Halifax 1969

Sept. 16-17

Sept. 19

PICKFORD AND BLACK LIMITED .....APPELLANT;

AND

CANADIAN GENERAL ELECTRIC COMPANY LIMITED .....} RESPONDENT.

Shipping—Damage to cargo—Insufficiency of stowage—Whether stevedores negligent—Evidence—Balance of probabilities—Tort.

A ship carrying heavy machinery returned to port (Halifax) after 24 hours because the cargo had shifted and suffered damage. The cargo had been stowed under the personal direction of an experienced superintendent of stevedores to the approval of the port warden and the ship's master. The stevedores who stowed the cargo were sued in tort for negligence. There was no evidence as to what caused the cargo to shift.

Held (reversing Pottier D.J.A.), it could not be found on the balance of probabilities that the cargo had been negligently stowed, and the action failed. The mere fact that cargo shifts is not proof of negligent stowing but, at most, that it was not fastened sufficiently to withstand the strains imposed on it, which was not inconsistent with the exercise of due care to do all that reasonably competent stevedores could foresee as necessary to prevent shifting.

APPEAL from Pottier D.J.A. (Nova Scotia) holding appellant liable in damages.

Donald D. Anderson for appellant.

Francis O. Gerity, Q.C. and *Gordon S. Black, Q.C.* for respondent.

THURLOW J. (CATTANACH AND KERR *JJ. concurring*):—This is an appeal from the judgment of Mr. Justice Pottier, Judge of the Nova Scotia Admiralty District, holding the appellant, a stevedoring firm, liable for damage to certain parts of a shipment of heavy electrical machinery loaded and stowed by the appellant in the ship *Lake Bosomtwe* in February 1965 for carriage to Ghana. The ship left Halifax on February 26th with the cargo safely on board but returned some 48 hours after leaving because in the meantime the cargo had shifted and sustained the damage in question.

As there was no contract between the appellant and the respondent with respect to the loading and stowing of the goods the only basis for liability of the appellant in these proceedings lies in tort and the case for such liability

*CORAM: Thurlow, Cattanach and Kerr JJ.

raised by the respondent was that the appellant had caused the damage by negligence in failing to adequately secure the cargo for the expected voyage.

That the cargo was in fact insufficiently secured to withstand the forces which were encountered is, in the circumstances, an obvious inference to draw. On the other hand as no member of the crew of the ship was called as a witness at the trial there is no evidence of what, if anything, the ship encountered or what it was that caused the cargo to shift. There was, however, some evidence of weather reports indicating that the weather had been relatively benign for the time of year and the judgment under appeal proceeds on the basis that nothing of an extraordinary nature that could account for the shifting had occurred.

In his reasons for judgment the learned trial judge said:

> It is admitted on the part of the defendant stevedores that the standard of care in stowing cargo is that to be expected of reasonably competent stevedores. I think that is a correct interpretation of the law. The evidence shows that the superintendent of stevedores had long years of experience in the stowage of cargo. The port warden gave evidence and also gave a certificate regarding the stowage. He said that he still thinks the stowage was proper. The bare facts are, however, that the cargo shifted and damage was caused. How it could be properly stowed and move the way it did, I fail to see.

Later in his reasons the learned trial judge also said:

> All that is necessary for the plaintiff to prove in this case is that on the balance of probabilities the damage was caused by defective stowage. That is a reasonable deduction from the evidence, it appears to me. There must have been negligence in the stowage of this cargo, otherwise it wouldn't have come back in the damaged condition it was within a few days of its departure from Halifax. I find that the known facts are sufficient to make a finding of negligence on the part of the defendants. I do not think the doctrine of *res ipsa loquitur* applies.

In my opinion, it is clear that a stevedore cannot be treated as an insurer that a cargo which he has stowed will not shift. It is, I think, equally clear that the mere fact that cargo does shift is not evidence of negligence on the part of the stevedore who has stowed it. Even in the circumstances that have been established in this case the shifting of the cargo, in my view, with respect, is not proof of negligence on the part of the appellant. It appears to me to be, at most, evidence that the fastening of the cargo was not sufficient to withstand the strains, whatever they may have been, that were imposed on it.

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This, however, is not enough to fix the appellant with liability. It is, of course, consistent with negligence on the part of the appellant in failing to take some measure or to do something of which a reasonably competent stevedore would have foreseen the need or in failing to do the same properly. If there were such a failure and if such failure were shown to be the cause of the damage the liability of the appellant might well be established. But the fact that the fastening of the cargo turned out to be inadequate or insufficient to prevent shifting is consistent as well with the exercise by the appellant of due care to do all that a reasonably competent stevedore would have foreseen as necessary to prevent shifting and with his having been guilty of nothing more than having been unable to foresee the necessity of doing something that reasonable competence would not have called upon him to foresee.

The learned trial judge did not mention this feature of the situation in his reasons. He referred to the balance of probabilities favouring the view that the damage was caused by defective stowage and he appears to have treated the fact of the shifting of the cargo in the circumstances, so far as established, as proof of negligence. He made no finding, however, as to what it was that was defective about the stowage.

In the view I take of the matter it was necessary, in order to reach a conclusion that the appellant was negligent, to weigh the probabilities, as well, of the defective stowage having been due to a negligent failure of the kind I have mentioned, of which I can find no direct evidence, against those of it having been due not to negligence but to the lack of something the necessity for which a reasonably competent stevedore would not have foreseen.

Here, to my mind, the fact that no one has offered so much as an opinion, let alone proved facts, as to what it was that was wrong with the stowage and that caused the damage, becomes of prime importance. The stowage of this cargo was carried out under the personal direction of a superintendent of stevedores of some 40 years experience, who had previously stowed two similar cargoes on the same ship without incident. The stowage in question was also done under the surveillance of the port warden of the port of Halifax who testified that he had personally

tested the lashings and observed the chocking and shorings. Both regarded the cargo as properly stowed. But the stowage was also carried out under the supervision and direction of the master of the ship, who had the ultimate responsibility for its adequacy, and he appears to have been satisfied with it as well, after a final request for another wire in a particular place had been complied with. When three such persons, all concerned in one way or another with the stowage of this cargo, but representing different interests, have, in advance, nothing more to suggest as necessary, and when this is coupled with the fact that even after the event, that is to say even after it has turned out that the fastening of the cargo was inadequate, no one has been able to point to what it was that was wrong with the stowage it seems to me that the balance of probabilities favours the view that the fault lay in the lack of something, the necessity for which was not reasonably foreseeable and that this view is to be preferred to that of attributing the shifting of the cargo to failure to do properly some unspecified part of what could reasonably be foreseen to be necessary or to failure by three men of the experience and responsibility of the superintendent, the Port Warden and the Master of the ship to adequately carry out their duty to see that the stowage was done as well as any reasonably competent stevedore would have done it.

I should add that while there was evidence that a different method of shoring some parts of the cargo had been suggested and while there is a conflict of testimony as to whether or not this suggested method was carried out there seems to be no reason to think that the failure to shore as suggested, if indeed that is to be taken as having occurred, had anything to do with the shifting or damage or would have any difference in the result.

In my opinion, therefore, there was no proof of negligence upon which to hold the appellant liable.

I would allow the appeal and direct judgment in favour of the appellant with costs throughout.