
BETWEEN:

1924
Dec. 26.

GEORGE HALL COAL & SHIPPING CORPORATION ..... } PLAINTIFF;

AND

CANADIAN PACIFIC RAILWAY COMPANY .... } DEFENDANT.

Shipping and seamen—Scow and barge—Damages—Seaworthiness—Watchman.

Plaintiff had a contract with defendant for coaling of certain of its ships including the steamship *M.* Shortly after the docking of the *M.*, plaintiff's scow *W.* with a coal barge was placed alongside the *M.* When operations were discontinued on Saturday night, with the assent of

(1) [1872] L.R. 5 H.L. (E. & I.A.) 508.

the defendant the scow and coal barge were allowed to remain alongside the *M.* until operations were to be resumed on Monday. At 3.10 a.m. Monday a large volume of water was flowing on the deck of the scow from the sanitary discharge pipe in the side of the *M.* and the scow was in a sinking condition and shortly after sank and became a total loss. The scow was of sufficient seaworthiness for all purposes for which she was required. Defendant contended the scow was unseaworthy, having openings in the deck, without coverings or coamings, and holes in the stern too near the water line, and that the watchman was incompetent and negligent.

Held: On the facts, that as the plaintiff had its scow alongside the *M.* in the capacity of a person on lawful business in the course of fulfilling a contract in which both the plaintiff and defendant had an interest, it was incumbent upon the *M.* to use reasonable care for the safety of the scow, and that the *W.* was entitled to expect that the defendant and its employees in charge of the *M.* would use reasonable care to prevent damage from an unusual danger which such agents and employees knew or ought to have known and that the defendant was liable for the loss of the scow.

2. That the discharge of water as aforesaid was not a circumstance which the plaintiff should have foreseen and guarded against, but that on the contrary it was upon the *M.* to protect the *W.* from the effects of such discharge or to have given plaintiff reasonable notice that it must itself take care and avoid the danger.

3. That the seaworthiness of the scow must be considered in regard to the service in which it was engaged, and if a scow is reasonably fit for the work in which it is used, the suggestion of unseaworthiness must fail.

4. That the necessity for having a watchman on a scow or barge and the degree of vigilance to be exercised by him must depend on the danger to be anticipated and guarded against.

ACTION *in personam* to recover $50,000 for damage done by the defendant ship *Minnedosa* and the sinking of one of plaintiff's derrick scows in the harbour of Montreal.

Montreal, October 13th to the 16th and 29th, and November 5th, 18th and 29th, 1924.

Case now heard before the Honourable Mr. Justice Maclennan.

Francis King, K.C. and *W. B. Scott* for plaintiff.

A. R. Holden, K.C. and *R. Clement Holden* for defendant.

The facts are stated in the reasons for judgment.

MACLENNAN L.J.A., now this 26th December, delivered judgment.

[His Lordship here makes a resumé of the pretensions of the parties as contained in the statement of claim, the defence and the reply and proceeds.]

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During the navigation season of 1923 the plaintiff had a contract with defendant for coaling certain of the latter's ships trading to the port of Montreal including the steamship *Minnedosa*. This vessel arrived in Montreal shortly after midday on Saturday 17th November, 1923, and docked at Shed No. 8, being moored with her port side to the pier and facing the shore. Very shortly after her arrival the plaintiff placed its derrick scow *Wellington* and a coal barge alongside, the scow on the starboard side of the *Minnedosa* and the barge on the starboard side of the scow, both being moored to the steamer and facing the shore. The *Wellington* was a wooden vessel 132 feet long and 37 feet 6 inches wide, equipped with derrick, boom and the necessary appliances, driven by a donkey engine, for transferring coal from the barge into the coaling ports in the side of the *Minnedosa*. The coaling operations began at once, were continued until 9 p.m. Saturday, when, with the assent of the Marine Superintendent of defendant, they were suspended and the scow and coal barge were to remain where they were alongside the *Minnedosa* until the operations would be resumed at 7 a.m. Monday morning, 19th November. About 3.10 a.m. Monday morning a large volume of water was falling on the deck of the scow from the seven-inch sanitary discharge in the side of the *Minnedosa;* the scow was in a sinking condition and shortly after sank stern first in over thirty feet of water and became a total loss.

