

1938
Sept. 29 & 30.
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1939
March 9.

ON APPEAL FROM THE QUEBEC ADMIRALTY DISTRICT

BETWEEN:

DOMINION TANKERS LIMITED }
(DEFENDANT)

APPELLANT;

AND

SHELL PETROLEUM COMPANY }
OF CANADA LIMITED (PLAIN- }
TIFF)

RESPONDENT.

Shipping—Appeal from District Judge in Admiralty—Contract for carriage of goods by water—Loss of cargo—Onus of proof—Water Carriage of Goods Act, R.S.C., 1927, c. 207—Appeal allowed.

Respondent entered into a contract with appellant for the carriage of a cargo of gasoline from Montreal, P.Q., to Sydney, N.S. During the course of the voyage appellant's ship, with the gasoline on board, stranded on the south shore of the St. Lawrence river. The ship suffered serious damage and a large part of the cargo of gasoline was lost. The respondent contended that most of the lost cargo was pumped overboard in order to lighten the ship. The appellant contended that the loss of cargo was due entirely to the stranding of the ship which seriously damaged her hull, causing the oil to leak from the tanks.

Held: That the appellant's explanation of the loss of cargo was a reasonable one and consistent with the occurrence of the stranding and the severe damage done to the ship.

2. That the onus on a person relying on an exception relieving him from liability does not go so far as to make him prove all the circumstances which could explain an obscure situation.

Judgment of Demers D.J.A., for the Quebec Admiralty District [(1938) Ex. C.R. 338] reversed.

APPEAL from the decision of the District Judge in Admiralty for the Quebec Admiralty District, allowing plaintiff's action for damages for loss of cargo.

The appeal was heard before the Honourable Mr. Justice Maclean, President of the Court, at Ottawa.

R. C. Holden, K.C. and *F. Wilkinson, K.C.* for appellant.

C. Russell McKenzie, K.C. for respondent.

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

THE PRESIDENT, now (March 9, 1939) delivered the following judgment:

This is an appeal from a judgment of Mr. Justice Demers, District Judge in Admiralty for the Quebec Admiralty District.

The preliminary facts to be stated are the following. On August 3, 1935, about 550,000 imperial gallons of gasoline were shipped at Montreal on board the oil tank steamer *John A. McDougald* (hereafter to be referred to as *the McDougald*), owned by the defendant, for carriage to the Port of Sydney, N.S. The *McDougald* was between 250 and 260 feet in length; her breadth and tonnage does not seem to have been anywhere stated. She had ten oil tanks, five on the port side, and the same number on the starboard side, numbered 1 to 5 on each side, commencing from the bow. Each tank if filled would hold between 70,000 and 80,000 gallons. The contract for carriage was subject to all the terms and provisions of, and all the exemptions from liability contained in, the Water-Carriage of Goods Act, Revised Statutes of Canada, 1927, Chap. 207. After departing from the Port of Montreal on August 3, 1935, and during the course of her voyage to Sydney, and on the same day, the *McDougald*, at about 11.19 p.m., while going at full speed, stranded on the south shore of the River St. Lawrence, near St. Antoine, in the Province of Quebec, sustaining serious bottom damage, and other damage as well, which, it is conceded, caused some loss of cargo. The plaintiff contends that a portion of the total cargo loss was not attributable to any damage caused the ship by the stranding. On the night of August 4th, at 10.35 p.m., at high tide, the *McDougald* came afloat, there having been two low tides while she was stranded. She then proceeded back to Montreal where her cargo, such as

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remained, was discharged and delivered to the plaintiff. The plaintiff alleges that only 188,000 gallons of the original cargo were delivered back to it, leaving a balance of 359,000 gallons unaccounted for.

The learned trial judge decided that the ship was in all respects seaworthy, properly manned, equipped, and supplied, and that the stranding of the ship was due to faults or errors in the navigation of the ship by a pilot, and that under the contract of carriage, and by law, the defendant was exempt from liability for any loss of cargo shown to be attributable to the stranding. He found that the loss of cargo from tanks Nos. 1, 2 and 3 on the port side of the ship was in consequence of the stranding, and that under the contract of carriage the defendant was not responsible for any loss of cargo from those three tanks. He also found that the stranding might account for the loss of 300 gallons from each of the other seven tanks, 2,100 gallons altogether, and that altogether the loss of 174,543 gallons had been accounted for by the defendant. As to the balance of the cargo, less that delivered back to the plaintiff at Montreal, he found that the defendant had not satisfied him that the loss was without fault on its part, and he found the defendant liable in the sum of \$21,191.36 for such loss, and it is that finding that is the subject-matter of this appeal.

