QUEBEC ADMIRALTY DISTRICT

1964
Dec. 21
1965
Jan. 9, 10,
Feb. 8

BETWEEN:

MANNIX LIMITED ....PLAINTIFF;

AND

N. M. PATERSON & SONS LIMITED ......DEFENDANT.

Shipping—Charter agreement—Carriage of cargo—Stowage and securing of cargo—Loss of cargo lashed on deck and breaking loose in heavy weather—Duty of shipowner regarding stowage of cargo—Burden of proving lack of negligence on part of shipowner—Effect of participation by shipper in stowage of cargo on shipowner's liability for stowage—Quebec Code of Civil Procedure, Articles 1675, 2388, 2424, and 2427.

In this action the plaintiff claims damages for the loss of an 87 ton mechanical shovel which was being carried on the *S.S. Wellandoc*, a ship owned by the defendant, from Baie Comeau to Bagotville, Quebec. On November 30, 1954 the plaintiff entered into a time charter agreement with the defendant for the hire of the *S.S. Wellandoc* to carry steel outbound from Montreal and contractor's equipment inbound to Montreal and to and from St. Lawrence River ports. The

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defendant provided the vessel fully manned and the plaintiff was to be responsible for any damage caused through cargo handling at any or all ports.

On December 9, 1954 the ship left Baie Comeau for Bagotville after having loaded the shovel in question and other contractor's equipment. During the loading at Baie Comeau forty to fifty miles per hour winds caused heavy swells in the harbour and the ship was damaged by being banged against the wharf. The ship left Baie Comeau in heavy seas and high winds with the shovel lashed down on number two hatch forward. Three hours after the *S.S. Wellandoc* left Baie Comeau the shovel began to move and ten minutes later it broke loose and was lost overboard.

Held: That the stowage and method of securing the plaintiff's shovel were inadequate, improper and contrary to good practice and the dictates of ordinary prudence, having regard to the weight and dimensions of the shovel and the weather conditions which might reasonably have been anticipated at that time of the year in that area.

2. That Articles 2424, 2427 and 1675 of the Quebec *Civil Code* as well as the Quebec jurisprudence relating to such articles and English doctrine and jurisprudence may be considered and applied in the determination of this case.

3. That it is not necessary, having regard to Article 1675 of the Quebec *Civil Code,* and also generally according to English Law, for the shipper to show negligence on the part of the ship's owner, who, to escape liability for loss or damage to cargo, must prove that such loss or damage was caused by a fortuitous event or irresistible force or has arisen from a defect in the thing itself.

4. That if the shipowner in this case was released from its obligation to safely and properly secure and stow the plaintiff's shovel it could only have been because it was discharged of this obligation by agreement either express or implied, and no such agreement or release was alleged or proved. No such agreement is implied in the fact that the plaintiff's men participated in the loading and stowing of the shovel.

5. That in order that the participation of the plaintiff's men in the loading and stowing of the shovel might imply an agreement the effect of which would be to release the shipowner from its obligation to properly and safely stow the cargo it would have to be established that the plaintiff, or its representatives, knew and appreciated the risk to which the cargo was exposed by reason of the manner in which it was stowed and, with this knowledge, agreed to release the defendant and accept the risk.

6. That if the stowage of cargo were such that it might affect the stability of the ship or certain special methods of stowage were required to meet conditions well known to the shipowner, but of which the shipper had no knowledge, one cannot presume any intention on the part of the shipper, who assisted in the stowing of the cargo, to relieve the owner from its obligation to stow, secure and carry the cargo safely.

7. That the plaintiff's claim is allowed.

ACTION to recover value of mechanical shovel lost overboard from the deck of defendant's vessel.

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The action was tried by the Honourable Mr. Justice Smith, District Judge in Admiralty for the Quebec Admiralty District at Montreal.

Léon Lalande, Q.C. for plaintiff.