What was the cause of the scow sinking when moored alongside the *Minnedosa?* The plaintiff's contention is that those in charge of the *Minnedosa* took no precautions to prevent the water from her sanitary discharge falling over the rail of the scow on the latter's deck and into her hold, which resulted in the scow sinking, while the defendant's main contention is that the scow had a number of openings on her deck, unprotected by hatch-coverings and coamings, through which rain and other water could get into her hold, and a number of small holes in her stern above the water line where there were exhaust and other pipes which did not completely fill these holes and through which water from the harbour could enter, and because of these openings in the deck and stern the scow was unseaworthy and that the sinking was due to this unseaworthy

condition. It may be convenient to deal with these contentions of the defendant before considering the causes put forward by plaintiff for the loss of its scow.

The seaworthiness of the scow must be considered in regard to the service in which it was engaged and if it was reasonably fit for the work in which plaintiff used it as part of its coaling plant in the quiet waters of a sheltered part of the harbour of Montreal, the suggestion of unseaworthiness must fail. It is not relevant to the issue in this case that for other services, in other places, where conditions were entirely different, the scow might not be safe and seaworthy.

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[His Lordship here discusses the evidence as to seaworthiness of the scow *W.* and as to the cause of her sinking and concludes that she sank by reason of the water discharged from the *M.* onto her decks.]

That the discharging of water from the *M.* was not an ordinary peril to which the scow was exposed as part of plaintiff's coaling fleet, but was a most unusual occurrence. Nothing of that character had ever happened during the three years that plaintiff operated the scow. Can it be said that the owners of the scow should have foreseen the sudden and unexpected discharge, without warning, of a large volume of water from the vessel that was being coaled during the temporary suspension of the coaling operations on a holiday, and should a derrick scow like the *Wellington* have been built to withstand the sudden outpouring of tons of water on its deck from a vessel alongside? This appears to me to have been an extraordinary danger which the plaintiff could not be fairly expected to have foreseen and consequently was not bound to so equip its scow that no damage would result from this unusual danger. While some of defendant's witnesses testified that the scow was unseaworthy on account of these openings in the deck, other witnesses equally competent, in my opinion, held that the scow did not require hatch-coverings and coamings for coaling and was fit for the service in which it was engaged. I put this question to my Assessor:—

Was the *Wellington* reasonably fit to meet the ordinary perils which a scow of that kind, doing the work it was doing, might be fairly expected to meet, while alongside the *Minnedosa* at Shed No. 8, in the Harbour of Montreal?

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And his answer is:—

With the exception that coamings were omitted around the various deck openings, the scow *Wellington* was generally in good condition for carrying out the work. In laying alongside a vessel like the *Minnedosa* it would be expected that at times certain waters might be discharged on to the deck of the scow, from scuppers and discharges from the vessel's deck, and coamings around the deck openings would have diverted these waters to the scow's scuppers and prevented same from going into open hold.

The sanitary discharge system being continuous and not being general in vessels of this class, it was not to be expected that this discharge would come on the deck of the scow and the serious consequences could not be anticipated.

The coamings, in my Assessor's opinion, would divert water which might come at times on the scow from the ship's deck, but as there is no evidence or suggestion that any water came on the scow from that source, the absence of coamings cannot be considered a serious defect for the service in which the scow was engaged. I therefore find that the scow was seaworthy for the service in which it was used in coaling defendant's ship at the time of the accident.

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The plaintiff had its scow alongside the *Minnedosa* in the capacity of a person on lawful business in the course of fulfilling a contract in which both the plaintiff and the defendant had an interest, and on the principle laid down in *Indermaur* v. *Dames* (1), it is settled law that plaintiff, if it used reasonable care on its own part for the safety of the scow, was entitled to expect that the defendant through its agents, servants and employees in charge of the *Minnedosa* would on its part use reasonable care to prevent damage from unusual danger which such agents, servants and employees knew or ought to have known.