The defendant counterclaimed against the plaintiff for the proper proportion of losses, charges and expenses incurred and paid by it, as a result of the stranding, in general average, in the sum of \$1,827.65; this claim was allowed by the trial judge and there was no appeal therefrom. The appeal here therefore relates to the remaining portion of the original cargo after deducting 174,543 gallons, and also the quantity delivered back to the plaintiff at Montreal, the loss of which, it was held by the trial judge, the defendant had not satisfactorily accounted for.

It might be desirable to state the quantities of gasoline, loaded in each tank at Montreal, the quantity there discharged from each tank on the return of the *McDougald* to Montreal, and the quantities estimated to be in each tank while the ship was still stranded at St. Antoine. The latter is estimated by taking what is called the "ullage," that is, the measurement in feet and inches between the top of the tank and the surface of the oil cargo in any

given tank. The ullage taken at St. Antoine, which I am about to state, was later converted into gallons. There was put in evidence a document showing the loading of gasoline, in gallons, at Montreal, by port and starboard tanks, and in the same way the quantities discharged therefrom on the return of the ship to Montreal, and the results of the ullage taken at St. Antoine at 4.30 p.m. on August 4th. That is as follows:

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	Montreal (loading)	St. Antoine (ullage)	Montreal (discharge)
Port Tank No. 1	32,591	12,404	
2	70,786	13,196	
3	70,858	14,816	
4	70,897	30,927	30,565
5	30,138	31,451	23,912
	<hr/>	<hr/>	<hr/>
	275,270	102,794	54,480
Starboard			
Tank No. 1	32,393	31,760	5,947
2	70,786	27,702	31,413
3	70,996	29,642	31,007
4	70,877	33,641	44,750
5	30,975	33,129	68,053
	<hr/>	<hr/>	<hr/>
	276,027	155,874	181,179
	551,297	268,668	235,659

The same document shows the water found in seven tanks, on the *McDougald's* return to Montreal, which is regarded by the defendant as an element of importance in its case, and which water the other side suggest got there owing to the negligence of the servants of the defendant. The particulars are as follows:

Port No. 1	Starboard No. 1.. . . .	4,081
2	2.. . . .	9,174
3	3.. . . .	7,789
4	4.. . . .	8,603
5	5.. . . .	8,658
	<hr/>	<hr/>
	4,660	43,065

On her return to Montreal the *McDougald* was surveyed by a Mr. Tait, Acting Surveyor to Lloyd's Register of Shipping, in the Vicker's Dry Dock, and later he supervised the repairs made to the ship on behalf of the owners. He stated that thirteen plates on the port side of the bottom were renewed, five were removed and then faired and replaced, and two were faired in place. "Faired" means that the plates are rolled and straightened out to their original shape. The damage on the starboard side

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of the bottom, Tait stated, extended practically the full length of the ship, and consequently throughout all the five tanks on the starboard side. Sixteen plates were renewed, four were removed and then faired and replaced, and five were faired in place. Altogether forty-five plates on the bottom of the ship were damaged. Nineteen frames and bulkheads on the port side, and thirty-nine on the starboard side, had to be dealt with, and approximately 3,000 rivets were started, excluding, as I understand it, the rivets in the plates that had to be removed. The ship's machinery also suffered some damage, the whole engine being thrown out of line. He stated that many seams and butts of plates which were not holed were distinctly opened up. He stated also that seams and butts would open more when the ship lay on the rocks, and under strain, than when she was in dry dock and lying evenly on her keel. The cost of repairs to the ship was around \$54,000. There was put in evidence a copy of a report made by Tait, as Acting Surveyor to Lloyd's Register, wherein are found the details of the damage disclosed by his survey of the *McDougald*, and what repairs he recommended should be done.

The question at issue being one largely of fact I must review, as briefly as possible, such portions of the evidence as would seem to bear upon the principal finding of the learned trial judge, and which constitutes the real issue here for decision. That issue might be stated by saying that it is contended on behalf of the plaintiff that the officers or crew of the *McDougald* must have pumped the lost cargo (outside the three port tanks) overboard, in order to lighten her and thus facilitate her floating at high tide, and that the water got into the tanks because the valves had been opened at low tide and not closed, and that the water came in through the pipes on a rising tide. The defendant denies this, and its submission is that the loss of cargo was owing entirely to the stranding of the ship, which seriously damaged her hull, on both the port and starboard sides, so as to cause the cargo to leak from the tanks to the degree and extent which represents that part of the cargo not delivered back to the plaintiff.

