
Eisenerz-G.m.b.H. (*Plaintiff*) *v.* **Federal Commerce & Navigation Co. Ltd et al** (*Defendants*)

Noël J. in Admiralty—Montreal, December 2, 3, 4, 1969; Ottawa, January 13, 1970.

Shipping—Evidence—Ship going aground off Quebec—Cargo unloaded and re-loaded by general average adjuster—Negligent damage to cargo—Carrier's liability—Whether adjuster representative of cargo as well as carrier—Exclusions in charterparty—Pilot's error—Admissibility of report of inquiry finding pilot negligent.

Navigational error by a pilot aboard the *S.S. Oak Hill* caused her to ground off Quebec on a voyage to Genoa. The ship was chartered to plaintiff for the voyage by *F* who had time chartered her from *H*, the ship's owner. Plaintiff was owner of part of the ship's cargo, *viz* pig iron of two different qualities which was stowed in separate holds as required by the charterparty. Plaintiff also held two clear bills of lading for the pig iron signed by the ship's master. In order to repair the ship following the grounding, her cargo was unloaded and then re-loaded under the supervision of a general average adjuster who negligently allowed plaintiff's pig iron of both qualities and pig iron of a third quality belonging to another shipper to be mixed indiscriminately. The ship's master who knew that pig iron of different qualities must be kept separate did not convey this information to the adjuster. Plaintiff sustained heavy loss from breakage and mixing of its pig iron and sued

F and *H* for damages. The charterparty provided for general average to be settled according to the York-Antwerp Rules 1959.

Held, while defendants' liability for the grounding of the vessel was excluded by the charterparty defendants were liable for the damage suffered by plaintiff after the grounding. They had failed their duty as carrier with respect to safe custody of the cargo. The adjuster in directing the unloading and re-loading after the ship grounded was acting as agent only of the carrier and not of the cargo owners as well so as to make them equally responsible for the adjuster's negligence.

Plaintiff's loss, even if it fell within Rule XII of the York-Antwerp Rules, resulted from the joint fault of the surveyor and ship's captain, for which defendants as carrier were liable. Even if plaintiff's claim were for general average under the York-Antwerp Rules instead of an action for damages against the carrier, plaintiff's remedy would be preserved by Rule D of the Rules.

Goulandris Brothers Ltd v. B. Goldman & Sons Ltd [1958] 1 Q.B. 74; *The Mary Thomas* [1894] P. 108; *Wavertree Sailing Ship Co. v. Love* [1894] A.C. 373; *Chandris v. Argo Insurance Co.* [1963] 2 Ll.L.R. 65, referred to.

Held also, the report of an officer appointed under the *Canada Shipping Act* to enquire into the pilot's conduct was admissible as *prima facie* evidence.

ACTION for damages.

W. Tetley, Q.C., for plaintiff.

L. S. Reycraft, Q.C., for defendants.

NOËL J.—The plaintiff, a corporation located in Frankfurt, Germany, claims from two Canadian corporations payment of the sum of $180,000 in breach of contract, delict and tort, resulting from the loss of and damage to cargoes of pig iron carried on board the *S.S. Oak Hill* from Sorel, P.Q., to Genoa, Italy, under bills of lading and charter-party. The contracts of carriage were allegedly breached off Quebec City, P.Q., when the carrying vessel, the *S.S. Oak Hill* went aground on August 26, 1962, and the cargoes were, during the process of unloading and loading necessary in order to repair the vessel, damaged, lost and mixed with other cargo and found to be so damaged and mixed upon delivery in Genoa, Italy.

Halifax Overseas Freighters Limited, one of the defendants herein, are the owners of the vessel *S.S. Oak Hill* which they time chartered (Exhibit D-1) to Federal Commerce & Navigation Company Limited (at times hereafter called Federal), the other defendant, who in turn chartered the vessel to plaintiff under a voyage charter (Exhibit P-3)[1]. Federal also issued two bills of lading (Exhibits P-1 and P-2) on board, both of which, however, were signed by the master of the vessel during both the time and voyage charter and the charterer and the owners are bound by the bill of lading, it being a signed master's bill of lading.

[1] The voyage charter (P-3) was actually in the name of a company called Montan Transport G.m.b.H. who are merely brokers and it was agreed by the parties that this firm was at the time acting for plaintiff (cf. Exhibit AD-3).

The above damage and mixture of the pig iron carried on board the *S.S. Oak Hill* occurred in the following circumstances.

The loading of the two types of pig iron, F-1 and S-100, took place on August 24, 1962, at Sorel, P.Q., when under bill of lading No. 1 (Exhibit P-1), 756.2 G.T. of F-1 were loaded in No. 3A and 5 holds of the vessel, and 1,000.2 G.T. of S-100 were loaded in No. 3 hold and when under bill of lading No. 2 (Exhibit P-2) 2,000 of G.T. of F-1 were loaded in Nos. 1, 3A and 5 holds and 1,000 G.T. of S-100, were loaded in No. 3 hold.

This pig iron was apparently received in good order and condition from the shipper, Quebec Iron and Titanium Corporation, of Sorel, P.Q., which both defendants, according to plaintiff, jointly and severally undertook and contracted to carry, care for and deliver in like good order and condition to Genoa in accordance with the bills of lading issued herein together with the charterparty (Exhibit P-3) dated at Hamburg, Germany, on July 17, 1962.

Prior to the loading of the pig iron F-1 and S-100 at Sorel, on August 24, 1962, the vessel had[2] taken on board at Tonawanda, New York, 4,503.9106 tons of hematite pig iron after which the vessel proceeded to Milwaukee where it picked up a cargo of machinery to be shipped to Kingston, Jamaica, and oak timbers, the latter for the purpose of securing the heavy machinery in place in the hold.

