

ONTARIO ADMIRALTY DISTRICT

1953
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 Feb. 10,
 11 & 12
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 Mar. 6
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BETWEEN:

THE KURTH MALTING COM-
 PANY and McCABE GRAIN } PLAINTIFFS;
 COMPANY LIMITED }

AND

COLONIAL STEAMSHIPS LIMITED...DEFENDANT.

Shipping—Damage to cargo—Water Carriage of Goods Act, 1936, 1 Edw. VIII, c. 49, s. 2 & 3, articles III, IV—Failure of defendant to discharge onus of showing loss was caused by peril of the sea.

The action is one for damages for loss to a cargo of barley shipped in good order by plaintiffs on defendant's vessel. Defendant admits the cargo was damaged and pleads the bill of lading under which it was shipped and The Canadian Water Carriage of Goods Act, 1936, 1 Edw. VIII, c. 49. The Court found that the damage was due to a break in a steam pipe which had occurred some considerable time before the accident relied upon by defendant as a peril of the sea.

Held: That the defendant failed to discharge the onus of showing that the loss or damage suffered by the plaintiffs resulted from perils, danger and accidents of the sea.

ACTION by plaintiffs to recover damages for loss to a cargo of barley shipped on defendant's vessel.

The action was tried before the Honourable Mr. Justice Barlow, District Judge in Admiralty for the Ontario Admiralty District, at Toronto.

R. C. Holden, Q.C. and *H. L. Rowntree* for plaintiffs.

Peter Wright and *F. O. Gerity* for defendant.

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

BARLOW D.J.A. now (March 6, 1953) delivered the following judgment:

The plaintiffs' claim is for the sum of \$55,441.59 by reason of loss suffered to a cargo of 291,835 bushels of No. 3 Canada Western 6 row barley shipped in good order and condition by bills of lading on the ship *Laketon* owned and operated by the defendant at Port Arthur, Ontario, on the 19th day of November, 1951, for delivery at Milwaukee where the said ship arrived on the 22nd day of November, 1951, at which time the cargo was found to be wet with the resultant loss and damage.

The defendant carrier admits that the cargo was received in good order and condition at Port Arthur and further admits that the cargo was wet upon arrival, causing damage in the sum of \$55,441.59.

The defendant alleges that the cargo suffered damage as the result of perils, danger and accidents of the sea, for which it is not responsible and pleads the bills of lading under which the cargo was shipped and The Canadian Water Carriage of Goods Act, 1936, being Statutes of Canada 1936, 1 Edw. VIII, Chapter 49.

The bills of lading contained the following paragraph:

6. All the terms, provisions and conditions of The Canadian Water Carriage of Goods Act, 1936, and of the rules comprising the Schedule thereto are, so far as applicable, to govern the contract contained in this Bill of Lading, and this Bill of Lading is to have effect subject to the provisions of the rules as applied by the said Act. If anything herein contained be inconsistent with the said provisions, it shall to the extent of such inconsistency and no further be null and void.

The pertinent sections of The Water Carriage of Goods Act, and the Schedule of Rules made applicable by the above paragraph by the bills of lading are as follows:

2. Subject to the provisions of this Act, the rules relating to bills of lading as contained in the Schedule to this Act (hereinafter referred to as "the Rules") shall have effect in relation to and in connection with the carriage of goods by water in ships carrying goods from any port in Canada to any other port whether in or outside Canada.

3. There shall not be implied in any contract for the carriage of goods by water to which the Rules apply any absolute undertaking by the carrier of the goods to provide a seaworthy ship.

Article III.

Responsibilities and Liabilities.

1. The carrier shall be bound, before and at the beginning of the voyage, to exercise due diligence to,

- (a) make the ship seaworthy;
- (b) properly man, equip, and supply the ship;
- (c) make the holds, refrigerating and cool chambers, and all other parts of the ship in which goods are carried, fit and safe for their reception, carriage and preservation.

Article IV.

Rights and Immunities.

