BRITISH COLUMBIA ADMIRALTY DISTRICT

Vancouver
1966
Jan 31,
Feb 1-4,
7-11
Mar 3

BETWEEN:

ANGLO-CANADIAN TIMBER PRODUCTS LTD. ..... PLAINTIFF;

AND

GULF OF GEORGIA TOWING CO. LTD. and RAYMOND McCULLOUGH ..... DEFENDANTS;

AND

STRAITS TOWING LIMITED ..... THIRD PARTY.

AND BETWEEN:

STRAITS TOWING LIMITED ..... PLAINTIFF;

AND

GULF OF GEORGIA TOWING CO. LTD. and RAYMOND McCULLOUGH ..... DEFENDANTS.

AND BETWEEN:

McKEEN & WILSON LIMITED ..... PLAINTIFF;

AND

GULF OF GEORGIA TOWING CO. LTD. and RAYMOND McCULLOUGH ..... DEFENDANTS.

Shipping—Scow sinking during loading—Damage to scow and berth—Whether negligence—Liability—Towing contract—Clause excluding liability "however caused" if tug seaworthy—Construction of.

S employed G to tow a scow a short distance from its berth in a scow grounds to A's scow berth where it was to be loaded with chips by A for delivery to A's customer. S was charterer by demise of the scow, which was owned by someone else. While being towed by G's tug the scow struck another scow and was then towed to A's scow berth where it was loaded during the next several days. On the last loading day the scow listed heavily to starboard with resultant damage to the scow berth, and on examination a hole was found in the scow's planking. A sued G and the tug's master for negligently causing damage to the

1966

ANGLO-CANADIAN TIMBER PRODUCTS LTD. *et al.* *v.* GULF OF GEORGIA TOWING CO. LTD. *et al.*

scow and to the scow berth, and S sued them for negligently causing damages to the scow. The towing contract between G and S declared: "providing the tugboat owner uses due diligence to make and keep the tugboat seaworthy the towboat owner is not to be liable for loss or damage to the tow or its contents, howsoever caused".

On the evidence the court found that the scow was not damaged whilst being towed by G's tug.

Held, dismissing both actions: (1) A's action for damage to the scow failed on the grounds: (*a*) the damage was not caused by defendants; (*b*) defendants owed no duty of care to A not to damage the scow as it was not A's property nor had A proved an exclusive right to its use.

(2) A's action for damage to the scow berth failed on the grounds: (*a*) neither defendant owed a duty to inform A of the damage to the scow as the tow was performed for S and not for A; (*b*) there being no contract between A and defendants there was no implied warranty of seaworthiness by defendants; (*c*) there was no proof of negligence by either defendant or that the alleged negligence was the cause of the damage complained of.

(3) S's action for damage to the scow failed on the grounds: (*a*) the damage was not caused by defendants' negligence; (*b*) G's liability was expressly excluded by the towing contract. *The West Cock* [1911] P. 208, distinguished.

ACTIONS for damages.

J. G. Alley for plaintiff Anglo-Canadian Timber Products Ltd.

John I. Bird, Q.C. for plaintiffs McKeen & Wilson Ltd. and Straits Towing Ltd.

D. B. Smith for defendant Gulf of Georgia Towing Co. Ltd.

V. R. Hill and *J. L. J. Jessiman* for defendant Raymond McCullough.

SHEPPARD D.J.:—This is a consolidation of three actions for the negligent towing of a scow, *Straits 43*. The first action is by the Anglo-Canadian Timber Products Ltd. who alleged that the defendant, Gulf of Georgia Towing Co. Ltd., by its master, the defendant, Raymond McCullough, on the 22nd December, 1961, did so negligently operate the tug *Grapple* owned by the defendant Company as to damage the scow *Straits 43* and did damage the plaintiff's scow berth by putting therein the *Straits 43* after it had been so damaged. Under third party proceedings, the defendant, Gulf of Georgia, claimed over against Straits Towing Ltd.

The second action is by the Straits Towing Ltd., a charterer by demise of the *Straits 43,* against the defendants, Gulf of Georgia and McCullough, for negligent towing of the scow *Straits 43* thereby causing it damage.

The third action by McKeen & Wilson Ltd., owners of the scow *Straits 43* was abandoned at the trial, probably by reason of the claim being raised in the second action.

The facts follow.

