THE ONTARIO ADMIRALTY DISTRICT

1963
Mar. 25, 26, 27, 28, 29
1964
Jan. 31

BETWEEN:

THE ALGOMA CENTRAL AND HUDSON BAY RAILWAY COMPANY and PARRISH & HEIMBECKER LIMITED ..... PLAINTIFFS;

AND

MANITOBA POOL ELEVATORS LIMITED and LAKEHEAD HARBOUR COMMISSIONERS ..... DEFENDANTS.

Shipping—Action for damages—Ship colliding with boulder embedded in bottom of Harbour at Dock—Negligence—Contributory negligence—Lakehead Harbour Commission Act, S. of C. 1958, c. 34, s. 10—British North America Act 1867, s. 108, Schedule III—Public Works Act, R.S.C. 1952, c. 228, s. 9—Public Authorities Protection Act, R.S.O. 1960, c. 318, s. 11—Agent of Crown in Right of Canada.

The plaintiff, The Algoma Central and Hudson Bay Railway Company, was the owner of the ship *Algoway* and the plaintiff, Parrish & Heimbecker Limited, was the owner and consignee of wheat being loaded on the *Algoway* on November 29, 1961 at the dock of the defendant, Manitoba Pool Elevators Limited, in the Lakehead Harbour in the City of Port Arthur, Ontario, when, as the ship was being winched forward to permit loading through the after hatches, it ran aground and was holed near the bow resulting in water damage to some of the wheat and necessitating the unloading of the wheat in order to permit the ship to go into drydock for repairs. The damage to the ship was caused by collision with a small boulder embedded in hard clay. At the time the mate, who was in charge of the loading, determined to pull the ship forward so that the after hatches could be filled up the ship was drawing 19 ft. 8 in. forward. A chart of the harbour, No. 2314 of the Canadian Hydrographic Services, which was in the wheelhouse of the *Algoway* indicated a depth alongside the dock in question of 18 or 19 ft. which when corrected for present datum at the season of the accident became 17½ to 18½ ft. The ship also carried a document entitled "By-laws and General Information of the Lakehead Harbour Commissioners, Port Arthur, Ontario" in which the depth at the said dock was given as "M.W.D. 21.2'.". Immediately before he had the ship winched forward, the mate asked a man on the dock if there was lots of water and he was told there was and that they had loaded ships to 21½ ft. The man who gave the mate this information was the foreman in charge of the loading operation for the defendant elevator company, although the mate was not aware of his identity at the time.

Held: That the defendants, the Lakehead Harbour Commissioners, administer and manage the harbour for the Crown in the right of Canada as represented by the Minister of Transport but they are neither the owners nor the occupants of the harbour, the fee in the land being vested in Her Majesty in the right of Canada quite apart from any

1964

ALGOMA CENTRAL & HUDSON BAY RY. CO. *et al.* *v.* MANITOBA POOL ELEVATORS LTD. *et al.*

functions of the said defendants, and the action as against them must accordingly fail.

2. That the defendants, the Lakehead Harbour Commissioners, operate as agents of the Crown in the right of Canada and, as such, are entitled to take advantage of s. 11 of the *Public Authorities Protection Act* of Ontario under which this action is barred since the writ was issued more than 6 months after the happening of the Act, neglect or default complained of.

3. That the decision as to whether this was a safe berth for the purpose of loading wheat rested squarely on the master of the ship and it was recklessness of a high degree to depend on the information shown on the sketch of the harbour contained in the Lakehead Harbour Proceedings Booklet which was only a rough guide to various installations and elevators in the harbour for the berthing of a ship which was going to take on a very heavy cargo of wheat, rather than to rely on the Canadian Hydrographic Services chart which indicated that it was quite unsafe to load to the depth contemplated but which both the captain and the mate chose to ignore.

4. That although the information regarding depth alongside the dock given by the defendant elevator company's foreman was inaccurate, the real and proximate cause of the accident was the disregard of any precaution by the master of the ship and his first mate to ascertain the depth alongside the dock at which they were loading.

5. That even if the defendant, Manitoba Pool Elevators Limited, was negligent, the *Ontario Negligence Act* has no application and negligence cannot be apportioned between the ship's officers and the said defendant and accordingly the plaintiffs are not entitled to recover because of the contributory negligence of the ship's master and mate.

6. That the *Canada Shipping Act* incorporating the *Maritime Conventions Act* of 1911 has no application to a collision between a ship and a structure on land, in this case a small boulder on the floor of the harbour.