It is common ground between the parties that it was understood, well known and agreed, that the pig iron of different qualities must be kept separate and the charter-party, at paragraphs 28 and 49, specifically points this out. I should add that the three different qualities of pig iron involved in this shipment all resemble each other. They were all uniform in size, about 20 inches long, semi-circular in shape, each individual bar weighing in the neighbourhood of 45 to 50 pounds. Each quality of pig iron is used in the fabrication of a specific type of steel or castings and once mixed, cannot economically be separated. A specific type of pig iron only can be used in casting work although the requirements are less in sheet making. F-1 is a high carbon iron whereas S-100 is a high silicose grade.

After the loading at Sorel, P.Q., on August 24, 1962, the vessel went aground at Quebec City, opposite Lauzon, P.Q., a few minutes after taking on a pilot. Approximately one and a half hours later, the vessel got off with a rising tide without the assistance of tugs. It then proceeded to a place called Wolfe's Cove, on the Quebec City side of the river, where the cargo of machinery and timbers was discharged and then went across the river to Levis, P.Q., where the greater part of the cargo of pig iron was discharged. The vessel was then repaired at a local dry-dock, the cargo was reloaded on board and the vessel then proceeded to Genoa where the breaking, mixing and shortage already referred to was noted. It was indeed found at Genoa that not only was part of the cargo of S-100 mixed with F-1 in various holds of the vessel, but also that the hematite for another consignee loaded prior to the loading at Sorel was also mixed with plaintiff's pig iron.

[2] Under a voyage charter to Associated Metals and Minerals.

Plaintiff submits that defendants have thus breached their obligation under contract and law to keep the said cargoes of pig iron separate in separate holds and undamaged from receipt at Sorel to delivery at Genoa, thus causing damages in the amount of $180,000.

The plaintiff further alleges that the defendants, prior to or upon the departure of the *S.S. Oak Hill* from Sorel on this voyage and at all its various stages, did not exercise due diligence to make the vessel in all respects seaworthy and fit to carry the shipment and that the ship was at the time of her departure unseaworthy and, therefore, defendants are not entitled to any of the rights or immunities of which they might otherwise have the benefit by law or contract. The plaintiff adds that without affecting the generality of the foregoing, the *S.S. Oak Hill* before, at the beginning and after the voyage, was beneath her marks and was unseaworthy which, it says, directly contributed to the loss.

As common carriers by water for hire, the defendants had, according to plaintiffs, failed to safely carry, stow, discharge, care for and deliver its cargo and to fulfil their obligations and undertaking as by agreement and law required and they are, therefore, jointly and severally beholden and bound in breach of contract, delict and tort, to pay and satisfy to plaintiff the damages thus caused to the extent and sum of $180,000.

The defendants admit that the *S.S. Oak Hill* stranded in the St. Lawrence River, near Quebec City, P.Q., on August 25, 1962, at about 10:30 p.m. but state that it was due to the act, neglect or default of the pilot, master or other servants of the carrier in the navigation of the vessel. They indeed take the position that if the pig iron suffered any loss or damage or inter-mixture whilst in their custody (which they deny) this loss, damage and inter-mixture was caused in whole or in part by the stranding of the *S.S. Oak Hill* near Quebec City, due to the act, neglect or default of the pilot, master or servants of the carrier in the navigation of the vessel, for which the defendants say they are not responsible under paragraph 20 of the charter-party (Exhibit P-3) or under the Canadian *Water Carriage of Goods Act,* R.S.C. 1952, c. 291, or the U.S. *Carriage of Goods by Sea Act* 1936, whichever may be applicable.

The defendants further plead that if the pig iron suffered any loss or damage or intermixture whilst in their care and custody, it was caused in whole or in part in the acts of handling, discharging, storing, reloading and stowing the pig iron subsequent to the stranding, which acts, they say, were not carried out by the defendants but by or on the instructions of the general average adjuster and/or its agents, appointed on behalf of the ship owner and cargo and all other interests, and for those acts the defendants say they are not responsible. They plead paragraph 13 of the charter-party (Exhibit P-3) which provides for general average to be settled according to the York-Antwerp Rules 1950 and particularly rule XII of these rules. Defendants therefore pray for the dismissal of this action.

The plaintiff, on the other hand, denies that the defendants can plead general average in the present action, adding that while general average has been denied and that it continues to deny it, plaintiff nevertheless prays *acte* of the fact that defendants, having admitted and claimed general average, have admitted the validity and the quantum of plaintiff's claim, the whole as more fully appears from the general average statement, particularly at page 91, the original of which statement it calls defendants to produce.

As a result of these admissions, which have cut down considerably the length of this trial it therefore now is agreed that the plaintiff is the owner of the cargo of S-100 and F-1 pig iron claimed herein; the contract comprises, taken together, the charter-party (Exhibit P-3) and the two bills of lading (Exhibits P-1 and P-2); the plaintiff is the holder in due course of the bills of lading and is one of the contracting parties to the charter-party (Exhibit P-3) and it suffered the loss or damage claimed for in the present action.

[His Lordship referred to admissions of the parties as to the issues and proceeded as follows:]

The three following questions now remain to be answered:

(1) Was the vessel seaworthy at her departure from Sorel or had the defendants exercised due diligence to make the vessel in all respects seaworthy and fit to carry the shipment prior to her departure from Sorel and, if not, was this the cause of the loss or damage;

(2) Was the grounding in Quebec City on August 25, 1962, the result of an error in navigation on the part of the pilot, master or officers of the vessel; and

(3) Was the mixture, breakage and shortage which occurred during the enforced discharge at Quebec, carried out on the instructions and supervision of the general average adjusters (for whose acts defendants claim they are not responsible) a matter for which all interests are responsible and for which they should contribute under Rule XII of the York-Antwerp Rules of 1950 which reads as follows:

Rule XII

Damage to cargo in discharging, etc.