By charterparty of 15th February, 1960, McKeen & Wilson Ltd., the owners, chartered to Straits Towing Ltd. the scow *Straits 43,* the scow in question, for a period to continue until terminated by 30 days' notice, and as no notice has been given the charter has operated throughout as a charter by demise. In 1954 or earlier Puget Sound Pulp & Timber Co. of Bellingham, arranged with the plaintiff Anglo-Canadian to purchase chips to be delivered by Anglo-Canadian loading at its scow berth in North Vancouver on scows to be supplied by Puget Sound. In 1954 Puget Sound Co. arranged with Straits Towing Ltd. to supply empty scows and to do the towing necessary to put the empty scows into the Anglo-Canadian berth and to deliver the loaded scows at Bellingham. On the 22nd December, 1961, the Straits Towing, having their tugs otherwise engaged, employed the Gulf of Georgia to tow the empty scow *Straits 43* from Moodyville scow grounds to the berth of Anglo-Canadian that night. Accordingly, the Gulf of Georgia by its despatcher assigned the tug *Grapple* with Captain Raymond McCullough, the co-defendant, as Master, and Kenneth John Brewster, as deckhand, to make the tow.

At the Moodyville scow grounds the scows were opposite each other lying forward to forward in two parallel rows from north to south separated by a space of 10 feet between the two rows (Ex. 44). A lumber scow partly loaded was in the west row and the *Straits 43* was in the east row opposite the lumber scow but their forward ends separated by the 10 feet between the rows (Ex. 44). The tug then proceeded to yard out the *Straits 43* by moving out of the way an empty scow, next put the deckhand aboard the *Straits 43* to fasten a bridle to the port forward corner (the southwest) and began to tow the *Straits 43* to the south. The *Straits 43* began to turn counterclockwise as this corner

1966

ANGLO-CANADIAN TIMBER PRODUCTS LTD. *et al.* *v.* GULF OF GEORGIA TOWING CO. LTD. *et al.*

Sheppard, D.J.

moved to the south, and came in contact with the lumber scow to the west. The plaintiffs allege that in the contact the forward rake of the *Straits 43* was damaged to the extent of putting a hole in plank 5 and opening the seam between planks 5 and 6. On the other hand, the defendants contend that no damage was caused; that the corner only of the *Straits 43* made contact with the head log or bumper of the lumber scow.

When the forward starboard corner of *Straits 43* was around sufficiently to be reached, the tug went astern within 10 feet of the scow so that the deckhand could receive the bridle for that corner, then, with the two bridles, towed the scow to the Anglo-Canadian berth without incident, a distance of 1,000 to 1,500 feet. There about 2245 the deckhand tied up the scow at the chip berth of Anglo-Canadian. The log of the *Grapple* contains the following entry of the contact with the lumber scow:

> 20 30 Yard out MT S43 at MM (Moodyville)—1 stanchion on side of box smashed Hit rake of S43 on corner of LD at MM—Bruised.

Captain McCullough reported by telephone to his despatcher who made the following record:

> Grapple—reports hit empty S43 a load coming out of M/M (Moodyville) and bruised rake of S43, might only be sheeting but would be wise to check with mill—its on the end in first @ Anglo-Canadian mill. Phoned mill & advised.

The stanchion was previously "smashed" but not by these defendants.

Captain McCullough made no report of the contact with the lumber scow to Anglo-Canadian. The despatcher tried to telephone to Anglo-Canadian but apparently got a wrong number. The scow at the berth of Anglo-Canadian was loaded with chips at the rate of 60 units a shift as follows: On the night of 22nd December, 1961, one-half shift, on the 27th, 28th and 29th December, two shifts each, a total of 375 units, and on the 2nd January, 1962, in 7½ hours, loaded approximately 60 units, making a total of 435 units. That was well within the capacity of the scow. Haddon, the mill foreman, sounded the scow on the 27th December, 1961, and again on the 2nd January, 1962, about 1130 and on each occasion found therein 4 inches of water; that did not indicate any material defect in the scow. There was then no list but a slight rake aft which was intended.

The damage to the Anglo-Canadian berth occurred on the 2nd January, 1962. That morning the plaintiff began to load the forward end of the scow and there was noticed nothing wrong until 1445 when the scow began to list to starboard and this list increased in spite of the efforts of Seniowski, the chipperman, to reduce it by shovelling chips to port. About 1530 Seniowski reported the list to Haddon, his foreman, who found the starboard corner under water about 12 inches. The scow continued to sink and eventually she lost part of her load. Her listing damaged the chipper loading machinery and piling on the east of the berth and also some piling on the west of the berth.