7. That the Lakehead Harbour is located in one of the roughest and rockiest parts of Canada and there is nothing in what the divers and sweepers discovered on the harbour bottom which could be described as a hidden risk to which it was the duty of the defendant, Manitoba Pool Elevators Limited, as proprietors of the dock, to draw attention.

ACTION for damages to a ship grounding in Lakehead Harbour.

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

F. O. Gerity, Q.C. and *S. G. Fisher* for plaintiff, Algoma Central & Hudson Bay Ry. Co.

C. I. Mason for plaintiff, Parrish & Heimbecker Ltd.

A. S. Hyndman for defendant Manitoba Pool Elevators Ltd.

B. J. Thomson, Q.C. and *V. K. McEwan* for defendant Lakehead Harbour Commissioners.

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

WELLS D.J.A. now (January 31, 1964) delivered the following judgment:

This action arises out of a grounding in the Lakehead Harbour of the ship *Algoway* which was transporting wheat for the co-plaintiff Parrish & Heimbecker Limited the owner and consignee of wheat being loaded on the *Algoway*. The ship was owned by the plaintiff The Algoma Central and Hudson Bay Railway Company and the accident occurred on November 29, 1961 at the dock of the defendant Manitoba Pool Elevators Limited at a berth alongside a wheat elevator known as Manitoba Pool No. 2 in the City of Port Arthur. The Lakehead Harbour Commissioners are also sued as defendants. The Commissioners are a corporation created by a statute of the Parliament of Canada being chap. 34, 7 Eliz. II. It will be convenient to deal with the claims against the Lakehead Harbour Commissioners first as their defence is chiefly of a technical nature apart from the merits of the case.

The accident in question occurred after the ship had loaded a very substantial amount of grain and was being pulled further in towards shore to permit the spouts of the elevator from which she was loading to pour wheat into her afterholds. The ship was pulled inward by winches, ran aground and was holed in its forward parts apparently by a small boulder lying on the bottom of the harbour. Claims for the damage which ensued were made against both defendants and in its pleading in paragraph 12 of its statement of claim the plaintiff Algoma Central and Hudson Bay Railway Company alleged as to the defendant Commission:

> 12. . . ., as to the second defendant Lakehead Harbour Commissioners, that the said corporation
>
> (*a*) failed in its duty to the plaintiff, in publishing the document mentioned in paragraph 4 hereof for the information and use of those having charge of the navigation and management of ships entering into the harbour and using the several berths situate therein, to ascertain the actual depths of water available in the

1964

ALGOMA CENTRAL & HUDSON BAY RY. CO. *et al.* *v.* MANITOBA POOL ELEVATORS LTD. *et al.*

Wells D.J.A.

said berths and more particularly in the berth to be used and in fact used by the ship *Algoway* as hereinbefore alleged;

(*b*) was in breach of its duty to the plaintiff to take reasonable steps to discover from time to time the existence of any obstructions in the said berth or of the depths of water available therein and to discover the condition of the bottom if it was expected that the ships might lie on the bottom during the course of loading;

(*c*) failed in its duty to the plaintiff to warn those having charge of the navigation and management of its ship *Algoway* of the actual conditions of the berth to be used and in fact used as hereinbefore alleged and of the depths of water to be expected therein.

The allegation referred to in paragraph 4 of the statement of claim is set out as follows:

The said ship was fully manned with a proper complement of officers and men and (in addition to the usual charts and other navigational publications) had on board a copy of a document dated January 14, 1960, entitled "By-laws and General Information of the Lakehead Harbour Commissioners, Port Arthur, Ontario." Amongst other things set forth in the said document and publication was to be found descriptive material indicating the various berths within the said Lakehead Harbour, numbering the same and indicating the location of the said numbered berths on a Plan annexed, and the berth numbered 22 showed, amongst other things, the following information:

"Name of Elevator—Manitoba Pool No. 2

Depth of Water at dock—M.W.D. 21.2'".

The plaintiffs Parrish & Heimbecker raised a substantially similar plea against the defendant Lakehead Harbour Commissioners and in reply to these claims the Lakehead Harbour Commissioners admitted publishing the booklet referred to but pleaded that the booklet was one for general distribution to the public and was not intended for those operating ships in the Harbour and pleaded the depth shown in Chart 2314 published by the Canadian Hydrographic Services. In paragraphs 6 and 7 the Lakehead Harbour Commissioners also plead that the land on which the berth was situated was partly owned by the Manitoba Pool Elevators Limited, its co-defendant, or if not so owned was the property of Her Majesty the Queen in right of Canada and that the defendant had no power, jurisdiction, authority or control over the land in question and pleaded section 10 of the *Lakehead Harbour Commissioners Act* to which I have already referred. This section is as follows:

10. Subject to this Act, the Corporation has jurisdiction within the limits of the harbour, but nothing in this Act gives the Corporation the right to enter upon or deal with any property of Her Majesty, except when authorized to do so by order of the Governor in Council, or gives the

Corporation jurisdiction or control over private property or rights within the limits of the harbour, except as provided in this Act.