Damage to or loss of cargo, fuel or stores caused in the act of handling, storing, reloading and stowing shall be made good as general average, when and only when the cost of those measures respectively is admitted as general average.

Rule D of the York-Antwerp Rules, *British Shipping Laws,* volume 7, states that:

> Rule D—Rights to contribution in general average shall not be affected, though the event which gave rise to the sacrifice or expenditure may have been due to the fault of one of the parties to the adventure; but this shall not prejudice any remedies which may be open against that party for such fault.

I will first deal with the question of seaworthiness of the vessel. The plaintiff submits that the *Water Carriage of Goods Act,* R.S.C. 1952, c. 291 does not apply to the present situation as the charterer here being the holder of the bills of lading, the charterparty (as decided in *The Sonia II*[3] and *The Northern*[4]) is the contract and the bills of lading are merely receipts. This, of course, would mean that the carrier's obligation is not limited to merely exercising due diligence to make the ship seaworthy, but must supply a seaworthy ship. The carrier also would not benefit from the rights and immunities provided under the Act (paragraph (2) of article IV) unless such rights or immunities are contained in the charter-party. For the purposes of this case (and without deciding whether the bills of lading in this case are mere receipts or not) it is sufficient to say that the charter-party does, however, contain in paragraph 20 the following immunity:

> 20. . . . damage . . . from any act, neglect, default or error in judgment whatsoever of the Pilot, Master, Crew or other servants of the Shipowners in the management and/or the navigation of the Steamer, and all and every other Dangers and Accidents of the Seas, Rivers and Canals of whatever nature and kind whatsoever, before and during the said voyage always excepted.

The only other difference, as already mentioned, is the obligation of the carrier to supply a seaworthy vessel, and this obligation of the owner can become material to the determination of the rights of the parties herein only if the damage to the cargo happened in consequence of the unseaworthiness.

This appears from a decision of the Supreme Court of Canada per Ritchie J. in *Western Canada S.S. Co. v. Can. Commercial Corp. et al*[5], as well as of this court in *N. M. Patterson and Sons Ltd v. Robin Hood Flour Mills Ltd*[6].

Although the charter-party, Exhibit P-3, invokes the "USA paramount clause as attached hereto" at clause 43, I cannot see how *Cogsa* (the *Carriage of Goods by Sea Act*) or the USA clause can apply to this case. This paramount clause was not, in fact, attached to the charter-party and even if it had been attached, this foreign law was not proven and, therefore, the law of Canada must govern this case or the law of the United States, if that governs, must be assumed to be the same as the Canadian law on this subject.

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[3] (1946) A.M.C. 90.
[4] (1936) A.M.C. 1296.
[5] [1960] S.C.R. 632 at 641.
[6] [1968] 1 Ex.C.R. 175 at 189.

If the *Water Carriage of Goods Act* does not govern the parties herein, then as the trial was heard in Quebec involving one Quebec located defendant, and the whole cause of action took place in this province, the rules set down in articles 1672, 1682 and 2407-2436 of the Quebec *Civil Code* could apply, cf. *Mannix Ltd. v. N. M. Patterson and Sons Ltd.*[7] I do not think, however, that it is necessary to go into the very involved question of determining which law applies when a carriage of goods is not governed by the *Water Carriage of Goods Act* and whether the above articles of the *Civil Code* would apply to such a situation or whether recourse should be had to the civil and maritime laws of England.

In view of clause 2 of the charter-party[8] which is in some respects similar to article 2423 C.C.[9] and in view of clauses 28[10], 29[11] and 49[12] of the charter-party, it appears clearly that the carrier here, in addition to having to carefully load, handle, stow, carry, keep, care for and discharge the goods carried, also had undertaken to insure that the qualities of pig iron would be kept properly separated from each other "at Owner's risk and expense and Owners remain fully responsible for any damages resulting from contamination".

Under clause 2 of the charter-party, Exhibit P-3, the defendants warranted that the vessel was "tight, staunch and strong and in every way was fitted for the voyage . . ." which counsel for the plaintiff submits is not only an obligation to show due diligence to make the vessel seaworthy, but a warranty or guaranty to supply a seaworthy ship. I do not believe that if the shipowner or carrier here is found deficient in not supplying a seaworthy ship, he would be liable for damage to cargo without any causal relation between the defect and the casualty. There is indeed considerable authority to the contrary in

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[7] [1965] 2 Ex.C.R. 107 at 113-114.

[8] That the said Ship being warranted tight, staunch, and strong, and in every way fitted for the voyage, shall after delivery of her outward cargo, proceed with all convenient speed to SOREL and there load always afloat in the customary manner, free of turn, when, where and as soon as ordered by Shipper's agent, a part Cargo of Pig Iron, 5,000 tons, 2% more or less at Owner's option, not exceeding what she can reasonably stow and carry over and above her Tackle, Apparel, Provisions and Furniture, and being so loaded, shall with all convenient speed proceed to one good and safe port WEST ITALY at Charterer's option and there deliver the same as customary, when, where, and as directed by Consignee, to whom written notice is to be given during office hours, 9 a.m. to 5 p.m. or Saturdays 9 a.m. to 1 p.m. of the Vessel being ready to discharge.