In my opinion defendant was bound either to use reasonable precautions and to put up some safeguard to protect the scow from the danger of the discharge of water on it doing damage, or to give the plaintiff reasonable notice that it must itself take care and avoid the danger. No notice or warning of any kind was given to plaintiff to look out for the safety of its scow. The contention of defendant is that, as the plaintiff had used its scow for coaling the *Minnedosa* on several previous occasions, no protective

(1) [1866] L.R. 1 C.P. 274; 2 C.P. 311.

measures or warning were required on the part of the ship and that, if plaintiff's employees and servants had properly looked after and watched over the scow, they could easily have seen if any danger threatened and have taken the necessary precautions to avoid it. This contention of defendant is supported by the evidence of the Harbour Master and the Shipping Master of the port of Montreal, both Master Mariners having many years experience in many ports, but there is other evidence of Master Mariners, with equal experience to theirs, that it is the customary practice of seamen to safeguard any discharge of running water by a tarpaulin or hatch-cover from doing any damage to anything alongside, and there is further evidence that on a subsequent occasion the sanitary discharge from the *Minnedosa* was protected during a coaling operation in the harbour of Montreal. The officer of the watch on the *Minnedosa* from midnight to 6 a.m. on the morning of the accident testified that he saw the water from the sanitary discharge going against the rail of the scow at 2 a.m., but he was unable to say how close to the top of the rail the discharge came as it was too dark. In the evidence of the master of the *Minnedosa* at the trial the duty of taking care not to cause any damage to the scow is recognized in the following extract from his examination:

[His Lordship here cites from the evidence.]

In *Rylands* v. *Fletcher* (1), Mr. Justice Blackburn stated the rule of law, that the person who for his own purposes brings on his land, and collects and keeps there anything likely to do mischief, if it escapes, is *prima facie* answerable for all the damage which is the natural consequence of such escape, but that he can excuse himself by showing that the escape was owing to the plaintiff's default. In this opinion Cairns L.C., and Lord Cranworth concurred in the House of Lords, the latter stating:—

> If a person brings, or accumulates, on his land anything which, if it should escape, may cause damage to his neighbour, he does so at his peril. If it does escape, and cause damage, he is responsible, however careful he may have been, and whatever precautions he may have taken to prevent the damage.

(1) [1868] 3 H.L. (E. & I.A.) 330.

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In that case the defendant had collected water on his own land by means of a reservoir and the water escaped through underground shafts in old workings which were unknown to defendant and flooded and damaged the plaintiff's mine and the defendant was held liable for the damage. In the case at bar, the defendant pumped into the sanitary circulating system of its ship large volumes of water which were ejected through the ship's side, without taking any precautions to prevent it escaping to the deck of plaintiff's scow which was moored alongside, in the performance of a contract in which both plaintiff and defendant were interested and without giving any warning or notice to plaintiff that it must take care and avoid the danger.

Counsel for plaintiff also rely upon articles 1053 and 1054 of the Civil Code of Lower Canada.

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They also rely upon the interpretation given to this latter article by the Judicial Committee of the Privy Council in *Quebec Railway Light Heat & Power Company Limited* v. *Vandry & al* (1), and the *City of Montreal* v. *Watt & Scott Limited* (2). In the Vandry case, high tension electricity found its way into the plaintiffs' houses and set them on fire, and in the Watt & Scott case, water from a street sewer during a heavy rain storm flooded the cellar of plaintiff's warehouse damaging goods stored therein. In each of these cases the Privy Council maintained the actions and applied article 1054 C.C., holding that the article established a liability for damages defeasible by proof of inability to prevent the damage by reasonable means. The evidence establishes that defendant used no means whatever to prevent the water discharged from its ship doing damage to plaintiff's scow and therefore did not bring itself within the terms of the exculpatory paragraph of the article. The same principle was applied in the Circuit Court of Appeals in the case of *Lincoln* v. *Cunard S.S. Co.* (3), in which the libelant sued for personal injuries sustained as a result of a discharge of steam from the side of a steamship while lying at her pier in the port of New York

(1) [1920] A.C. 662; 89 L.J.P.C. 99.

(2) [1922] 2 A.C. 555; 91 L.J. P.C. 239.