1. Neither the carrier nor the ship shall be liable for loss or damage arising or resulting from unseaworthiness unless caused by want of due diligence on the part of the carrier to make the ship seaworthy, and to secure that the ship is properly manned, equipped and supplied, and to make the holds, refrigerating and cool chambers and all other parts of

1953
 KURTH
 MALTING
 COMPANY
et al
v.
 COLONIAL
 STEAMSHIPS
 LIMITED
 ———
 Barlow
 D.J.A.
 ———

1953
 KURTH
 MALTING
 COMPANY
et al
 v.
 COLONIAL
 STEAMSHIPS
 LIMITED
 Barlow
 D.J.A.

the ship in which goods are carried fit and safe for their reception, carriage and preservation in accordance with the provisions of paragraph 1 of Article III.

Whenever loss or damage has resulted from unseaworthiness, the burden of proving the exercise of due diligence shall be on the carrier or other person claiming exemption under this section.

2. Neither the carrier nor the ship shall be responsible for loss or damage arising or resulting from,

(c) perils, danger, and accidents of the sea or other navigable waters;

The defendant carrier having admitted the receipt of the cargo in good order and condition, and the loss suffered during the voyage, the burden of proving its defence that the loss was suffered by perils, danger and accidents of the sea falls upon the defendant carrier if it is to escape responsibility for the loss or damage. It was admitted by counsel for all parties that if the defendant satisfied this onus then the onus would be upon the plaintiff to show unseaworthiness of the vessel, to which the defendant's answer would be that it had exercised due diligence to make the ship seaworthy.

After the above admissions had become part of the record the defendant carrier proceeded to adduce evidence.

The *Laketon* is 436 feet long over-all, with a breadth of 50 feet and a depth in hold of 24 feet, and a moulded depth of 28 feet. The forward accommodation for the crew is heated by steam which is brought forward from the engine to the radiators by a 1½ inch iron pipe passing through the holds under the deck on the port side. Another pipe of like size returns the condensate or surplus steam to the hot pit of the engine. This pipe also runs along the port side parallel to the steam pipe some 12 or 18 inches from it and about 3 feet from the port side.

The *Laketon* sailed from Port Arthur at 21.45 o'clock on the 19th of November, 1951, and arrived at Milwaukee at 12.32 o'clock on the 22nd November. When the *Laketon* arrived at Milwaukee it was noticed that vapour was rising along the port side of the deck and that the deck felt warm. Steam was rising from underneath the tarpaulins on the hatches. When the hatches were opened it was found that the grain in holds 2, 3 and 4 was wet, more particularly on the port side, and that the barley along the top of these holds had sprouted. It was then found that the pipe which returned the condensate or surplus steam to the engine had

split open in holds Nos. 2 and 3, and that a joint had pulled apart in hold No. 4 allowing the steam and condensate to escape and thus wetting the cargo of barley.

There is no direct evidence as to when the return pipe suffered damage, nor as to what caused the return pipe to break as it did. No breaks were found in the pipe which carried the steam forward. The defendant leads evidence to show that nothing unusual happened during the voyage on the 19th or 20th November but that on the 21st of November when in Lake Michigan the ship encountered heavy seas. On this day it became necessary to repair the hause pipe packing and in order to do so the vessel at 20.37 o'clock on the 21st was checked to half speed. She held her head until 20.48 when she fell off into the trough of the seas and was subjected to severe twisting and racking for about ten or fifteen minutes until, with full steam ahead she steadied herself and proceeded. The defendant alleges that this caused the breaks in the return pipe.

I am asked to infer from these facts that the heavy weather and the falling off into the trough of the seas caused the breaks in the return pipe. This incident of the voyage occurred about 16 hours before the vessel reached Milwaukee when the hatches were opened, disclosing the damage to the barley and the broken pipe.

Expert evidence is tendered by the defendant in an endeavour to show that the breaks in the return pipe could have occurred by reason of the twisting of the vessel when she fell off into the trough of the sea.

As stated above there is no direct evidence as to how the breaks occurred or when they occurred. The Captain says that he does not know when the breaks in the return pipe occurred.

Certain of the defendant's witnesses admit that internal pressure on the pipe may at least have played a part in causing the breaks.