[9] The lessor is obliged to provide a vessel of the stipulated burthen, tight and staunch, furnished with all tackle and apparel necessary for the voyage and with a competent master and a sufficient number of persons of skill and ability to navigate her, and to keep her to the end of the voyage. The master is obliged to take on board a pilot, when by the law of the country one is required.

[10] It is understood that the following parcels of the aforementioned quantity are to be separated by holds at Owners' risk and expense: 2,000 tons, 2,000 tons and 1,000 tons.

[11] The cargo to be loaded and discharged free of expense to the vessel, trimming, however, to be for Owners' account.

[12] Owners have the liberty to complete with other lawful merchandise for own account via port or ports on or off the route. Such completion cargo to be kept properly separated from the Pig Iron at Owners' risk and expense, and Owners remain fully responsible for any damages resulting from contamination.

the case of an implied undertaking of seaworthiness and I do not see that it should be any different in the case of a warranty of staunchness such as here[13]. (cf. *Scrutton on Charterparties and Bills of Lading,* 17th Ed. pp. 80, 81 and 82). Carver *British Shipping Laws,* vol. 2, p. 89:

> Apart from the *Carriage of Goods by Sea Act,* 1924, every contract for the carriage of goods by sea or water is subject to an implied undertaking by the carrier to provide a seaworthy ship, unless such undertaking is expressly excluded.
>
> *Effect of unseaworthiness*
>
> The shipowner is responsible for loss or damage to the goods however caused, if the ship was not in a seaworthy condition when she commenced her voyage and if the loss would not have arisen but for the unseaworthiness. The goods owner must, in order to make the shipowner liable, establish both these facts and cannot recover for the damage merely on the ground that the ship was unseaworthy unless it is also shown that the loss or damage was caused by the unseaworthiness.

Considerable evidence was adduced by the plaintiff to establish that the *Oak Hill* was overloaded when it left Sorel on August 25, 1962, and that such overloading had caused or contributed to the grounding of the vessel in Quebec in the evening of the same day.

Evidence was also submitted by the defendants to establish that all precautions had been taken to properly load and stow the cargo of pig iron at Sorel and that the condition of the vessel had nothing whatsoever to do with the grounding.

[His Lordship reviewed the evidence on over-loading and proceeded:]

Now, although it would appear from both the drafts taken and recorded of this vessel in Sorel on August 25 and later in Quebec City and the tonnage on board, that this vessel was somewhat beyond its marks and overloaded, it does not appear from the evidence that the vessel was, in view of the hogging, unduly overloaded and thereby unseaworthy. The discrepancies between the deadweight indicated on Exhibit P-15 and the deadweight in Exhibit D-22 can, according to the assessor who assisted me in this case, Captain Roger Frégeau, be explained by the hogging and it does not necessarily mean that the vessel was overloaded to a very great extent. This is in accord with Captain Dalziel's[14] evidence (at p. 14) who clearly states that he was satisfied that the vessel was thoroughly seaworthy at the time and added that he had no reason "to doubt that she was unseaworthy for the

[13] MacCachlan on Merchant Shipping, tenth edition, p. 331, "This warranty of seaworthiness must, as we have seen, be satisfied when the ship sails on her voyage with the cargo on board and the effect of a breach of it is that the shipowner is liable for any loss or damage that happens to the cargo in consequence of the unseaworthiness, even though the immediate cause be a peril excepted by the contract of carriage."

[14] Capt. Dalziel was master of the *S.S. Oak Hill*—ED.

voyage that she was making" nor does it appear that this excess had anything to do with the grounding of the vessel that occurred on the evening of August 25 in Quebec City. Indeed, everything points to the grounding of this vessel being caused by an error of navigation of the vessel and if such is the situation, the condition of the vessel prior to its departure from Sorel the same day or at the time of grounding, becomes irrelevant in that such a condition had nothing to do with the casualty. It also follows, of course, that if such is the case, the carrier could not be held liable in view of the exception contained in its charter-party at clause 20 where the carrier is said not to be responsible for any damage caused by "an act, neglect, default or error in judgment whatsoever of the Pilot, Master, Crew or other Servants of the Shipowners in the management and/or the *navigation of the Steamer* (the emphasis is mine).

The defendants had the burden of establishing that the grounding had been caused by an error in navigation in order to benefit from this exception and the question is whether they have succeeded in doing so.

Captain Dalziel states in his evidence that he was at the top of the bridge ladder when pilot Brochu came on board and he says that the latter seemed to be quite normal. He then left the bridge around 22.25 hours, two or three minutes after the arrival of the pilot. While he was down in his room, the first thing he remembers was hearing a noise which told him that the vessel was grounding some place. He immediately rushed on deck and by the time he reached the bridge, the vessel had stopped and he says "the pilot was in a very agitated manner". The latter then told him that the anchors had worked loose and had gone out but that the vessel was not ashore. He then, he says, sent the third officer, the officer of the watch, forward adding that he (at p. 14 of his evidence):

> . . . knew perfectly well that the anchors could not have come loose, but by the noise of it, my experience told me different. But to satisfy the pilot, I sent the third officer forward and when he came back he told the pilot and myself that the anchors were complete where they were.

He then said that when his vessel came to rest, the Lauzon dry-dock was close to the portside and buoy 87½ (a flashing buoy) was on the starboard quarter. He did not take a fix, but the next day looking at a chart of the river and considering the position of the Lauzon dry-dock and the flashing buoy, the point of grounding was determined as being at 46.50 12 N. Lat. 71.9 6W Long. on a bank where at low tide (and at the time of grounding the tide was low) there was 25 feet of water. This, according to Captain Allard, the Quebec harbour master, was the only place in that vicinity where the vessel could ground, as it was the only place where there was 25 feet of water. The vessel went aground about 10.39 to 10.40 and refloated about three minutes past midnight. The captain then left the pilot in the wing of the bridge out of the road because he could see that he was not fit to take charge of the vessel.