J. Brisset, Q.C. for defendant.

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

SMITH D.J.A. now (February 8, 1965) delivered the following judgment:

By its action the plaintiff claims the value of a mechanical shovel, lost overboard from the deck of the defendant's vessel, the *S.S. Wellandoc,* on the 9th day of December 1954.

On the 30th day of November 1954 the plaintiff entered into a time charter agreement with the defendant for the hire of the *S.S. Wellandoc* to carry steel outbound from Montreal, and contractor's equipment inbound to Montreal, to and from St. Lawrence River ports, the said charter agreement being in the following terms:

November 30th 1954

Mannix Limited,
660 St. Catherine St. W.,
Montreal, P.Q.
Attention Mr. G. J. Pollock

Dear Sirs:

As per our agreement the *SS Wellandoc* will be provided to carry out a voyage on your behalf from Montreal 1, P.Q. to Mont Louis, P.Q., Baie Comeau, P.Q. and Bagotville, P.Q., and return to Montreal, P.Q. or Cornwall, Ont, if possible, under the following terms and conditions.

1. Cargoes to consist of steel outbound and contractors' equipment inbound with no dangerous cargo permitted unless arranged for.

2. Charterers to have full use of ship's gear as on board.

3. Charterers to pay for all extra insurances on the vessel during the term of this charter. Extra meaning everything additional to insurances normally carried on this vessel prior to November 30th 1954.

4. Owners to provide this vessel fully manned, victualled and fueled at a daily rate of hire of $900.00 or pro rata thereof. Hire payable in advance on the estimated term of the charter and to be adjusted in full immediately upon redelivery.

5. Delivery of the vessel to date from the hour the vessel clears Elevator 2 Montreal today with redelivery on the date and time when the vessel is safely returned to Montreal, cleaned and free of cargo.

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6. Charterers to be responsible for any and all damage caused through cargo handling at any or all ports and to make good said damage before the vessel is accepted at redelivery.

Yours very truly,

N. M. PATERSON & SONS LIMITED
(sgd) I. C. McEwen

Traffic Manager

Accepted:

Mannix Limited

The *Wellandoc* left Montreal on November 30th with 400 tons of steel-piling, one-half of which was stowed on deck. She called at Baie Comeau on December 3rd, and loaded cement and machinery which were to be unloaded at Mont Louis. The *Wellandoc* left Baie Comeau at 1150 hours on December 3rd, arrived at Mont Louis at 2300 hours on the same day and discharged most of her cargo. Up to that time the voyage had been uneventful.

The vessel left Mont Louis at 0355 hours E.S.T., December 6th, for Baie Comeau to load machinery belonging to the plaintiff. She arrived at Baie Comeau at 1930 hours on the same day and started loading at 2100 hours. Around midnight there was light snow and a moderate southeast wind. Loading was stopped at 0700 hours on December 7th when there was rain and snow with a strong east wind. The ship was tied up, starboard side to, on the east side of the inside spur dock, heading south and parallel to the shore. She started to roll and surge and fenders were placed over the side. The crew stood by continuously from the time the ship started to heave until 2 a.m., December 8th, during which time the wind attained a velocity of from forty to fifty m.p.h., and possibly more in gusts. The sea, coming from the northeast direction, was breaking over the outside pier, the ship getting the swell.

Although those in charge of the vessel had had warning of westerly winds of from twenty-five to thirty-five m.p.h. they actually experienced strong northeasterly wind of which there had been no indication. The Master considered that the ship could not leave her berth light, as she would have been in danger of being blown ashore. As a result of the heaving and banging of the vessel against the wharf she was damaged on her starboard side, both foreward and

aft. Two cracks were noticed in plates on the starboard bow and plates were also shoved-in considerably from the deck-line down to the bilge-line for a distance of about twenty feet. Aft, one seam was opened in the oil bunker.