On the 3rd January, 1962, a diver put a patch on the damaged forward rake. The scow was then pumped out and taken to McKenzie Barge & Derrick Co. Ltd. for repairs. She was there examined by surveyors, Symons and Clark, and by Brown of Straits Towing. Symons and Clark reported that the 5th plank below the bumper or head log had a hole about 4 inches in diameter with fracture of the surrounding wood; the 6th plank was damaged about 2 to 3 inches from its upper area—and the seam was pushed back and thereby opened up. Brown thought the hole about 3 inches in diameter and the damaged area to extend over 3 feet—from 3 inches down to zero. The real difference was whether the hole was 6 feet from the starboard side, as Symons and Clark testified, or a few inches to starboard of the midships as Brown testified. There was evidence that the damage was such as would be made by a steel rail, and Clark was of the opinion that the damage was consistent with having been made by a corner iron of a scow; further, that the sinking was probably due to the chips loaded forward on 2nd January, 1962, bringing the damaged rake below the water line whereby the water flowed in until the scow lost her stability, listed and sank.

Brewster, the deckhand aboard the *Straits 43,* said that at Moodyville the corner of the *Straits 43* hit the lumber scow and the point of contact was about 4 to 4½ or 4 to 5 feet above the water line and that the damage complained of, that is to the rake of *Straits 43,* was not then caused. "Corner" may be taken to mean that section of the scow from the corner of the deck down the edge of the rake beneath, as together making that corner of the scow.

1966

ANGLO-CANADIAN TIMBER PRODUCTS LTD. *et al.* *v.* GULF OF GEORGIA TOWING CO. LTD. *et al.*

Sheppard, D.J.

The question common to both actions is whether or not the *Grapple* in yarding out the *Straits 43* and bringing her into contact with the partly loaded lumber scow did cause the damage to the rake which was complained of by the plaintiffs.

The plaintiffs contend that as the scow was delivered by the defendants to the Anglo-Canadian berth in a damaged condition, therefore the onus was on the defendants to explain that the damage occurred without their fault: *Joseph Travers & Sons v. Cooper*[1]. The plaintiffs did not rely upon such presumption exclusively but adduced evidence to prove that the damage was not caused at other time or place and therefore inferentially it was caused in the yarding out at Moodyville. Also the defendants adduced evidence to prove that they had not caused the damage alleged. In some cases, the relation of bailee or the fact of a party being in the better position to explain may affect the onus of adducing evidence, but here can have no application as all parties have adduced evidence and the question is not who should begin but whose witnesses are to be believed, the defendants' or the plaintiffs.

The plaintiffs called Captain Wicks, tug master, who testified that he had towed the scow *Straits 43* from Bellingham and had put her into the Moodyville scow grounds on the 11th December, 1961 at 2155, and at that time the scow was in good shape and had no broken plank in the forward rake. The plaintiffs adduced further evidence to prove that the damage could not have been received in the scow berth of Anglo-Canadian because the berth is surrounded by pilings and inside thereof are bumper logs. The scow had been put into the berth with her forward rake to the shore where she would be safe, and a diver, after the sinking, had examined the berth and found nothing there which would account for the damage. Accordingly, the plaintiffs contend that the damage was received by the *Straits 43* coming in contact with the corner iron of the partly loaded lumber scow when the *Straits 43* was being yarded out of Moodyville scow grounds.

The defendants adduced the evidence of Captain McCullough and of Brewster to prove that in the yarding out there was no damage caused to the *Straits 43*. Captain

[1] [1915] 1 K.B. 73.

McCullough testified that he yarded out the empty *Straits 43* by putting the deckhand aboard to put the bridle on the forward port corner (southwest), then he (Captain McCullough) proceeded to pull to the south; that he proceeded slowly by letting the clutch in and out and did not exceed ½ knot. According to other evidence, the scow empty weighs about 325 tons, and it is to be expected he would slowly take up the single line holding the tow. Captain McCullough further stated that he did not actually see the *Straits 43* come into contact with the lumber scow, but when the starboard forward corner was around where it could be reached by the tug he went astern so that the deckhand could get the second bridle aboard the *Straits 43*. When doing so he saw a bruise on the rake at the place appearing on Exhibit 27, but he saw no hole in the rake and did not cause any hole or the damage complained of.