Now although it is not possible to say exactly where the vessel touched the bank opposite the Lauzon shipyard, it does appear clear that as the vessel was going downstream, she had no business to be in the vicinity of

the bank or to be on the right hand side of the white flashing buoy 87½. The channel, indeed, was on the left side of this buoy and the vessel grounded on its right hand side at some considerable distance therefrom.

One must, I believe, from this, infer that whoever was on the bridge directing the vessel had committed a very serious error of navigation to have, on a clear night, so misdirected this ship as to ground her on the wrong side of the buoy and outside of the channel. This accident can, under these circumstances, be explained only by a serious error of navigation of the pilot who, at the time, was in charge of the vessel. It strikes me also that the captain was somewhat remiss in not remaining on the bridge for some time after the new pilot had taken over. Pilot Brochu could not be produced as a witness at the present trial as he died some years ago. Captain George W. Graves, who in 1962 was superintendent of Nautical Regulations was appointed, shortly after the grounding, under sections 568 and 579 of the *Canada Shipping Act* to enquire into the conduct of pilot Jacques Brochu in the grounding of the *S.S. Oak Hill* as well as in a casualty of the vessel *Continental Pioneer* when the same pilot was also in charge of this vessel. Although separate investigations were made, the report was combined to cover both enquiries. As a result of this enquiry, pilot Brochu's certificate was suspended indefinitely. Counsel for the plaintiff objected strongly to the production of this report on the basis that it dealt with the two casualties and that (according to my understanding) this report or decision cannot be given in evidence in this action to establish the truth of the facts on which it was rendered. As for the investigation covering both casualties, Captain Graves was clearly of the view that Brochu could have been suspended on the sole strength of the *Oak Hill* grounding. The general rule that a judgment or conviction cannot be proven in a purely civil action to establish the truth of the facts on which it was rendered should, I believe, be relaxed to the extent of permitting the introduction of the conviction or decision as *prima facie* evidence of the facts involved in a case such as the present one where the State has a right and a duty under its police power to define and control the qualifications one should possess and maintain in order to engage in the piloting of ships. This power given the State for the purpose of protecting the public and exercised under the *Canada Shipping Act* with all the safeguards thrown around the person under investigation and with a possible appeal from the conviction (which was apparently not exercised in the present case) gives an assurance of reliability, rarely found in such cases.

Furthermore, we are not dealing here with the guilt of the pilot *per se,* but only so far as that guilt can assist in determining the cause of the casualty in the present case. Brochu's suspension by the Minister of Transport can, and in this case should, be part of the evidence which, taken with the unusual conduct of the pilot as described by Captain Dalziel, does, in my view, establish conclusively that on the evening of August 25, 1962, the grounding of the *Oak Hill* was caused by a serious error in navigation of the pilot.

This report, dated October 3, 1962, and produced as Exhibit D-27, reads as follows:

In re: Pilot Jacques Brochu,
S.S. "Oakhill",
Grounding in River St. Lawrence,
25th August 1962,
S.S. "Continental Pioneer",
Grounding in River St. Lawrence,
5th September 1962.

ORDER OF THE MINISTER OF TRANSPORT

Upon the report of Capt. G. W. R. Graves of enquiries held by him into the conduct of Pilot Jacques Brochu, a licensed pilot of the Pilotage District of Quebec, while piloting the *S.S. "Oakhill"* in the river St. Lawrence on 25th August 1962, and the *S.S. "Continental Pioneer"* in the River St. Lawrence on 5th September 1962, I find that Pilot Brochu was on both occasions unfit to discharge his duties by reason of some unexplained physical or mental impairment.

I direct that the Pilot's Licence in the name of the said Jacques Brochu be suspended indefinitely.

Dated at Ottawa this 31st day of October, 1962.

The carrier having thus established that he falls within the exception provided for in the charter-party, I now have to deal with defendant's argument that the loading and unloading operations which resulted in the plaintiff's damage or loss were carried out by the general average adjusters or surveyors as agents for the cargo owners as well as for the defendants. The defendants rely on Rule XII of the York-Antwerp Rules of 1950 which, for convenience, I reproduce again hereunder:

Rule XII

Damage to cargo in discharging, etc.

Damage to or loss of cargo, fuel or stores caused in the act of handling, storing, reloading and stowing shall be made good as general average, when and only when the cost of those measures respectively is admitted as general average,

and Rule D which, as already mentioned, states that rights to contribution in general average shall not be affected though the event which gave rise to the sacrifice or expenditure may be due to the fault of one of the parties but that this shall not prejudice any remedies which may be open against that party for such fault.

My understanding of the position taken by counsel for the defendants is that after a general average act is declared (1) a surveyor or adjuster takes over the general average procedure in order to preserve the common maritime adventure from damages, (2) the carrier is no longer responsible for whatever damages or loss are caused in the general average procedure, when the cost of handling, storing, reloading and stowing is admitted as general average, (3) any fault committed in the general procedure thus becomes the fault of the various interests concerned including the owners

of the cargo, and (4) even a fault committed by the defendants shall not prevent them from their right to contribution in general average as provided for by Rule XII of the York-Antwerp Rules, 1950, mentioned above.

In order to properly deal with defendant's submission herein, a brief explanation of the general average procedure as well as of the York-Antwerp Rules will be helpful.