It is I think, not disputed that what now comprises the Lakehead Harbour was a public harbour which by virtue of section 108 of the *British North America Act* of 1867 became vested in Her Majesty the Queen in the right of Canada. Section 108 provides that public works and property of each province enumerated in the Third Schedule to this Act shall be the property of Canada. Item 2 of the Third Schedule is "Public Harbours." By reason of section 9 of the *Public Works Act,* being chap. 228, R.S.C. 1952 which provides in subsection (*a*) as follows:

> 9. The Minister has the management, charge and direction of the following properties belonging to Canada, and of the services in this section enumerated namely:
>
> (*a*) the dams, the hydraulic works, the construction and repair of harbours, piers and works for improving the navigation of any water, and the vessels, dredges, skows, tools, implements and machinery for the improvement of navigation.

the Lakehead Harbour Commissioners plead this statute and say that the area in question which was not owned by the Manitoba Pool Elevators Limited was the property of Her Majesty the Queen as represented by the Minister of Public Works for Canada or was under his charge and control. The Lakehead Harbour Commissioners also pleaded that it is a public authority within the *Public Authorities Protection Act* as passed by the Legislature of the Province of Ontario, being R.S.O. 1960, chap. 318.

The grounding as I have already said, is alleged to have occurred on November 29, 1961. The writ was not issued until July 9, 1962 and this defendant pleads that by virtue of the provisions of section 11 of the Ontario statute that the action brought is prohibited unless it is commenced within six months next after the act, neglect or default complained of. This defence, as I understand it, is based on the conception that the Lakehead Harbour Commissioners are an agent of the Crown and that under the prerogative rights of the Crown they are entitled to claim the benefit of a provincial statute. I will have more to say about this later.

An examination of the statute of incorporation of the Lakehead Harbour Commissioners would appear to indicate that they were set up to manage and operate the Lakehead Harbour which compirses the waters of the former harbours

1964

ALGOMA CENTRAL & HUDSON BAY RY. CO. *et al.* *v.* MANITOBA POOL ELEVATORS LTD. *et al.*

Wells D.J.A.

of Port Arthur and Fort William and Thunder Bay within the boundaries set out in the statute itself. It is quite apparent from an examination of the statute that the Corporation has very little independent power apart from what the Minister of Transport who is the Minister referred to in the statute gives it by means of orders of the Governor in Council. They have certain rights of employing harbour masters and other officers necessary to carry out their duties. They have jurisdiction within the harbour but as section 10 provides, they have no right to enter upon or deal with any property of Her Majesty except when authorized to do so by order of the Governor in Council. They have powers of purchase and expropriation and they may sell and dispose of such lands and other property, real or personal within the harbour as they deem necessary and they may develop and administer on behalf of Her Majesty in the right of Canada and on behalf of the municipalities of Port Arthur and Fort William any property owned by Her Majesty or by the said municipalities at any time the control thereof is transferred to the Corporation. There is no evidence before me to suggest that any of the land either under the harbour water or elsewhere concerned in this action was ever transferred to the Corporation. If the land was acquired from Her Majesty in the right of Canada they have not the power to mortgage or sell it or manage it in any way without the consent of the Governor in Council. They have quite wide powers for dealing with the land that is transferred to them apart from the restrictions I have indicated and they have very wide powers for regulating and controlling navigation and the use of the harbour by the vessels including their mooring, berthing, discharging and loading, but no by-laws passed in respect of any of these matters have any effect until they have been confirmed by the Governor in Council and published by the Canada Gazette. This over-all control seems to run like a thread through the whole statute. In my view the statute examined by Duff C.J. in the case of the *City of Halifax v. Halifax Harbour Commissioners*[1] and the Act incorporating the Lakehead Harbour Commissioners bear striking resemblances. After analyzing the statute governing the Harbour Commissioners of Halifax, that learned

[1] [1935] S.C.R. 215.