Brewster, the deckhand, testified that he was put aboard the empty scow and she was towed to a dolphin where he tied her. Then the tug put him aboard the *Straits 43* where he remained until the scow was tied up at the Anglo-Canadian scow berth, except for a few moments when he was aboard the lumber scow. The tug held the *Straits 43* by pushing against the south side while Brewster untied her, put the bridle on the forward port corner (southwest); the tug then began to yard out by towing to the south which caused the scow to turn. During that turning he saw that the starboard (northwest) corner, although moving slowly, would come in contact with the lumber scow, and he started towards that corner which he had not reached when he saw that corner (the starboard or northwest) take about midships the forward rake of the lumber scow. He jumped down to the lumber scow to make sure that her lines were fast and jumped back on to the *Straits 43* but in doing so he glanced at the rake of the *Straits 43* and saw no damage. The tug continued to pull to the south until the scow had swung around sufficiently to attach the bridle to that starboard (northwest) corner, then the Master passed to him the second bridle which Brewster fastened. Brewster also testified that no damage was done by the contact with the lumber scow, that he was close by when contact was made, and that the lumber scow had a freeboard of 4 to 5 feet. This height of the freeboard is significant as the corner iron of the lumber scow at such height would be too high to

1966

ANGLO-CANADIAN TIMBER PRODUCTS LTD. *et al.* *v.* GULF OF GEORGIA TOWING CO. LTD. *et al.*

Sheppard, D.J.

have caused the damage to the *Straits 43*, as the seam between the 5th and 6th planks is 2'8" above the water line (Ex. 34). Again, Brewster had no interest in this matter as his position as deckhand, and being on the scow not on the tug, did not permit fault being assigned to him; he gave the impression of being a truthful and careful witness who completely absolved Captain McCullough from having caused the damage. It is not overlooked that there are apparent contradictions, namely, that Brewster has estimated the freeboard of the lumber scow at 4 to 4½ feet and at 4 to 5 feet, also that he has testified that he was in the port corner, in the starboard corner or going to the starboard corner at the time of the contact of the two scows. The important fact is that Brewster was on the forward part of *Straits 43* from the commencement of the yarding until she was tied up at Anglo-Canadian berth, and in particular, was in the forward part when the scows made contact and he alone had the best opportunity of seeing the contact. Of that there can be no doubt. The differences in the height of the freeboard and in fixing his exact position on the forward end of the scow at the time of contact are merely matters of opinion with such apparent conflicts as might be expected in the case of a truthful witness after a lapse of three years.

Captain McCullough also gave the impression of a truthful witness who was trying to tell what he saw. Their evidence therefore cannot be disregarded and it becomes necessary to consider from the relative position of *Straits 43* and the lumber scow what probably happened in yarding out.

At the Moodyville scow grounds before the yarding out, the *Straits 43* appears to have been immediately opposite, that is, immediately east of the lumber scow (Ex. 44). When the bridle was attached to the forward port corner (southwest) of *Straits 43*, the *Grapple* began to pull towards the south which would result in the *Straits 43* turning in a counterclockwise direction as the scow proceeded to the south. When the forward starboard (northwest) corner was pulled around to the south so that it could be reached by the tug, the second bridle would be put aboard so that the towing by the two bridles could proceed to the Anglo-Canadian berth. But in turning, the length of the *Straits 43* would be extended to the west when the diagonal

line between the northwest and southeast corners became due west, that is towards the lumber scow, and she would touch the lumber scow if sufficiently close. But when *Straits 43* would have turned to the extent that such diagonal line or the northwest corner was extended to the west, then at such time the forward rake must have turned so far to the south as to be facing towards the southwest and in any event so far south of the northerly side of the lumber scow that it would be impossible for the forward rake to strike the northeast corner of the lumber scow. Brewster has so testified.

On the other hand, the plaintiffs' contention is that the forward rake of the *Straits 43* came upon the corner iron at the northeast corner of the lumber scow but that contention presents serious difficulties. In order that the forward rake of *Straits 43* could come into contact with the northeast corner of the lumber scow, the *Straits 43*, as appears from Exhibit 44, would have to move north sufficiently to bring the hole in plank 5 opposite the northeast corner of the lumber scow. That would mean moving *Straits 43* north 6 feet if the hole be 6 feet from the starboard side, or approximately 22 feet (Ex. 25) if the hole be within a few inches of the midships line, as also testified, also it would be necessary to move the *Straits 43* westerly the distance between the two scows. But that would not be sufficient; that would merely bring the bumper or head log of the lumber scow, with her lower freeboard, into contact with the rake of the *Straits 43*, or so much thereof as would be south of the northerly side of the lumber scow, whereas the plaintiffs' contention is that the corner iron of the lumber scow came in contact with the hole in plank 5. That would mean that the stern of the *Straits 43* did swing in an arc to the north sufficiently to permit the forward rake of the *Straits 43* at a distance of 6 feet from the starboard side or at midships, to strike the northeast corner of the lumber scow. As the *Straits 43* is 126 feet in length (Ex. 25) such a swing would be impossible by reason of the scows immediately to the north of the *Straits 43*, and also of the pylons to which such scows are tied. Moreover, on the plaintiffs' contention such swing must continue to sweep out of the way the scows and pylons north of the lumber scow in order that the *Straits 43* could bring its rake down upon the corner iron of the lumber scow with sufficient force to cause