When an expenditure of money is incurred in order to preserve the common adventure from danger, the interested parties, shippers and shipowner who have benefited, must contribute towards reimbursing the party who has made it in proportion to the value of the interests saved. MacLachlan in his *Merchant Shipping*, 7th edition, p. 554, states with respect to general average that:

> . . . introduced and justified by expediency, and sanctioned by the principles of natural equity, this law appears from various circumstances to be regarded by the law of England as founded upon an implied contract between the co-adventurers entered into on the eve of the expedition.

Where the loss or expenditure is due to a pure accident it lies where it falls. Where for instance cargo is lost, it is borne by its owner though he may have a right over against the carrier unless the latter is excepted by law or the charter-party from liability. Where, however, the loss or expenditure has been effected purposely or voluntarily for the benefit of all interests, it would not be fair to let the ordinary rule govern the case. The other interests which have been saved must then contribute to make good the loss or expenditure.

The York-Antwerp Rules on the other hand, constitute what may be considered as a trade made code prepared by British and foreign shipowners, merchants, underwriters and average adjusters for the purpose of facilitating general average adjustments which may take place in various countries where differences of law may exist. These rules are incorporated into charter-parties and bills of lading. Where they are not, the general law prevails.

There is no question that the entering of the *Oak Hill* into the Lauzon dry-dock was necessary for the common safety of the ship, cargo and freight and that the repairs there effected were also necessary for the safe prosecution of the voyage. The costs of the repairs as well as all the consequential expenses of unloading and reloading the cargo insofar as this was necessary to enable the vessel to be repaired, appear to form part of the general average expenses necessary for the purpose of preserving from loss the property involved in the common maritime adventure and such costs did, in fact, form part of the adjustment of general average produced as Exhibit P-10 at page 88. It also would seem that if the cost of unloading and reloading in Quebec is to be admitted as general average, as required by Rule XII of the York-

Antwerp Rules, the damages or loss, in the amount of $107,621.26 caused to the plaintiff's pig iron in the course of these operations by mixture and breakage, if they necessarily arose from the general average act, should also be made good as general average under the same rule.

The defendants indeed rely on the above Rule XII as well as on Rule D which says that rights to contribution in general average shall not be affected though the event which gave rise to the loss or expenditure may have been due to the fault of one of the parties to the adventure. They take the position that the loss and damage to the plaintiff's pig iron, during the unloading and reloading in Quebec became part of the general average loss even if such loss was due to their fault and should, therefore, be dealt with on a contributory basis between the various interests concerned. They also submit that as the general average procedure was conducted solely by an independant surveyor, Hayes Stuart & Company, who represented all the interests involved in the common adventure, they cannot be held responsible for any neglect for the mixture of the pig iron in unloading and reloading the vessel.

Before dealing with the submission of the defendants herein and in order to clarify even for my own benefit the effect a procedure under the York-Antwerp Rules may have on a claim such as the present one, it is helpful, I believe, to explain the general scheme of such rules and before doing so, it is important to point out that the present claim is not a general average contribution claim but merely an action against the carrier for damages sustained to the plaintiff's cargo during a voyage from Sorel, P.Q., to Genoa. I should also point out that the objects of Rule D of the Rules are to keep all questions of alleged fault outside the average adjustment procedure but reserving unaffected the legal position at the stage of enforcement. The second part of Rule D which states that "... this shall not prejudice any remedies which may be open against that party for such fault" indeed operates in such a manner that the rights to contribution provided for in the first part may be defeated or diminished. The carrier may, therefore, have a *prima facie* right to recover contribution from the cargo owners in general average, subject always, however, to a possible defence by the cargo owners who may have "remedies" for the fault of the shipowners.

The manner in which Rule D operates was well expressed in *Goulandris Brothers Ltd v. B. Goldman & Sons Ltd*[15] at pp. 92-93 by Pearson J. when he said:

> Another question is as to the relationship between the first part of rule D and the second part of it. In my view the manifest objects of rule D are to keep all questions of alleged fault outside the average adjustment and to preserve unimpaired the legal position at the stage of enforcement. The effect of the first part of the rule is that the average adjustment is compiled on the assumption that the

[15] [1958] 1 Q.B. 74.

casualty has not been caused by anybody's fault. The convenience of this arrangement appears when regard is had to the size and complexity that an average adjustment may attain. The average adjustment in the present case covers 183 pages and the compilation would involve much collection of information and many calculations. I understand that the task of compiling an average adjustment in a complicated case may take years. It is highly convenient and desirable, almost necessary, that the task should not be further enlarged and complicated by questions whether the casualty was caused by some fault or faults of one or more of the parties. Moreover, such questions would naturally be settled by litigation or arbitration, as they go beyond the sphere of general average and may affect other matters. The average adjusters ought to be able to produce figures which, so far as they are concerned, are final figures. When they have produced their final figures, the question of enforcement arises, and it is at this stage that the second part of rule D comes into play. The average adjustment shows X owing to Y £100, but that showing is without prejudice to any remedies which may be open to X for Y's fault having caused the casualty. In my view that is clearly the intended mode of operation of the two parts of rule D, and it affords the clue to the interpretation of the rule. The first part refers to the rights to contribution in general average as they will be set out in the average adjustment, and these are properly and naturally called "rights", because normally the holder of such rights is entitled to receive payment. But the second part of the rule provides that the first part is not to prejudice remedies for faults. That implies that in some cases the remedies referred to in the second part of the rule will override the rights referred to in the first part; in other words, the second part operates as a proviso, qualifying, overriding, cutting down or derogating from the first part. The rights may be nullified or defeated or diminished or otherwise affected by the remedies. In that sense the rights referred to in the first part of the rule are prima facie rights because they are subject to the remedies.

