967

N. M. PATERSON & SONS LTD. v. CARGILL GRAIN CO. LTD. et al

Thurlow J.

exercise of reasonable care there is, in my opinion, no need of anything further from the cargo owner to discharge the onus of proving a *prima facie* case that the loss was caused by negligence on the part of those for whose acts or defaults the shipowner is responsible. The effect in such a case will therefore be the same as that achieved by what may I think be regarded as the more direct approach used in the *Bayliss (supra)* case since it will be for the shipowner to rebut if he can the *prima facie* case so established. On the facts of the present case, in my opinion, the same result is reached whether the matter is considered by applying the test of the *Bayliss (supra)* case or by applying the reasoning of Taschereau J. in the *Keystone (supra)* case or that of Lord Pearson in *Albacora S.R.L. v. Wescott & Laurance Line, Ltd.*[9] when he said at page 64:

> . . . There is no express provision, and in my opinion there is no implied provision in the Hague Rules that the shipowner is debarred as a matter of law from relying on an exception unless he proves absence of negligence on his part. But he does have to prove that the damage was caused by an excepted peril or excepted cause, and in order to do that he may in a particular case have to give evidence excluding causation by his negligence.

The exception relied on in the *Albacora (supra)* case was that provided by Article IV, Rule 2(m) in respect of loss by inherent vice of the cargo but the principle expressed appears to be of general application. As applied to a claim for immunity under Article IV Rule 2(c) in respect of loss by perils of the sea it seems to me to follow from the general principle that if the evidence led to prove the exception shows a *prima facie* case of negligence on the part of the shipowner or those for whom he is responsible he will fail unless he gives evidence excluding causation by such negligence. On the other hand if the evidence led to prove the exception does not show a *prima facie* case of negligence the cargo owner will fail if he does not prove it. The *Keystone (supra)* case appears to me to have been one of the latter class.

In contrast with the situation in that case the evidence adduced by the appellant in the present case, in my view, gave rise to an inference of negligence for which it was responsible and as this was not rebutted the appellant was properly held liable for the loss.

In my opinion the appeal should be dismissed with costs.

[9] [1966] 2 Lloyd's Rep. 53.