1966

ANGLO-CANADIAN TIMBER PRODUCTS LTD. *et al.* *v.* GULF OF GEORGIA TOWING CO. LTD. *et al.*

Sheppard, D.J.

the alleged damage. It would require considerable force to damage the rake of *Straits 43* as the planks of the rake are 6 inches thick and are braced with 6 longitudinal keelsons in addition to the side walls (Ex. 33). In any event, the plaintiffs' contention should not succeed as it requires the pull of the *Straits 43* to be made to the north followed by a swing of the stern to the north, whereas the pull was in the opposite direction, to the south, and there is no evidence of any swing of the stern to the north.

Further, the damaged portion of the *Straits 43* is so close to the water line that it could not have been caused by the lumber scow. The seam between planks 5 and 6 of *Straits 43* is 2'8" above the water line (Ex. 34). According to Brewster the freeboard of the lumber scow is 4 to 4½ or 4 to 5 feet, whereas the plaintiffs must contend that it was so low that the corner did cause the damage to planks 5 and 6 at a distance of 2'8" from the water line. There is no evidence that the freeboard of the lumber scow was that low. If the freeboard be taken at 4 to 5 feet, then undoubtedly it was too high to have caused this damage.

On the other hand, if we assume that the lumber scow was so heavily laden as to reduce her deck line to 2'8" then as the deck of the *Straits 43* was 8'10" above the water line (Ex. 34) it would be 6'2" above the lumber scow (Ex. 34), and more than that to clear the bumper or head log (Ex. 34), but as Brewster jumped from the *Straits 43* down to the lumber scow, examined the lines and jumped back aboard the *Straits 43* all within 15 to 20 seconds, it is not credible that he could jump over 6'2" in that space of time or at all.

Again, the angle of the blow to the rake of *Straits 43* is significant. Brown testified that when the *Straits 43* was in drydock he had to bend down to see up into the hole. That is possible as the hole is 3 to 4 inches across and the plank holed is 6 inches thick. Clark put the angle at 30° to the rake (being at 45°), which, taken with the evidence of Brown, must mean 30° measured from below the hole, otherwise if the hole were 30° to the rake from above the hole, one looking down could see into it. Therefore, at 30° to the rake from below the hole, the blow causing that hole must have come vertically upwards from the direction of the water, not from the sweep of a scow, which would be

parallel to the water. Such a vertical blow could have happened on the 11th December, 1961, on the voyage from Bellingham to Moodyville scow grounds when the scow in tow could have been making up to 5 knots and a rounded deadhead in a rising swell could have hit the scow without being noticed by those on the tug. However that may be, the vertical angle of the hole explains why Brown had to bend down to see up into it; why Clark at the trial had to mark the photo (Ex. 24) taken at the horizontal, so that the location of the hole could be seen; why Captain Wicks, not down in the water did not see the hole when he delivered the *Straits 43* to the Moodyville scow grounds on the 11th December, 1961, and thought the rake to be sound; and why Captain McCullough on looking down from the bridge of his tug at Moodyville after having put his tug astern so that the deckhand could get the second bridle, then saw what appeared to him to be a bruise on the sheeting of the *Straits 43* which he reported with the broken stanchion. The vertical direction of the hole has this significance; the hole was not made by Captain McCullough in yarding out, because the hole, on the plaintiff's contention would have been horizontal and not vertical.

I therefore find that the damage to the *Straits 43* was not caused by the tug *Grapple* on the night of the 22nd December, 1961, either at the Moodyville scow grounds or elsewhere.

It also follows that the evidence of Brewster should be accepted that it was impossible for the rake of the *Straits 43* to have struck the corner iron of the lumber scow, and also that his following evidence accurately states what did occur:

Q. And would you agree that the lumber scow struck the *Straits 43* about 18 inches from the water line?

A. No, I believe it would be four feet. Four and a half feet above the water line.

* * *

Q. Down below the rake?

A. I had to jump down to the scow. It was lower than *Straits 43*.

* * *

Q. And when you jumped back up again, sir, did you jump up on the front of the bow or the side?

A. Right on the corner.

Q. Right on the corner?

A. On the starboard corner.

1966

ANGLO-CANADIAN TIMBER PRODUCTS LTD. *et al.* *v.* GULF OF GEORGIA TOWING CO. LTD. *et al.*

Sheppard, D.J.