The position, therefore, is that the claimants have their prima facie right to recover from the respondents contribution in general average, but the respondents may be able to defeat that right by using their "remedies" for the claimants' "fault". As I have said, the York-Antwerp Rules are silent as to what are the remedies and what is a fault, and for elucidation of those matters it is necessary to have resort to the English law.

The latter part of the above citation referring to the right of an interested party upon being sued for contribution to take a cross-action to recover back the whole of the sum claimed is given in order to prevent a circuity of actions.

It therefore follows, I believe, that the general average procedure has nothing to do with, nor does it affect, the rights of any party to any remedy he may have against one of the parties to a general average for any fault committed and which has caused him damage. Such, indeed, would be the situation of the plaintiff here if it can establish that it is entitled to a recourse against the defendants for the damage sustained to its cargo during the reloading procedure conducted in Quebec City after the grounding of the vessel, whether or not there is or may be a general average enforcement against all the parties to this common adventure. I should point out that although the action for contribution against the owners of the machinery loaded on board of the vessel was produced (Exhibit AD-2) none taken against the plaintiff were produced.

The defendants here, as we have seen, take the position that the fault or neglect, if any, committed during the reloading operations in Quebec

City are the fault and neglect of all the interested parties including the plaintiff as the surveyor appointed to carry out this work represents not only the shipowner but also the owners of the cargo. In order to sustain such a proposition, the surveyor adjuster must, I believe, be the agent of all interests so that whatever fault or neglect he commits is held also to be the fault and neglect of the parties he represents to the extent that the latter cannot invoke such fault (which would also be their own) against the carrier.

The evidence clearly indicates that there was very serious neglect in the reloading of the cargo in Quebec City which caused the mixture and breakage and which resulted in the damages claimed in this action.

[His Lordship here reviewed the evidence on this subject.]

I now come to the submission of defendants that the surveyor appointed under a general average act becomes the agent of all the interested parties and that he takes over all of the general average operations so that the shipowner, or its master, no longer has any responsibility with regard to the care of the cargo on board the vessel. The defendants, indeed, must establish that the takeover by the surveyor involves such a responsibility to successfully reject the present claim.

The defendants, I am afraid, have in this respect extended unduly the powers and responsibilities of a surveyor or a general adjuster in such a situation and minimized unreasonably the liability of the carrier during such a procedure. The truth of the matter is, I believe, that when a general average expenditure is involved, the owner or master conducts or supervises the operations.

In *The Mary Thomas*[16] Gorell Barnes, J. explains how a claim for general average arises:

> The position is this: that the shipowner, on the one hand, has his ship and freight at risk; on the other hand, the cargo owner has his cargo at risk; and going back to the way in which this matter is discussed in some of the old books, if both of the parties were there at the time, each responsible for the difficulty in which they found themselves, that is to say, each of them bearing the loss which would result from it, they would naturally say, "We must spend some money to get out of this difficulty, and that we must share in proportion to the benefit to be derived from it".

and at page 118:

> . . . the operation of saving is taken for the benefit of both the ship and the cargo . . . and therefore the captain who at this time . . . acts as agent for the person whose property is at risk, spends the money on behalf of all who are interested, and all who are interested must contribute to it.

It therefore appears that the master or the shipowner are generally speaking called upon to initiate and complete the general average procedure when such action is required.

In *Wavertree Sailing Ship Co. v. Love*[17] Lord Herschell points out that at the time of this decision, the profession or calling of an average stater or

[16] [1894] P. 108 at 117.
[17] [1897] A.C. 373.

average adjuster was of comparatively modern origin and that the right to receive and the obligation to make general average contribution existed long before any class of persons devoted themselves to the profession of preparing average statements.

> . . . It was (he says at p. 380) formerly, according to Lord Tenterden, the practice to employ an insurance broker for the purpose. The shipowner was not bound to employ a member of any particular class of persons or indeed to employ any one at all. He might, if he pleased, make out his own average statement, and he may do the same at the present time if so minded. If he engages the services of an average stater, it is merely as a matter of business convenience on his part. The average stater is not engaged, nor does he act on behalf of any of the other parties concerned, nor does his statement bind them. It is put forward by the shipowner as representing his view of the general average rights and obligations, but the statement or adjustment is open to question in every particular by any of the parties who may be called on to contribute.

In a more recent decision in *Chandris v. Argo Insurance Co.*[18] Megaw J. mentions also at p. 75 that:

> It is the practice of shipowners who insure on the London market to employ professional adjusters to compute the amounts of the expenditures and sacrifices, the contributory values of contributory interests and the amounts of contributions in every case in which a general average loss is involved; and also to compute their claims when a particular average loss is involved, unless it is very small in amount—say not more than £200—or a question of drydocking for repairs is involved. When the insurer pays after such an adjustment, he accepts as part of the claim his proper proportion of the average adjuster's fee, even though the average adjuster is instructed by the shipowner.

It therefore appears that when a general average act takes place under the direction of the captain, such an act, although done for the common benefit of the cargo and shipowner, does not necessarily mean that the master is acting as agent for ship and cargo alike. In some cases, as we have just seen, the shipowner may, for business convenience, appoint an adjuster, which, however, should not be any different as far as the general average procedure is concerned, than if he conducted such a procedure himself.