Judge at p. 226 summed up the powers and duties of the Commissioners of Halifax Harbour in the following words:

> Their occupation is for the purpose of managing and administering the public harbour of Halifax and the properties belonging thereto which are the property of the Crown; their powers are derived from a statute of the Parliament of Canada; but they are subject at every turn in executing those powers to the control of the Governor representing His Majesty and acting on the advice of His Majesty's Privy Council for Canada.

and after some further examination of those Commissioners' powers at p. 227 he summed the matter up as follows:

> I cannot doubt that the services contemplated by this legislation are, not only public services in the broad sense, but also, in the strictest sense, Government services; or that the occupation of the Government property with which we are concerned is, in the meaning with which Lord Cairns used the words in the passage cited (and in the sense in which those words were interpreted by Lord Blackburn and Lord Watson), an occupation by persons "using" that property "exclusively in and for the service of the Crown."
>
> It is not without importance to observe that, since Confederation, except in special cases where it has been found convenient to make provision for the administration of harbours by the appointment of harbour commissioners, the control, management and regulation of the matters committed to the charge of the respondents have been treated in this country as belonging to the services of the Crown.

With respect these words seem just as applicable to the defendant Commissioners in the present action. In my opinion from a careful reading of the statute it is quite patent that these defendants operate as agents of the Crown in the right of Canada. The rights of the Crown or servants of the Crown in a case such as this were discussed in the Supreme Court of Canada in the case of *Toronto Transportation Commission v. The King*[1]. Kellock J. in describing the rights and obligations of the Crown in such an action said:

> As stated in Chitty on *Prerogatives of the Crown*, page 245, the King "may maintain the usual common law actions . . . And though the King chuse a common law action, he may, by virtue of the prerogative we have just noticed, commence it in any court". In a common law action based on the negligence of the defendant, the plaintiff may not recover if the injury has been contributed to by the negligence of his own servant; *William v. Holland* (1883) 6 C. & P. 23. Where, therefore, the Crown brings such an action I think that by analogy to the rule applied in the case of a proceeding in Admiralty, the action is subject to the common law rule, and it is clear, by reason of section 50A of the Exchequer Court Act, that the members of the Air Force here in question are to be considered

[1] [1949] S.C.R. 510 at 521.

1964

ALGOMA CENTRAL & HUDSON BAY RY. CO. *et al.* *v.* MANITOBA POOL ELEVATORS LTD. *et al.*

Wells D.J.A.

as servants of the Crown for the purpose of this proceeding. While the section does not create any direct or specific right in the Crown, it places the Crown in recognized common law relationship and its rights are those arising from that relation under the rules of that law; *Attorney-General v. Jackson* [1946] S.C.R. 489, per Rand J. at 493.

On this basis the result in the case at bar, in view of the finding of negligence on the part of servants of the respondent would be that the Crown's claim would be dismissed. It is well settled, however, that the Crown may take the benefit of a statute and, applying the provisions of the Ontario *Negligence Act,* the Crown should recover one moiety of its claim. As to the quantum, I think the trial judge has correctly dealt with the Crown's claim.

In that case the Provincial statute which the servants of the Crown chose to take advantage of was the *Ontario Negligence Act.* The matter was again discussed in the Supreme Court in the case of *Gartland Steamship Company v. The Queen*[1]. Judson J. who gave the judgment of the majority of the Court said at p. 326:

> I would apportion the fault two-thirds to the bridge-master and one-third to the ship. The next question is whether the plaintiff can recover anything in these circumstances. Apart from statute this action would be dismissed. With a plea of contributory negligence established as in this case, the plaintiff fails because he does not prove that the defendant caused the damage: *T.T.C. v. The King* [1949] S.C.R. 510, 515, 3 D.L.R. 161, 63 C.R.T.C. 289. *The Canada Shipping Act,* incorporating the *Maritime Conventions Act* 1911, has no application to a collision between a ship and a structure on land. The choice is between no recovery at all and a recovery under the Ontario *Negligence Act.* This is a common law action for damages within s. 29(*d*) of the *Exchequer Court Act,* R.S.C. 1952, c. 98, and in my opinion the Crown, as plaintiff, is entitled to the advantage of the Ontario Act: *T.T.C. v. The King, supra.* It should have judgment for one-third of its loss.