Q. You scrambled right up on the starboard corner?
A. That's right.
Q. And was it difficult to scramble up, sir?
A. Not too hard, no.
Q. To reach up and pull yourself up?
A. No. It was about four feet, something like that.

The Anglo-Canadian Co. alleges that the defendants are liable for negligently damaging the scow *Straits 43* at Moodyville scow grounds. That fails on two grounds:

(1) The defendants did not cause the damage alleged, and

(2) The action in negligence cannot succeed without a duty of care. There appears no basis for imposing a duty on the defendants or either, to the plaintiff, Anglo-Canadian, not to damage at Moodyville scow grounds the scow, not the property of this plaintiff, but the property of McKeen & Wilson Ltd. and in the possession of Straits Towing Ltd. under charter by demise. Also, Anglo-Canadian has not proven any exclusive right to the use of *Straits 43*, hence there is no evidence that this plaintiff has suffered damage merely by reason of the alleged damage to the *Straits 43* at Moodyville.

This plaintiff's alternative case in negligence is for the putting of the defective scow into this plaintiff's scow berth, that is, that Captain McCullough, knowing that the scow was being used for loading chips, put into this plaintiff's scow berth *Straits 43* which he knew or ought to have known had been holed and was unfit for the purposes intended, and for failing to inform the plaintiff of the scow's condition, and that the Gulf of Georgia is liable on the principle of *respondeat superior*.

This plaintiff has not alleged that Captain McCullough put the scow into the scow berth wilfully intending to injure the plaintiff. That is neither alleged nor proven. Further, Captain McCullough has denied that he knew that the scow had been damaged as alleged, and that evidence is to be believed. Therefore this plaintiff's case is reduced to the contention that the defendants are liable by reason that Captain McCullough ought to have known that the scow was so damaged and ought to have informed this

plaintiff. In such an action this plaintiff must establish that Captain McCullough or the Gulf of Georgia was under a duty:

(*a*) to this plaintiff;

(*b*) to know the condition of the rake of the scow, that is to have examined it, and

(*c*) to have informed this plaintiff.

Without such duty this plaintiff's action must fail for the reasons stated by Lord Esher, M.R. in *Le Lievre v. Gould*[1]:

> A man is entitled to be as negligent as he pleases towards the whole world if he owes no duty to them.

Also such duty must be owing to this plaintiff, as it is not sufficient that the duty may be owing to another: *Winterbottom v. Wright*[2]; *Dickson v. Reuter's Telegram Co., Ltd.*[3]; *Le Lievre v. Gould, supra.*

To establish such duty this plaintiff has cited as applicable quotations from various judgments but such quotations must be understood in the light of *Quinn v. Leathem*[4], where the Earl of Halsbury, L.C. at p. 506 said:

> ... that every judgment must be read as applicable to the particular facts proved, or assumed to be proved, since the generality of the expressions which may be found there are not intended to be expositions of the whole law, but governed and qualified by the particular facts of the case in which such expressions are to be found. The other is that a case is only an authority for what it actually decides. I entirely deny that it can be quoted for a proposition that may seem to follow logically from it. Such a mode of reasoning assumes that the law is necessarily a logical code, whereas every lawyer must acknowledge that the law is not always logical at all.

and of *Kreglinger v. New Patagonia Meat & Cold Storage Co., Ltd.*[5], where Viscount Haldane, L.C. at p. 40 said:

> To look for anything except the principle established or recognized by previous decisions is really to weaken and not to strengthen the importance of precedent. The consideration of cases which turn on particular facts may often be useful for edification, but it can rarely yield authoritative guidance

When so understood the quotations do not assist this plaintiff. The quotations from *Donoghue v. Stevenson*[6] as explained by *Farr v. Butters Brothers & Co.*[7] and *Grant v. Australian Knitting Mills, Ltd.*[8], must be understood as

[1] [1893] 1 Q B 491 at p 497.
[2] (1842) 10 M & W. 109 (152 E R. 402)
[3] (1877) 3 C.P.D. 1.
[4] [1901] A C. 495.
[5] [1914] A.C. 25.
[6] [1932] A C. 562.
[7] [1932] 2 K.B. 606.
[8] [1936] A.C. 85

1966

ANGLO-CANADIAN TIMBER PRODUCTS LTD. *et al.* *v.* GULF OF GEORGIA TOWING CO. LTD. *et al.*

Sheppard, D.J.