First, I might say that when the ship stranded she was going at full speed. The shore where the stranding occurred was more or less a rocky one, and I was led to

believe that where stranded the ship lay on a nest of rocks or boulders, at least to a considerable extent of her length. This, it was said, would, particularly during the two low tides following the stranding, cause a strain upon the bottom plates, the frames and bulkheads, the rivets, and other portions of the ship, because at low tide the ship would be pretty well out of water.

The master of the ship stated there was never any voluntary discharge of cargo, and that the pumps or valves were never used for that purpose, but he said that cargo was transferred on the night of August 4th, between 9.05 p.m. and 10.35 p.m., from No. 1 starboard tank to No. 5 starboard tank, and from No. 5 port to No. 4 starboard. The transfer from No. 5 port to No. 4 starboard was to offset a port list, and the transfer from No. 1 starboard to No. 5 starboard was to lighten the ship forward. He stated also that on the evening of the day the cargo was discharged at Montreal the ship was on an even keel with water ballast, but the next morning it was found she had a starboard list, indicating leaking on the starboard side. The master under cross-examination used the words "slight leak" once or twice and the trial judge comments upon this, but the sense of the evidence of the master as a whole is quite obvious; he makes it quite plain that in his opinion the cargo shortage leaked from the ship owing to the damage caused the hull by the stranding, and he could not otherwise account for the loss of cargo, that is, from the seven tanks.

The transfer of gasoline from No. 1 starboard to No. 5 starboard, and from No. 5 port to No. 4, starboard, appears to have been decided upon at a conference which took place on the *McDougald* in the late afternoon of the 4th between the master of the ship, Mr. Roberts of the defendant company, Mr. Drake, the surveyor of the cargo underwriters, and Mr. Solery, the defendant's marine superintendent. The master states that Mr. Drake was on the *McDougald* when the pumping began and that he was aboard when the ship floated and there is no evidence to the contrary, but if the master were in error as to this it matters not. That this transfer of cargo should be made was decided upon at the conference, no doubt hoping that it might assist greatly in floating the ship at the next high tide, when in fact she did float off the strand.

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The chief engineer of the *McDougald*, Wells, was in charge of the cargo pumps, which are operated only under his direction, and he stated that just before the ship came off, the cargo had been transferred from two tanks to two other tanks, as has already been explained. The valves, he said, were never opened to allow cargo to go overboard, to lighten the ship. Dick, the first mate, stated that he and the master took the ullage of the tanks in the afternoon of the day following the stranding and they found port tanks Nos. 1, 2 and 3 away down and the gasoline almost gone, and in the remaining tanks the cargo was going down a little in some cases, and considerably in others. Dick transferred the cargo from No. 1 starboard to No. 5 starboard, and from No. 5 port to No. 4 starboard before the ship floated, and other than this, he stated, there was no pumping or dealing with the cargo from the time the ship stranded until she floated. He confirmed the evidence of the master that after the discharge of cargo at Montreal the tanks were dry, other than port tanks Nos. 1, 2 and 3, and the ship was on an even keel, but the following morning she had a starboard list and that, he said, would be due to water getting in on the starboard side during the night; I entertain no doubt but that there was such a list, and it is difficult to see what other explanation there could be of it than that given by Dick.

Fontaine, Canadian Government Steamship Inspector for the District of Montreal, attended the official survey of the *McDougald* at the Vicker's Dry Dock on August 9th. He made a careful examination of the ship and stated that the damage to the ship was very severe, and as set forth in the joint report of the surveyors. From the damage he saw on the ship it was possible, he said, that leakage could have occurred from all the tanks, that is, those other than Nos. 1, 2 and 3 on the port side. He saw evidence of started seams and rivets in the ship's bottom and said that the ship was leaking on the starboard side as well as on the port side. If a ship were stranded on rocks, and unevenly supported, she would strain, he said, and this would start the seams and butts.

Captain Solery, the operating manager of the vessels of the defendant company, went to the place of stranding and was on the *McDougald* during the afternoon of the

4th, and he stated that he gave no orders that any of the cargo should be pumped overboard. In the afternoon of that day, after a discussion on board the *McDougald* between the master, Mr. Drake representing the London Salvage Association, and Mr. Roberts and himself of the defendant company, it was decided to transfer cargo from No. 1 starboard tank and No. 4 port tank, as already explained. Late in the afternoon he went on board the tug *Lord Strathcona*, which was standing by the *McDougald*, but he returned about 9.30 p.m. to the *McDougald*. He confirmed other evidence as to the damage to the ship, which he said extended throughout the whole length of the ship on the starboard side. He said that if a ship containing a liquid cargo were grounded on rocks, there would be a dislocation and breaking of plates because the ship would be under strain, and the cargo to some extent would leak out. If the ship were floated, or put on an even keel in, say, a dry dock, the plates would have a tendency to go back to their original position, though not completely, and leakages would close up to a certain extent. He said that after seeing the plates and rivets at the time of inspection in the dry dock at Montreal it was easy to see that there were leaks, and which had been worse at some time. There were, he said, thousands of rivets on the starboard side that were damaged. He said he saw scores of rivets unfastened and by tapping them he could see they were bad, and there would, he said, be a leak wherever there was a loose rivet.