With respect, it would seem to me that the same principle applies to the *Public Authorities Protection Act* on which these defendants as agents of the Crown have elected to rely. By reason of section 11 thereof to which I have already alluded, it would seem to me that this action is barred by reason of the provisions of that section of the statute and that the Lakehead Harbour Commissioners are entitled to take advantage of it as being agents of the Crown in the carrying out of their duties in respect of the harbour in question. It would also appear to me to be quite clear that the fee in the land in the harbour has never been vested in the Harbour Commissioners nor can I think it be said that the Commissioners are occupants of the land in question. It is quite true they administer the harbour and they manage it

[1] [1960] S.C.R. 315.

but they manage it for the Crown in the right of Canada as represented by the Minister of Transport. The fee in the land is vested in Her Majesty in the right of Canada quite apart from any functions of the defendant Lakehead Harbour Commissioners. They are not in any way responsible for the dredging of the Harbour—that is the duty of the Minister of Public Works.

It would appear to me that a number of the decisions in England which have been cited to me relate to an entirely different situation. There in the cases which I have read, the land would appear to be vested in the Harbour Commissioners and they are the owners and occupiers of the harbour. Such is not the case here. If these plaintiffs had wished to obtain relief it should have been by petition of right against Her Majesty and not against the defendant Corporation. On either of these grounds that is under the provisions of the *Public Authorities Protection Act* or because the defendant Corporation is not the owner or occupant of the lands under the Harbour, the action must fail in so far as the defendant Corporation is concerned. It will accordingly be dismissed as against it with costs.

In respect of the pamphlet which the plaintiff The Algoma Central and Hudson Bay Railway said it relied on, I have examined it. It is obviously a pamphlet for the information of anyone having business with the Lakehead Harbour Commissioners. It consists of the Act itself, of the by-laws of the Commissioners which had been approved by the Governor in Council and then a very informal map which quite obviously was not intended for any marine use but was simply to act as a sort of guide to where various elevator and harbour installations were located. To have relied on it for depths of water would have been a very negligent procedure in my opinion on the part of those operating the ship and there is no believable evidence in my opinion which would tend to show that they did believe or act on it.

Before discussing the rights of the plaintiffs and the defendant Manitoba Pool Elevators Limited it might be salutary to briefly outline the facts as I see them.

This involves the merits of the case and the actions of both parties in relation to negligence. As a preliminary I am taking the liberty of quoting certain opinions expressed to me by my assessor. These are of a general nature but I think

1964

ALGOMA CENTRAL & HUDSON BAY RY. CO. *et al.* *v.* MANITOBA POOL ELEVATORS LTD. *et al.*

Wells D.J.A.

put the matter of duty owed in the navigation of a ship by the master and officers in charge quite clearly:

> The duty of commanding a ship primarily consists of operating it in a safe manner. This is for the protection of the shipowner, the crew and any cargo it may carry.
>
> To this end the master is charged with navigating safely at all times, including those occasions when the vessel is directed to and berthed at a port installation, for the purpose of loading or discharging cargo. Between shipowners and charterers this bounden duty is recognized by inserting in charter parties the clause for charterer to provide a safe berth. A safe berth necessarily need not be one where the vessel always remains safely afloat during cargo operations. There are some ports in the world where it is the custom or practice to lie aground at low water. However, at all other ports the requirement is that the berth shall always allow the vessel to lie safely afloat.

On the morning in question the ship had been loading grain at Thunder Bay and was then instructed to go to Manitoba Pool No. 2 Elevator for the balance of her cargo. It was the intention according to the first mate who testified in this respect, to load her down to what he called "her winter marks". This apparently involved a depth of some 19 feet 9½ inches forward. Neither the Captain of the ship nor Mr. White the first mate, save as seamen, had been at this elevator before. They had in the wheel-house a chart of the harbour, No. 2314 of the Canadian Hydrographic Services, and this indicated a depth alongside the Manitoba Pool No. 2 Elevator dock of some 18 to 19 feet at the northerly portion of it and with a much shallower depth directly to the west of the dock. As my assessor points out, when these depths of 18 feet to 19 feet were corrected for present datum at the season of the accident they become 17 feet 6 inches to 18 feet 6 inches. This information was available to those navigating the *Algoway*.

In coming in to the berth draught was apparently not a matter of importance for despite the wheat taken on at Thunder Bay elevator the *Algoway* was not drawing very much water when she approached Manitoba Pool Elevator No. 2. At that time she is described as drawing 8 or 9 feet forward and 15 feet aft.