The *Wellandoc* completed loading at about 0005 hours on December 9th by which time she had loaded about 360 tons, mostly heavy machinery, including one shovel and one crane weighing about 87 tons each. These were loaded on deck, on number two and three hatches, the shovel forward and the crane aft. The shovel, on number two hatch, was a Bucyrus Model 54B which covered practically the whole of the hatch. Two thicknesses of 12″ x 12″ timbers were laid over the hatch and were secured by spikes. The shovel was placed on the floor so constructed, sitting on caterpillar tracks, heading athwartship, the tracks being blocked by 6″ x 4″ pieces of timber. Wires were used on both sides to lash the shovel. These wires which were tightened with turnbuckles led from the frame of the shovel to eye-bolts on the deck. The boom was raised to a perpendicular position and the wire cable normally used to operate the shovel was used to lash the boom to the bulwark on the port side.

The *Wellandoc* left Baie Comeau for Bagotville at 0120 hours on December 9th. From 0133 hours, strong south-westerly wind was encountered and the sky was overcast with occasional light snow. From 0230 hours the vessel was rolling and plunging heavily and at 0420 hours, conditions having worsened and it being noticed that the shovel was begining to move, the vessel was turned about, it being the intention to return to Baie Comeau. At 0430 hours the shovel broke loose from its lashings, went overboard and was lost. The *Wellandoc* returned to Baie Comeau where she tied up at 0740 hours.

The preponderance of the proof is that the stowage and method of securing the plaintiff's shovel were inadequate and bad, having regard to the weight and dimensions of the machine and the weather conditions which might reasonably have been anticipated at that time of the year in that area. That such was the case would appear moreover, from the fact that in a little over three hours after leaving Baie Comeau, the shovel began to move and the lashings, which were intended to secure it, parted and the plaintiff's shovel went overboard.

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Messrs. Crocker and Bagger, marine surveyors, both of whom have had long experience in such matters, testified at some length as to the inadequate and inept means adopted to secure the shovel and indicated what precautions should, as a matter of ordinary prudence, have been taken in the circumstances to adequately secure and prevent the movement of the equipment. This evidence was not contradicted and the Court is satisfied that the stowage and securing of the plaintiff's shovel was inadequate, improper, and contrary to good practice and the dictates of ordinary prudence.

At the hearing the defendant relied, not so much on the contention that the stowage and securing of the said cargo was proper and adequate, but rather on the submission that the stowage and securing of the shovel had been executed entirely by the plaintiff's own employees, who had declared themselves entirely satisfied with it.

The evidence is contradictory as to the part played by the plaintiff's employees in the stowing and securing of the cargo. Although Captain McCurdy testified that the crew of the vessel had nothing to do with the stowage, he stated that he himself had checked the same and found it to be satisfactory. This testimony, would seem to be in contradiction to the allegation of the statement of defence, to the effect that the accident was due "to defects in the stowage by plaintiff's men." Moreover, the testimony of Bellefontaine, Master Mechanic, employed by the plaintiff, who apparently was superintending the plaintiff's employees, was that although the plaintiff supplied the cables and timbers used in connection with the stowage as well as the assistance of its men, the actual control of the stowage was left in the hands of the ship's crew.

The defence contains no allegation that, because of the plaintiff's participation in the stowage and securing of the cargo it is precluded from complaining of poor stowage or that the effect of this participation was to release the defendant from its obligation to safely and properly stow and secure the cargo. In any event (even if this had been alleged) "the mere fact that the charterer or shipper knew how the goods were being shipped and assented to what was done, will not generally excuse the shipowner". Carver, Carriage of Goods by Sea 10th Edition, page 462.

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It may well be that there are cases in which the shipper, who has participated in or approved the stowage and securing of the cargo, is precluded from later complaining of such stowage. For example, when the shipper is fully aware, or it is patent, that stowage of a particular type of cargo in a particular manner or place will expose that cargo to damage, e.g. contamination, and nevertheless participates in and approves stowage in that manner, such shipper may be precluded from claiming in respect of damage to cargo due to said stowage.