The master of the ship is, generally, in the event of a sacrifice, an agent of necessity for all interests concerned; he acts for all, he is the agent for all, but he is not, in my view, in respect of the general average expenditure or procedure the agent for the cargo owner in the sense that the latter is his principal and as such liable even for a fault committed in negligently performing his functions. The master, or the adjuster was, in this case, no doubt, the appointed agent of the owner of the ship and as such was competent to bind him but it does not and should not, I believe, follow that because he was working in the interests of all parties that he became the ordinary agent of all parties and could bind them in all cases. The captain or the carrier is indeed the depository of the cargo with the obligation of

[18] [1963] 2 Lloyd's Rep. 65.

safe custody and conveyance and I should think that the obligation to properly carry, take care and deliver the cargo during the voyage does not disappear once a general average procedure is initiated and conducted. I should also think that such obligations of custody become more imperative when the charter-party contains, such as here, a clause that the cargo will be separated "by holds at owners risks and expense" (clause 28) that the stevedores shall be under the direction and control of the captain (clause 37) and that the shipowners shall keep any completion cargo "properly separated from the pig iron at owner's risk and expense and owners remain fully responsible for any damages resulting from contamination".

The captain of the vessel, Dalziel, was fully aware of the importance of insuring that there would be no mixture of the various types of pig iron on board his vessel, as appears at p. 15 of his evidence:

Q. From your own experience, were you aware of the importance of preventing any admixture of the different types of cargo?
A. Oh yes of course.

At p. 51 he reiterates that he was fully aware that every precaution was to be taken so that there was no mixing of cargo adding that "it was only natural that we, as master of the ship, should make sure that this was adhered to".

He declared at p. 18 of his evidence that he knew after the grounding that there would be a declaration of general average because of this incident and stated that the general average must have been arranged from London. He then stated that after his vessel was brought back to anchorage "to the best of my knowledge a Lloyd's surveyor boarded the vessel". He added that "afterwards, the vessel was under the control of the surveyors." He remembered the name Hayes Stuart & Company and that they were the people responsible for the discharging of the vessel. He then testified as follows:

Q. Did these surveyors in fact supervise the discharging operations?
A. They should, yes.
Q. Did you allow them to carry out the operations or did you try to interfere in any way?
A. Well, there was no point in interfering with the surveyors who were placed there.
Q. And so far as the officers and crew of the vessel were concerned, did you instruct them to cooperate with the surveyors and so forth?
A. Of course and they cooperated.
Q. Was the position the same with regard to reloading the cargo as it had been with regard to discharging it? Did you leave the operations to the surveyors?
A. Of course. It was in the hands of the surveyors.

And at page 45 of the captain's evidence:

Q. And you said that you left the matter of discharging and keeping cargo separate and caring for the cargo at Lauzon to the surveyors?
A. Yes.

Q. You did not attend to that yourself?
A. Well, the ship's officers are always on duty.
Q. I see. But you left that up to the surveyors?
A. Yes.

He then at p. 68, under cross-examination, repeats that ". . . when the cargo was discharged and reloaded that was under the supervision of the surveyors of Hayes Stuart & Company, so that if a mistake was made by them, well it was beyond my power." He was then asked the following questions:

Q. I see, as you say, you were not in charge at Quebec when it was discharging and loading?
A. Well, I was in charge of the vessel but it was under the supervision of the insurance surveyor when the discharging and the loading was carried out.
Q. Are you saying that the captain gives up control of the cargo of the ship?
A. No, he does not give up control of anything but at the same time when the ship is under, shall I say, general average and surveyor is on board the ship there they usually decide what is to be done.
Q. And you gave up the control to them. Is that the case?
A. Well, I would not say you give up the control, but at the same time you have got to go around and see.
Q. Well, which did you do? Did you maintain control of everything? Were you in charge, or were they in charge?
A. They were in charge so far as discharging and loading of the cargo was concerned.
Q. The care of the cargo?
A. Rested with them.
Q. You gave up the care, did you?
A. Well, yes.

In view of the negligent and faulty manner in which the reloading of the cargo took place in Quebec, as established by the two Italian surveyors and experts of the defendants, and the somewhat detached attitude of the captain of the vessel during the operations, as there is nothing to even suggest that the surveyors were told by the captain or the shipowners of the importance of not mixing the pig iron, I cannot see how the defendants can, under the present circumstances, even say that they have, as a carrier of this cargo, properly and safely carried and taken care of it so as to ensure that it would safely and separately reach its destination. This loss or damage, in my view, was not a direct consequence of the general average act declared herein, but even if because of rule XII of the York-Antwerp Rules it should be accepted as "damage to or loss of cargo . . . caused in the act of handling, storing, reloading and stowing" it resulted from the joint fault and negligent actions or omissions of both the surveyors and the captain of the *Oak Hill*, for

which fault and neglect the defendants, as carriers, hold no immunity. They have none under the York-Antwerp Rules as this is not a general average claim (and even if it was the plaintiff would still have its remedy) and they have none under the charter-party because the loss herein did not result from an error of navigation or neglect in the navigation of the ship in the ordinary course of the voyage within the meaning of the exceptions. The damage here was indeed caused by the combined acts of negligence of the surveyors and of the captain and his officers and crew in the management of the cargo[19] at a time when the ship was not navigating but was moored in dock where it remained during the whole operation of unloading and reloading. These acts of neglect, even if committed during the general average procedure cannot, in my view, be held as those of the plaintiff so as to prevent the latter from successfully recovering the damages to its cargo.

It follows that the plaintiff is entitled to the conclusions of his action.

[19] In . . . *Instituto Cubano de Estabilization Del Azucar v. Star Line Shipping Co. Inc.* ((1958) A.M.C. 166) 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.

In *Phryné* ((1965) D.M.F. 408—Cour de Cassation (Phryné, 11 mars 1965) 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 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.