Apparently no effort was made by either the master or his first mate to obtain any other information as to the depths available for the ship at the Manitoba Pool No. 2 Elevator berth at which she was to load and in the result the forward holds of the ship were loaded with a very heavy weight of

grain to a point where the *Algoway* was drawing about 19 feet 8 inches forward. At this point the mate who was in charge of the loading apparently determined to pull the ship forward so that the after hatches could be filled up and as he expressed it, by this additional loading in the stern he would bring up the ship's head and balance the whole cargo better. He said he asked the foreman if there was lots of water at the dock. The man whom he asked, whose name he did not know at the time but whom he later identified as Mr. Stansfield, and who was standing on the dock at the time, told him there was plenty of water and that they had loaded ships to 21 feet 6 inches. At the time this question was asked in my opinion it is clear from the evidence that White did not know whom he was asking or what his function was with Manitoba Pool Elevators Limited. It was suggested to him that he might have asked the foreman of the grain trimmers, but he denied this and said it was Mr. Stansfield who was in point of fact the man in charge of the loading operation for the elevator company.

He had the ship pulled forward on winches so that the spouts could play on the after hatches when suddenly the ship stopped and as he put it, there was a rubbing on the bottom forward. At that point he examined the ship and she showed a draught of 19 feet 9 inches forward. The bow of the ship was about 8 feet off the dock at the leads in the winches and shortly afterwards it became apparent that she was taking in water in one of her tanks. It was suggested to the mate that the ship had been in other minor groundings and accidents and that these might have affected the situation but I must say that I cannot so find on the evidence. There is no evidence that the incidents in the previous October and earlier in November had created any leaks or any damage which rendered the ship liable to take in water or made her unseaworthy. Stansfield has no memory of giving Mr. White the depths it is suggested he did, or that he gave any assurances. It is also clear, I think, that White did not know who Stansfield was and did not take the trouble at that time to find out. However there was in Stansfield's office an older chart showing the area around the dock at No. 2 elevator at greater depths than shown in chart No. 2314 and this would have justified his assurances that there were safe depths up to 21 feet 6 inches. I have given the matter the best attention I can and from

1964

ALGOMA CENTRAL & HUDSON BAY RY. CO. *et al.* *v.* MANITOBA POOL ELEVATORS LTD. *et al.*

Wells D.J.A.

what I observed of the two men, I have come to the opinion that I should rely on White's positive evidence in preference to Stansfield's somewhat negative way of denying the incident ever took place.

After the ship had gone aground White the mate, took soundings around the ship and they are, I think, worthy of setting out:

	Starboard Side	*Port Side*
#1	hold—19′	20′ 6″
#2	" —18′ 4″	20′
#3	" —18′ 2″	20′ 8″
#4	" —19′	20′ 5″
#5	" —19′ 6″	20′ 4″
#6	" —20′ 6″	20′ 6″
#7	" —20′ 6″	20′ 7″
#8	" —20′ 8″	20′ 9″
#9	" —21′	21′ 3″

While the ship was securely aground according to the mate at this time she was free save in the bow area. I have not heard any evidence in this case nor am I aware of any view that it is a safe procedure to run ships aground in the Great Lakes. It is quite apparent from the soundings which Mr. White took after the event, that at no time was it safe to load the ship to the depth of 21 feet 6 inches or thereabouts.

In the result water finally came up through a ventilation pipe connected with the tank on the side where the bottom had been punctured apparently by a small boulder on the bed of the harbour and a certain amount of the wheat was damaged and deteriorated and the balance while not injured, had to be removed from the ship before she could be refloated and taken to a drydock for repairs.

With respect to the ship's officers, it would appear to me and in accordance with the advice that I have received from my very experienced assessor, the decision on whether this was a safe berth for the purpose of loading wheat as contemplated, still rested squarely on the master of the ship. As has been pointed out to me, it would be unreasonable to expect that the owners or operators of an installation can say whether a berth is safe for every ship which loads at their facilities. This would involve knowing such characteristics as trimming constants, inch trim moments, tons per inch immersion at various draughts, capacity and deadweight scales for seasonal freeboards. Such information is only found in the possession of those on board. Therefore,