Examples of such cases are those of *Bozzo v. Moffatt et al.*[1], and *The Santamana*[2] cited on behalf of the defendant. 159 cited on behalf of the defendant.

In the *Bozzo* case stowage had been entrusted by the shippers to stevedores. Cargo was damaged due to failure of the stowers to use sufficient dunnage to protect the cargo of the type shipped. The Court apparently considered that the shippers (or their agents, stevedores) had better knowledge concerning the dunnage required for the protection of the cargo, than had the Master of the ship, and therefore relieved the Master of the responsibility.

Article 2388 *Civil Code* was cited on behalf of the defendant in support of the argument that articles 2424, 2427 and 1675 CC do not apply because it is the Law of England, rather than the Law of this Province, which is applicable. This proposition appears to be unfounded since article 2388 *Civil Code* provides clearly that it is the provisions contained in Chapter Four (relating to the Privilege and Maritime Lien upon vessels) which do not apply in cases before the Court of Vice-Admiralty. There is no such provision applicable to articles of the *Civil Code* other than those contained in Chapter Fourth. In any event the point would appear to be academic in so far as the present case is concerned, since it is conceded in the defendant's Memorandum of Authorities that "the rules under both systems of law, in admiralty matters, are generally the same and that our Courts have consistently and rightly sought guidance in such matters from British jurisprudence and doctrine."

The contract of affreightment under which the defendant contracted to carry plaintiff's property was entered into in

[1] (1881) XI Revue Legale 41. [2] (1923) 14 Ll. L.R. 159

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the Province of Quebec and related to a voyage within the limits of that province. In the opinion of the Court, articles 2424, 2427 and 1675 CC cited on behalf of the plaintiff, as well as the Quebec jurisprudence relating to such articles, and English doctrine and jurisprudence may be considered and applied in the determination of this case.

Articles 2424, 2427 and 1675 CC provide that:

2424. The master is obliged to receive the goods, and carefully arrange and stow them in the ship, and to sign such bills of lading as may be required by the freighter or lessee, according to article 2420, upon receiving from him the receipts given for the goods.

2427. The master is obliged to exercise all needfull care of the cargo, and in case of wreck, or other obstruction to the voyage, by a fortuitous event or irresistible force, he is obliged to use the diligence and care of a prudent administrator for the preservation of the goods, and for their conveyance to the place of destination, and for that purpose to engage another ship, if it be necessary.

1675. They (carriers by land and by water) are liable for the loss or damage of things entrusted to them, unless they can prove that such loss or damage was caused by a fortuitous event or irresistible force, or has arisen from a defect in the thing itself.

Carver's Carriage of Goods by Sea 10th Edition, at page 459:

The master is by law required to be a competent stevedore. (per Willes, J. in Anglo-African Co. v. Lamzed (1865) L.R.K.P. p. 229.)

It is, apart from special provisions or circumstances, part of the ship's duty to stow the goods properly not only in the interests of the seaworthiness of the vessel, but in order to avoid damage to the goods, . . . (per Lord Wright in Canadian Transport Co. v. Court Line [1940] A.C. 934, 943).

It is noteworthy that it is not necessary, having regard to article 1675 CC, (and also generally according to English Law) for the shipper to show negligence on the part of the ship's owner, who, to escape liability for loss or damage to cargo, must prove that such loss or damage was caused by a fortuitous event or irresistible force or has arisen from a defect in the thing itself.

Carver, Carriage of Goods by Sea 10th Edition at page 459:

We have seen that it is not generally necessary to show negligence in order to make a ship's owner responsible for the safety and good condition of the goods. Subject to the exceptions stipulated for in the contract, and those prescribed by the law, he is absolutely liable for their safety . . .

Also at page 459:

The duty of stowing the cargo in the ship lies on the owner and on the master as his representative unless there is an agreement to the contrary. The Master ought to be a competent stevedore, and he must see that the stowage is done with skill and care.