In rebuttal the plaintiff called two witnesses, one being a Mr. Allan, but his evidence does not appear to afford any real assistance to the issue here to be determined. The other witness was Mr. Hayes, a marine surveyor, practising in Montreal. This witness was permitted to put in evidence a report of his survey of the *McDougald*, made on behalf of the cargo underwriters, on the ship's return to Montreal. The reception of this report was objected to by counsel for the defendant. I do not propose referring to anything in this report because its reception, in my opinion, cannot possibly be supported upon any conceivable ground. This report is easily distinguishable from the report of Tait, earlier referred to. Hayes testified that he was at the plaintiff's dock when the *McDougald* arrived, representing the cargo underwriters.

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After the cargo was discharged, and while the ship was still at the plaintiff's dock, he saw no indication of any leakage of the tanks, that is the seven tanks, by looking through the tank lids on the deck. His opinion was that the leakage would be practically nothing. In answer to a question put by counsel for the plaintiff, this witness stated that the only explanation for the ship floating when she did, and not at the second high tide, was that "some of the cargo must have been taken out of the ship." The minor leaks he saw would account only for two or three hundred gallons for which the trial judge made an allowance of 300 gallons for each of the seven tanks. Hayes' theory as to how water got into the tanks was that when the ship suddenly floated, the "valves along the starboard side must have been opened, or in some way the gasoline on the starboard side must have been allowed to run to the damaged port number 2 and 3 tanks." If these valves, he said, were left open at low water the gasoline would naturally run to the lowest point of the damaged tanks on the port side, then, with a rising tide, if the valves were not shut immediately, water would back through the pipes and enter all the tanks. The suggestion sought to be conveyed was that the ship's officers permitted gasoline to escape out of the tanks at low tide and forgot to close the valves before high tide came along, and that is how Hayes accounts for the 43,000 gallons of water found in the tanks, and why the ship floated when she did. If this theory of Hayes is correct then the master, the first mate and the chief engineer, deliberately perjured themselves, though the trial judge makes no such suggestion, and I do not think he meant to say that he did not believe their evidence as to specific occurrences and facts.

The evidence clearly establishes that the damage to the hull of the ship was very substantial, and that the injury extended to the bottom of the ship on both sides, the full length of the ship. The extent of the repairs, considered necessary by competent persons, reveals the extent of the damage and the likelihood of the ship leaking throughout her whole length. It would be expected, I should think, that a ship of that size lying to a considerable extent on rocks, during two low tides, would be under such strain as would open butts and seams and start rivets, and in fact it is plain that this occurred in varying degrees no

doubt. The master and the first mate took the ullage on the afternoon of August 4, while the ship was still stranded, and they found the gasoline in all the seven tanks was leaking out, and there is no reason for doubting this evidence; and the subsequent survey of the ship at Montreal shows that this was not only possible but probable, and other facts lend support to the contention that the ship was leaking more or less on the starboard side. The master, the first mate, and the chief engineer swear that no cargo was pumped overboard, or in any way jettisoned, at any time between the stranding and the floating of the ship, and I cannot perceive of any reason why their evidence should be doubted. I, of course, did not have the opportunity of hearing those witnesses give their testimony, but I have read the evidence of each several times, and carefully, and I must say I am impressed with the same. The seemingly contradictory features of the master's evidence, and that of the first mate, which were emphasized by the plaintiff's counsel, and which were commented upon by the trial judge, are of a character that rather confirms me in my impression as to the reliability of those witnesses. The master says the cargo deficiency, outside of the three port tanks, was attributable to the damage to the ship. That is the true meaning of his testimony. Moreover, the trial judge does not even remotely suggest that the evidence of the master, the first mate, or the chief engineer, should be disbelieved. What motive could there be for those officers of the ship perjuring themselves? If the master sacrificed as much of the cargo as he thought would release and save his ship, why should he hesitate to report this, or why should he conceal it? Such sacrifice of cargo would be considered a general average loss. The suggestion of Hayes that cargo was pumped overboard for this purpose cannot be supported without doing violence to all the evidence and circumstances of the case. And, I think, it is utterly improbable.