only the master can give an authoritative opinion on how much water the vessel needs to load in. The mere fact that he has been directed to a certain berth to load does not entail blind obedience. As appeared from the Canadian Hydrographic Services chart No. 2314, it was quite unsafe to load to the depths contemplated. Apparently this did not for a moment deter those in charge of the *Algoway*. It has been suggested that they were correct in the proceedings they followed because in the Lakehead Harbour Proceedings Booklet containing the by-laws and information, on a sketch of the Harbour showing where various installations are located, a depth of 21 feet 2 inches M.W.D. is shown. This sketch as I have said earlier in these reasons, in my opinion was not for the information of mariners save as to a rough guide to various installations and elevators along the northerly reaches of the Harbour. What the letters M.W.D. really mean I am not sure. I was told during the trial that they signified the mean water depth which I would think indicate an average depth taken over the whole season. I already have expressed my opinion of the authority of this booklet and it seems to me to be recklessness of a high degree to depend upon such a piece of information for the berthing of a ship which was going to take on a very heavy cargo of wheat. The term M.W.D. is entirely nebulous in my opinion. The only proper source of information was the charts of the Canadian Hydrographic Services or possibly those of a similar service from the United States. Although the information contained in chart No. 2314 was available and was apparently seen by the master and the first mate, for some reason they chose to ignore it and substituted for it the casual remarks of a workman on the dock and the rough sketch in the Harbour Commissioner's booklet. To proceed in this fashion in my opinion, was negligence of a very high order.

It is argued on behalf of the plaintiffs that they were entitled to rely on the assurances that the first mate received from Mr. Stansfield the foreman in charge of the loading and that they were misled thereby and that as a result of the misinformation which he gave, the ship was run aground. To begin with I would question very seriously the authority Mr. Stansfield had to give any assurances about depth alongside the dock. His work was simply connected with the loading of the wheat but even if the information

1964

ALGOMA CENTRAL & HUDSON BAY RY. CO. *et al.* *v.* MANITOBA POOL ELEVATORS LTD. *et al.*

Wells D.J.A.

he gave (and which) was, as the event proved, not accurate, nevertheless in my opinion, the real direct and proximate cause of the accident was the disregard of any precaution by the master of the ship and his first mate to ascertain the depths alongside the berth on which they were loading. It is true that the assurances received from Mr. Stansfield may have misled the first mate but at the time he asked this information he was in charge of the ship and it was his duty to satisfy himself how it was and possibly for him to take soundings from the dock and from the bow of the ship. This would immediately have revealed to him the danger into which he was pulling the *Algoway*. The receipt of this piece of misinformation from Stansfield was not the direct and proximate cause of the grounding although it may have contributed to it. The real and proximate cause was the failure to ascertain the depth the *Algoway* had at No. 2 Pool Dock. They were warned by the figures in chart 2314 but they paid no attention, and they took no precautions or made any real investigation whatever. Stansfield's information although it may have been given negligently was by no means an act of ultimate negligence. If the provisions of the *Ontario Negligence Act* were applicable it might enable me to apportion damage in accordance with responsibility of the Manitoba Pool on one hand and the ship's officers on the other. Under the authorities, however, it would seem to me to be quite clear I am not entitled as between the ship, the owners of the *Algoway* and the elevator company to apportion negligence. The *Ontario Negligence Act* has no application to such a situation. The matter was discussed in the Supreme Court of Canada in the case of *Sparrows Point v. Greater Vancouver Water District et al.*[1] At p. 411 Rand J. said in respect of another aspect of the *Contributory Negligence Act* of British Columbia:

> It seems to have been assumed by counsel that the provincial *Contributory Negligence Act* applied as between the respondents, but I am unable to agree that it does. There is here a special situation. By the *National Harbours Act* the Commission is declared for all purposes of its administration of this harbour to be the agent of the Crown. Although that *Act* creates a duty on the Commission, by its commitment, in such a case, to the Admiralty Court, the law of that Court becomes applicable; and from the judgment of the House of Lords in *The Devonshire* [1912] A.C. 634 the maritime law, in this respect, is seen to be the same as the com-

[1] [1951] S.C.R. 396.

mon law. It follows that there can be no contribution between the defendants.

And it seems equally clear to me that apart from statute there is no relief from the results of contributory negligence.

Likewise in the decision to which I have already referred, that of *Gartland Steamship Company v. The Queen*, at p. 326 in a paragraph already quoted, Judson J. in delivering the judgment of himself and Taschereau and Cartwright JJ., made the observation dealing with the case, in which he held that contributory negligence had been established, that in this event "apart from statute this action would be dismissed." With a plea of contributory negligence established as in this case the plaintiff fails because he does not prove that the defendant caused the damage: *T.T.C. v. The King*[1], and as Judson J. went on to observe, the *Canada Shipping Act* incorporating *The Maritime Conventions Act* of 1911 has no application to a collision between a ship and a structure on land, in this case a small boulder on the floor of the harbour.