referring to the facts giving rise to the duty upon the manufacturer of goods intended to reach the consumer in the form sold without intermediate inspection. The quotation from *Hedley Byrne & Co., Ltd. v. Heller & Partners Ltd.*[1], is applicable to negligent use of words, and must be read in the light of *Guay v. Sun Publishing Co. Ltd.*[2] therefore is not here applicable. The quotations from *Heaven v. Pender*[3], must be taken to define the relation of invitor and invitee and the duty arising therefrom. *Denny v. Supplies & Transport Co. Ltd.*[4], extends the duty of invitor to invitee to cover that case where stevedores who had loaded a barge into a dangerous condition were held liable to the wharfinger's employees who were injured in unloading it. *Chapman v. Saddler & Co.*[5] and *Grant v. Sun Shipping Co. Ltd.*[6], were decided under Scots' Law and at common law are mere illustrations of the duty of the invitor to an invitee.

In *Sewell v. B.C. Towing & Transportation Co.*[7], the plaintiff's vessel was negligently towed by two tugs on to a reef and the Court held the ship's owners could recover against the defendant with whom the captain had made the contract of towage and also against the other defendant who assisted in the towing. Henry J. at p. 553 stated:

> It is a clear proposition that when a party undertakes to aid in the performance of a contract entered into by another, he assumes the responsibility of performing his part of it, either singly or jointly with the original contractor; and if he fails in the proper performance of that duty, and the contract is not properly carried out through the negligence or improper performance of either or both the parties, the other party is entitled to recover against both.

That statement following *Quinn v. Leathem* and *Kreglinger v. New Patagonia Meat & Cold Storage Co., Ltd., supra,* should be read as applicable to the facts of the *Sewell* case and hence not here applicable, as this towage was under a contract between the Straits Towing Ltd. and the defendant Gulf of Georgia and the services were performed for and at the request of Straits Towing Ltd., not at the request of this plaintiff.

[1] [1964] A.C. 465.
[2] [1953] 2 S.C.R. 216.
[3] (1883) 11 Q.B.D. 503.
[4] [1950] 2 K.B. 374.
[5] [1929] A.C. 584.
[6] [1948] A.C. 549.
[7] (1883) 9 S.C.R. 527.

The following cases deal with the implying of a warranty into contracts for carriage of goods by sea. In *Lyon et al v. Mells*[1], in *Kopitoff v. Wilson*[2] and in *Steel v. The State Line Steamship Company*[3], the Court held there should be imported the warranty that the vessel was seaworthy; in *The "Maori King" v. Hughes*[4], in *Elder, Dempster & Co. v. Patterson, Zochonis & Co.*[5], and in *Standard Oil Company of New York v. Clan Line Steamers, Ltd.*[6], the Courts implied a warranty that certain machinery aboard the ship such as refrigerators were fit for the purpose intended. There was no contract between this plaintiff and the defendants into which any warranty could be implied.

The *Overseas Tankship (U.K.) Ltd. v. Mort Docks etc. Ltd., The Wagon Mound*[7], does not assist this plaintiff; that is distinguishable. In *Donoghue v. Stevenson, supra,* the Judicial Committee emphasized the necessity of a duty and was concerned with the question whether facts gave rise to a duty; in the *Wagon Mound* case the Judicial Committee was concerned not with duty but with causation, namely, the damage caused by a breach of duty; that is not culpability but compensation: The *Wagon Mound,* pp. 418 and 425. In the case at Bar the question is whether the facts give rise to any duty. Also, in the former two cases the complaint was over the negligent doing of a positive act; in *Donoghue v. Stevenson* over the manufacture and distribution of a product and in the *Wagon Mound* case over the dumping of oil. In the case at Bar the complaint is over the omission to do an act, that is, the omission to examine the rake and to report the result. Towards this plaintiff the defendants, who are selling services, are in the same position as a merchant who, knowing that this plaintiff requires goods to continue the operation of his mill, nevertheless can take the position that there is no obligation to supply until this plaintiff buys.

Moreover, assuming that Captain McCullough or the defendant Company was under a duty of care to this plaintiff, there is no proof of negligence on the part of either defendant. It does not follow that reasonable care would

[1] (1804) 5 East 428 (102 E.R. 1134).
[2] (1876) 1 Q.B.D. 377.
[3] (1877) 3 A.C. 72.
[4] [1895] 2 Q.B. 550.
[5] [1924] A.C. 522.
[6] [1924] A.C. 100.
[7] [1961] A.C. 388.