(3) [1915] 221 Fed. Rep. 622.

which, suddenly and without warning, discharged steam and hot water from an exhaust pipe upon the master of a barge who was making fast alongside for the purpose of delivering coal to the owner and the latter was held chargeable with gross negligence and liable for the injuries. The Circuit Judge, in affirming the decree of the District Court, said at page 623:—

> Libelant was in charge of the barge *Harsimus*, owned by the Berwind-White Coal Company, which was delivering coal to the steamer. The barge was placed alongside of the steamer, made fast as was supposed at the bow, and Fill was engaged in making fast at the stern when some one called to him that his bow line was rendering. He at once hurried along the deck to the forward bitt, and while there engaged with the line, suddenly and without warning, there was thrown upon him out of an exhaust orifice in the side of the steamer a discharge of steam and boiling water, which knocked him down and scalded him, producing severe injuries.
>
> The complaint averred that it was the custom in the port of New York to protect these outlets for steam and hot water in some way, but that is unimportant. The requirements of ordinary care and prudence would impose upon defendant the duty of so managing discharges of such dangerous substances from the side of its vessels as not to throw them suddenly and without warning on the deck of other vessels, brought alongside at respondent's request, endangering persons engaged thereon in legitimate occupations. As the District Judge held, this is a case of *res ipsa loquitur;* and in the absence of any explanation on behalf of the steamship the necessary conclusion is that some one in respondent's employ was negligent—indeed grossly negligent—in thus exposing the libelant to serious injury without warning him of what was to be done.

I find that the proximate cause of the sinking of plaintiff's scow was the discharge of a large volume of water from the *Minnedosa* over the rail of the scow, without warning and without any care or precautions having been taken by those on board the *Minnedosa* to prevent the damage, and on the principle laid down in the cases referred to, as well as under the Civil Code, the defendant is liable for the resulting damages and must be held alone to blame, unless there was negligence or want of care on the part of plaintiff and those for whom it was responsible which contributed to the loss of the scow.

[His Lordship here discusses the evidence as to negligence of those in charge of the barge and scow, and finds the barge was kept alongside the scow until it sank and that no negligence can be attributed to those in charge.]

Counsel for defendant submitted that Brossoit failed to do his duty as watchman and was negligent in not sooner discovering the water from the *Minnedosa* and in not taking

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some steps to save the scow from the water which was coming on it, and they referred to By-law No. 36 of the Harbour Commissioners of Montreal, which is under the heading "Precautions against Fire" and reads as follows:—

* * * * *

The necessity for having a watchman on the scow and barge and the degree of vigilance to be exercised by him must depend on the dangers to be anticipated and guarded against. This principle is supported by authority.

Marsden's Collisions at Sea, 8th Edition, page 448:—

> Whether it is negligence to leave craft moored to the shore or other barges in dock or in tidal waters without a watchman depends on the danger to be anticipated having regard to the position of the barge.

MacLachlan's Law of Merchant Shipping, 6th Edition, page 235:—

> A vessel is bound to carry a sufficient crew for the purposes on which she is employed. The duty of a barge, when moored, to have a man in attendance has been discussed in several cases. The result of the cases appears to be that it is necessary for a man to be in attendance upon a barge whenever there is any reason for anticipating a danger which is known and so obvious that it ought to be guarded against; but in the absence of any such danger a barge may be left unattended when securely moored in a proper place.

The Western Belle (1); *The Hornet* (2).

The only danger which the watchman had in mind appears to have been the water in the bottom of the scow. He was careful to watch it did not become necessary to require pumping and for that purpose examined the scow every three hours. No trouble or danger from water from the ship alongside had ever been experienced, my Assessor says, *it was not to be expected that the discharge would come on the deck of the scow,* and there was nothing to suggest to the watchman any danger from that source.

I therefore find that Brossoit exercised reasonable supervision and is not chargeable with negligence or want of care in looking after the property of the plaintiff in his charge.

The plaintiff has established its claim and there will be judgment declaring it entitled to the damage proceeded for and the condemnation of the defendant therein and in costs, with the usual reference to assess the damage. The counter-claim of defendant fails.

Judgment accordingly.

(1) [1906] 10 Asp. M.C. 279. (2) [1892] P. 361.