The plaintiffs then adduced evidence which shows that when the vessel was loading at Port Arthur there were several degrees of frost, even down almost to zero. This fact, together with the nature of the breaks, leads certain of the witnesses to say that in their opinion ice forming in the return pipe could have caused the breaks. It is

1953
KURTH
MALTING
COMPANY
et al
v.
COLONIAL
STEAMSHIPS
LIMITED
Barlow
D.J.A.

1953
 KURTH
 MALTING
 COMPANY
et al
 v.
 COLONIAL
 STEAMSHIPS
 LIMITED
 —
 Barlow
 D.J.A.
 —

significant that no breaks were found in the pipes carrying the steam forward, although this pipe ran parallel to the return pipe. Both pipes were covered with $\frac{3}{4}$ inch of asbestos. Further evidence adduced by the plaintiff satisfies me that there was some sprouting of the barley when the ship arrived at Milwaukee. If the defendant's contention as to the time of the breaking of the pipe is correct, then this sprouting must have occurred within sixteen hours of the breaking of the pipe and the wetting of the barley. Is this possible? I do not believe that it is.

While the experts called as to the sprouting of the barley did not make their tests under exactly the same conditions of steam heat, yet I am satisfied from their evidence that no sprouting of the barley would occur until more than twenty-four hours after the barley became wet.

The result of the evidence leaves me to conjecture when the return pipe broke, and how. Even if the evidence were evenly balanced as to the two theories of the breaking of the pipe, it would not be sufficient to satisfy the onus placed upon the defendant.

Upon the evidence I am of the opinion that the balance of evidence is in favour of the theory of the plaintiffs that the return pipe must have broken some considerable time before the accident in Lake Michigan on the 21st November, which is relied upon by the defendant as a peril of the sea.

The onus cast upon the defendant by The Water Carriage of Goods Act quoted above, must be satisfied by a preponderance of evidence which would satisfy me that the return pipe was broken by the incident set out above as to the heavy seas in Lake Michigan. As stated above, I am far from satisfied that the return pipe was broken as contended for by the defendant.

Since I have found that the onus upon the defendant to show that the loss or damage resulted from perils, danger and accidents of the sea has not been satisfied, it is unnecessary for me to discuss at any length the questions of unseaworthiness and due diligence. I do find upon the evidence that unseaworthiness has not been shown and that in any event the defendant carrier did exercise due diligence to make the ship seaworthy.

For references as to the case law, see *Gosse Millerd Limited v. Canadian Government Merchant Marine Limited, The Canadian Highlander* (1); *Carver, Carriage of Goods by Sea*, 9th Ed. (1952) pp. 118, 119, 185; *Toronto Elevators Limited v. Colonial Steamships Limited* (2); "*Fred W. Sargent*": *Spencer Kellogg & Sons, Inc. v. Great Lakes Transit Corporation* (3); *Morris and Morris v. The Oceanic Steam Navigation Co. Ltd.* (4); *The Catania* (5); *Micks, Lambert & Co. et al v. United States Shipping Board* (6); *Imperial Sugar Co. v. Bright Star S.S. Co.* (7); *Sewaram v. Ellerman Lines, Ltd.* (8); *Caswell v. Powell Duffryn Associated Collieries, Ltd.* (9); *Jane Wakelin v. London & South Western Railway Co.* (10); *Jones v. Great Western Railway Co.* (11); and *Imperial Smelting Corporation, Ltd. v. Joseph Constantine Steamship Line Ltd.* (12).

1953
 KURTH
 MALTING
 COMPANY
et al
 v.
 COLONIAL
 STEAMSHIPS
 LIMITED
 Barlow
 D.J.A.

For the above reasons judgment will go for the plaintiff for \$55,441.59 and costs.

Judgment accordingly.

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| (1) [1929] A.C. 223 at 234. | (7) [1950] A.M.C. 2076. |
| (2) [1950] Ex. C.R. 371. | (8) (1930) 37 LL. L.L.R. 97. |
| (3) [1940] A.M.C. 670. | (9) [1940] A.C. 152. |
| (4) (1900) 16 T.L.R. 533. | (10) (1887) 12 A.C. 41. |
| (5) (1901) 107 Fed. Rep. 152. | (11) (1930) 42 T.L.R. 39. |
| (6) (1923) 16 LL. L.R. 276. | (12) (1940) 66 LL. L.L.R. 147. |