In the *Gartland* case the action was between the Queen on one part and the Steamship Company on the other and happily, it was held that the Crown as plaintiff was entitled to claim the advantage of the Ontario *Negligence Act*. Under the circumstances operating here, however, and as between three parties, none of whom represent the Crown in any way, there is in my opinion, no right to resort to the provisions of that statute, useful and just as such a resort would be. Up to the present time Parliament has not seen fit to enlarge the ambit of the provisions in the *Canada Shipping Act* relating to collisions between ships to other maritime mishaps. It would, therefore, seem to me that because of the plaintiff's contributory negligence in this case by which, in my opinion, the plaintiffs Parrish & Heimbecker Limited are also bound, in so far as the defendants are concerned, these plaintiffs are not entitled to any recovery against the defendant elevator company.

In saying this I am not unconscious of the rules which derive from cases such as *Mersey Docks v. Gibbs and Mersey Docks v. Pierce*[2]. There one of the defences brought to the claims against the Trustees of the Mersey Docks was that they were trustees for the benefit of the public and I

[1] [1949] S.C.R. 510, 515.

[2] 11 H.L.C. 686.

1964

ALGOMA CENTRAL & HUDSON BAY RY. CO. *et al.* *v.* MANITOBA POOL ELEVATORS LTD. *et al.*

Wells D.J.A.

think it will be sufficient if I quote from the judgment of the Lord Chancellor at p. 727:

> It is impossible to argue, after the decision of this House in the case of *The Mersey Docks and Harbour Board v. Cameron, Ante* 443, that the appellants are not in the occupation of the docks. They are as much the occupiers of them, as if they received the tolls and dues for their own use and benefit. The principle of that decision, coupled with that of *Parnaby v. The Lancaster Canal Company,* 11 A. & E. 230, must govern this case. The appellants are the occupiers of the docks entitled to levy tolls from those who use the docks; and so are liable to the same responsibilities as would attach on them if they were the absolute owners occupying and using them for their own profit.
>
> It cannot be denied that there have been dicta, and perhaps decisions, not capable of being reconciled with the result at which I have arrived. But all these authorities have been so fully brought under review, in the very able and elaborate opinion of the learned Judges delivered by Mr. Justice Blackburn in answer to the questions put to them by your Lordships, that I do not feel myself called on to do more than to express my concurrence in that opinion.

As I understand the result of this and other cases, if there is a danger which is not apparent at a dock operated by anyone commercially or otherwise, there is a duty to warn ships choosing to berth there of such danger.

In the case before me, after the grounding, divers were sent down who examined the surrounding area and after the *Algoway* had been moved the same company swept the area and the results of these activities are embodied in Exhibits Nos. 9, 10A, 10B and 11 filed before me in this action. No rocks of any substantial size were found but certain things were found sticking out of the clay which apparently formed the harbour bottom in this area. Very little of anything protruded more than 10 to 18 inches and it is significant I think, that when the diving company commenced sweeping at 20 feet it uncovered so many obstructions that they had to lower the sweeping depth to 19 feet. A number of small boulders, the majority not more than 12 to 15 inches in diameter, were found and at areas which could not possibly have had anything to do with the damage received by the *Algoway,* a ladder and an acetylene metal container were found. It is quite obvious from the evidence of the men who did this work, that the Lakehead Harbour which is situated in one of the rockiest and wildest parts of Canada, had a bottom which was like the country behind it. In Exhibit 10A for example, the report states that after the *Algoway* had pulled out the sweeping was commenced. The report goes on to describe how an object was hit at an 18 foot depth and

on investigation by the diver it proved to be an area of hard clay imbedded with small stones. No large rocks were found in this location. Some pulpwood sticks were found sticking upright but there were no rocks or boulders or any obstructions which could I think, reasonably be said in view of the countryside in which the Lakehead Harbour is situated, to constitute a hidden danger to navigation. It was unquestionably the combination of a small boulder imbedded in the hard clay and the running aground of the *Algoway* that caused a small boulder in the hard clay to puncture the hull. The weight in the foreward parts of the *Algoway* at the time of the accident must have been very great indeed, from the quantity of wheat which was taken on and apparently the clay was so hard that the weight did not press the boulder in and in the result the steel hull gave way and not the clay underneath the ship. In my opinion the same strict standards which have been maintained in the soft mud harbours of Great Britain cannot be maintained in an area such as that in which the Lakehead Harbour is situated. It is one of the roughest and rockiest portions of Canada and there is nothing in what the divers and sweepers discovered which could in my opinion, be described as a hidden risk to which it was the duty of Manitoba Pool Elevators Limited as proprietors of the dock to draw attention.

I have already dealt with the situation in respect of the Lakehead Harbour Commissioners and in the result both actions will be dismissed with costs.

Judgment accordingly.