An important circumstance, I think, is the conference or discussion which took place on the *McDougald*, on the afternoon of the 4th, between the master of the ship, Mr. Roberts, Mr. Drake and Mr. Solery, when it was agreed that the ship should before the next high tide be lightened forward, and that some cargo should be transferred from No. 1 starboard tank to No. 5 starboard tank, and from

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No. 5 port tank to No. 4 starboard tank. This would lighten the ship forward and correct any port list, and probably would give her a starboard list, which, in the circumstances, might not be an undesirable thing. And the operation was successful, without, so far as I can make out, any aid from the salvage tug which was standing by. That this transfer of cargo was made cannot be seriously doubted, and it worked out as expected. Now, is it likely that these persons, all having some interest in the situation, and who, presumably, had investigated the cargo situation, would have decided upon this course, if it did not hold a promise of success, or if they thought that cargo had been or would be sacrificed during the last low tide, to aid the floating of the ship? And none of these persons apparently made any suggestion that a sacrifice of cargo should be made. A sacrifice of cargo might, wisely, have been made, but upon the evidence there is no reason for suspecting that it was made. To say that this was done is purely an unsupported theory, and in my opinion one utterly untenable upon the evidence.

I have already explained that Hayes testified that the cargo deficiency could be explained only on the ground that some cargo must have been pumped out, and then he put forward a "theory" as to how the water got into the tanks, particularly on the starboard side, which theory I need not repeat. Hayes was giving expert or opinion evidence upon this point. He did not see the ship while she was stranded. He was the representative of the cargo underwriters. In the circumstances, Hayes should not, I think, have been called as an expert witness. And I agree with defendant's counsel, after a careful study of the evidence of Hayes, that he appears to have been a witness giving evidence on behalf of the cargo underwriters rather than a witness called to assist the court, and, being called as an expert witness, he was presumed to be a witness to assist the court, and not either of the parties. To say that the officers of the *McDougald* pumped some cargo overboard at low tide, and then were so careless as to leave the valves open and allow water to enter the tanks through the pipes on the rising tide, to fill up some of the cargo space allegedly vacated for the purpose of lightening the ship, is so much of theory, and so speculative, that I decline to accept it, in the face of all the other evidence.

Then it is suggested that other members of the ship's officers or crew might have been called, and who might have been able to explain the cargo deficiency. The key witnesses were called and I do not think it was imperative that others should have been called. I do not think it is proper, on this ground, to suspect the veracity of the witnesses called, and whose testimony seems to have been given in, I think, a quite satisfactory manner, and which evidence would seem to be supported by the facts and circumstances of the case.

Upon whom lies the burden of proof in a case of this kind is always more or less difficult. Are there facts in evidence here which, if unanswered, would justify men of ordinary reason and fairness in affirming the contention of the defendant? I think so. All the circumstances of the case, had there been no evidence at all, would lead, I think, to the conclusion that the loss of cargo was due to the damage caused by the stranding, which was not the fault of the owners of the ship. And there is practically no evidence against this. I do not think it is necessary for the carrier, in order to claim protection, to show the exact cause of the loss of cargo, provided he proves it was not due to his negligence. It was said by Roche J.—who had an extensive experience in cases of this kind—in the case of *City of Baroda v. Hall Line Ld.* (1), that the onus on a person relying on an exception relieving him from liability did not go so far as to make him prove all the circumstances which could explain an obscure situation. The defendant has given a reasonable explanation of the loss of cargo, and I see no grounds for rejecting it. This explanation is consistent with the happening of the stranding, and the severe damage done the ship. If I reject the theory of Hayes, which I do, then I must accept the explanation of the loss of cargo given by the defendant's witnesses. I cannot conceive of any other explanation of the loss of cargo. The loss of cargo is not alleged to be attributable to negligence, and in fact the plaintiff did not make negligence a part of its case, although the evidence of Hayes does suggest some negligence as to the presence of water found in the tanks, but not otherwise. My conclusion is that the defendant has satisfactorily established that the loss of cargo was due to the damage caused

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the ship, by the stranding. With great respect, I feel compelled to differ from the conclusion reached by the learned trial judge, and I am of the opinion that the appeal should be allowed with costs here and below.

It just occurs to me that I have designated the parties in this appeal as plaintiff and defendant respectively, as in the court below, and not as appellant and respondent, but with this explanation that need not occasion any confusion.

Appeal allowed.