1966

ANGLO-CANADIAN TIMBER PRODUCTS LTD. *et al.* *v.* GULF OF GEORGIA TOWING CO. LTD. *et al.*

Sheppard, D.J.

involve an examination of the rake under the circumstance that the employment was by Straits Towing Ltd. to make such a short tow at night or that a reasonable examination under the circumstances would have disclosed the damage to the rake of *Straits 43*, having regard to the fact that this plaintiff had possession of the scow for 11 days and did not discover the damaged rake, and that Brown, in examining the scow in drydock, had to bend down to look up into the hole, which was approximately 2'8" from the water line.

Again, causation has not been proved. That requires that the alleged negligence has caused the damage complained of: *Thompson v. The Ontario Sewer Pipe Co.*[1], and here the damage complained of by the plaintiff is the damage to this plaintiff's scow berth. This plaintiff had no loss of chips as the plaintiff was paid for the chips loaded.

Foresight is the test of causation applied in the *Wagon Mound* case, *supra*, and it has not been proven that the damage complained of would have been foreseen by either defendant or by a reasonable man in the position of the defendants, particularly as the source of the foresight is that learned in the yarding and towing of the scow 1,000 to 1,500 feet at the dead of night, and whereas the employees of the plaintiff had not foreseen such damage within the 11 days they were loading the scow, and Seniowski, the chipperman, who had the duty of loading properly, had thought to correct the list which developed on the 11th day by shovelling chips from starboard to port.

This action by Anglo-Canadian and the third party proceedings therein are dismissed.

The second action is by Straits Towing Ltd. in negligence for the damage alleged done to the scow *Straits 43* in yarding out at Moodyville scow grounds. As Straits Towing Ltd. did contract with the defendant Gulf of Georgia for the yarding out and towing to Anglo-Canadian berth, such contract would ordinarily imply a duty of care as in *Sewell v. B. C. Towing & Transportation Co., supra*, save for the special clause excluding certain actions for damages.

However, the basis of the action is the negligence of Captain McCullough, for which the Gulf of Georgia is said

[1] (1908) 40 S.C.R. 396 at 397.

to be responsible, as employer. This action must fail for each of the following reasons:

(1) There was no negligence. The yarding out by Captain McCullough at Moodyville scow grounds was not negligent nor did it damage the rake as alleged.

(2) Hence there is no proof of damage caused by the negligence of Captain McCullough and in this form of action, damage is the gist of the action: "Salmond on Torts" (14th Ed.) p. 698.

(3) Also, the cause of action against Gulf of Georgia is excluded by the special clause in the contract of towing. Reid, despatcher for Straits Towing Ltd., has stated in his examination for discovery that it was usual for his company so to deal with the Gulf of Georgia (Q. 18), that the towage was at a previously agreed rate (Q. 29), that the special clause which appears in the invoice and letters of the Gulf of Georgia was known to Straits Towing Ltd. (Qs. 111-118), and that such special clause was intended as a term of the agreement (ss. 121-125). That special clause reads (Ex. 29):

> It is a term of all towing contracts, written or verbal, that (providing the tugboat owner uses due diligence to make and keep the tugboat seaworthy) the towboat owner is not to be liable for loss or damage to the tow or its contents, howsoever caused.

The tugboat was fit for the purpose and the clause applies.

This plaintiff has cited *The "West Cock"*[1] where the defendant, when sued for negligent towage, relied upon a clause in the contract of towage excluding liability, but the Court held the defendant liable for the reason that the contract only applied to circumstances occurring after the commencement and during the towage and not to a state of things existing before the towage began, therefore the clause did not exclude liability for supplying an unfit tug to do the towing. *The "West Cock"* is distinguishable. The words "however caused" in the clause in question, following loss or damage, give loss or damage an extended meaning beyond that in *The "West Cock"*. Such words were commented upon in *Joseph Travers & Sons v. Cooper, supra,* by

[1] [1911] P. 208.

1966

ANGLO-CANADIAN TIMBER PRODUCTS LTD. *et al.* *v.* GULF OF GEORGIA TOWING CO. LTD. *et al.*

Sheppard, D.J.

Buckley L. J. at p. 85. Further, this action is for a negligent yarding out causing damage to the rake; all that followed, such as the expense of the diver in patching, of pumping out, of towing to the drydock, of repairs there effected, are not alleged as circumstances subsequent to the towage but are alleged as measures of the damage caused during the towage. Hence the clause would apply to exclude the liability of the defendant Gulf of Georgia raised in this action; the contract being with the defendant Company must intend the services be performed by a delegate, and Captain McCullough, the delegate, would have no higher duty.

This action also is dismissed.

In the result the action by Anglo-Canadian Timber Products Ltd. with the third party proceedings therein and the action by Straits Towing Ltd. are dismissed.