If therefore, the shipowner in the present case was released from its obligation to safely and properly secure and stow the plaintiff's shovel it could only have been because it was discharged of this obligation by agreement either express or implied. No such agreement or release was alleged and in the opinion of the Court none was proved. Certainly there is no evidence of any express agreement to this effect and in my opinion there is no evidence to justify the conclusion that such an agreement is implied in the fact that the plaintiff's men participated in the loading and stowing of the shovel. In order that this participation might imply an agreement the effect of which would be to release the shipowner from its obligation to properly and safely stow the cargo it would have to be established that the plaintiff, or its representatives, knew and appreciated the risk to which the cargo was exposed by reason of the manner in which it was stowed and with this knowledge agreed to release the defendant and accept the risk. There is neither allegation nor proof to support such a proposition.

The Master and crew of the *Wellandoc* were presumably aware, or should have been aware, that heavy seas and inclement weather were frequently encountered in that area and at that time of the year. They, moreover, knew or may be presumed to have known the effect heavy seas might have upon their vessel laden with a deck cargo of the nature, weight and dimensions of that loaded on their ship and of what constituted safe and adequate measures to secure such cargo against such conditions.

On the other hand the plaintiff's master-mechanic, Bellefontaine, who was in charge of the plaintiff's men, who assisted in the loading and stowing of the cargo, was a landsman with no knowledge of ships or experience at sea. In such circumstances it is improbable that he had any knowledge of what constituted proper and adequate measures to safely secure the plaintiff's cargo, in order to meet the conditions which the vessel was likely to encounter and there is in the Court's opinion no proof to justify the conclusion that either Bellefontaine or any other authorized representative of the plaintiff ever agreed to release the defendant from its obligation as shipowner to safely stow and carry the said cargo.

As above indicated, it might well happen that stowage of below-deck cargo which did not have any bearing upon the stability or safety of the ship, but related solely to the safety of the cargo, (e.g. its protection against contamination by other cargo) might if undertaken by a shipper who was in a position to know and appreciate that damage might result to the cargo if stowed in a certain manner and nevertheless participated in or approved of stowage in this manner, preclude the shipper from claiming against the owner for cargo damage due to poor stowage.

On the other hand if the stowage were such that it might affect the stability of the ship or certain special methods of stowage were required to meet conditions well-known to the shipowner, but of which the shipper had no knowledge, one cannot presume any intention on the part of the shipper, who assisted in the stowing of the cargo, to relieve the owner from its obligation to stow, secure and carry the cargo safely.

The Court is unable to accept the proposition that there was an agreement, either express or implied, the effect of which was to relieve the defendant, shipowner, from its legal obligation to safely and properly stow and secure the said cargo.

Although Counsel for both parties made reference to the matter of seaworthiness, in their notes, and although there is at least some evidence bearing upon this aspect of the case, the Court considers it unnecessary to do more than state that even if there is evidence of unseaworthiness (and on this point no opinion is expressed) there is a complete lack of proof that the loss of plaintiff's shovel was caused by or in any way related to any unseaworthiness which may have existed.

Reference also was made to loss due to the perils of the sea. This defence however, was not pleaded expressly and, in the opinion of the Court, was not established by the proof.

The Court finds on the whole that the defendant was unsuccessful in proving that the loss of the plaintiff's shovel was caused by irresistible force, a fortuitous event or arose from a defect in the shovel itself. On the contrary it concludes that the shovel was improperly and negligently stowed and secured and that its loss was attributable to the

fault and negligence of the defendant's representatives and their failure to discharge their obligations under the said Contract of Carriage.

The value of the plaintiff's shovel was admitted to be $60,925.00. To the payment of this sum the defendant must be condemned.

Plaintiff's action is maintained and the defendant is condemned to pay to the plaintiff the said sum of $60,925.00 with interest dated from the service of the action; and costs.