Privy Council Appeal No. 112 of 1936

Robin Hood Mills Limited - - - - *Appellants*

v.

Paterson Steamships Limited - - - - *Respondents*

FROM

THE EXCHEQUER COURT OF CANADA

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 23RD APRIL, 1937.

Present at the Hearing:
LORD ATKIN.
LORD THANKERTON.
LORD ROCHE.
[*Delivered by* LORD ROCHE.]

This is an appeal by the defendants from a judgment of the Exchequer Court of Canada dated 17th July, 1935, dismissing their appeal from a judgment of the Hon. Mr. Justice Demers sitting as the Local Judge in Admiralty for the District of Quebec dated 15th December, 1934, whereby the respondents obtained a decree for limitation of liability under the Merchant Shipping Act, 1894.

The facts which gave rise to the suit for limitation of liability are as follows: The respondent company was owner of the steamship "Thordoc" registered at Fort William in the Province of Ontario. In November, 1929, the appellant company was the owner of a cargo of flour and other cereal products laden on board of the "Thordoc" for carriage from Port Arthur to Montreal. The "Thordoc" with this cargo on board stranded at Point Porphyry on the north shore of Lake Superior and was wrecked with great loss of and damage to cargo. In an action in respect of that loss and damage the appellants obtained judgment for $146,326.29 against the respondents. The present action was brought by the respondents to limit their liability pursuant to section 503 of the Merchant Shipping Act, 1894, which provides as follows:—

"(1) The owners of a ship, British or foreign, shall not where all or any of the following occurrences take place without their actual fault or privity, that is to say:—

(*a*) . . . .

(*b*) Where any damage or loss is caused to any goods merchandise or other things whatsoever on board the ship; be liable to damages beyond the following amounts, that is to say

(i) . . . .

(ii) in respect of loss of or damage to vessels, goods, merchandise, or other things . . . an aggregate amount not exceeding eight pounds for each ton of their ship's tonnage.

The Local Admiralty Judge granted a decree limiting the respondents' liability to $80,363.42 or £16,522 16s. od. sterling being the aggregate amount of £8 per ton for each ton of the "Thordoc's" tonnage calculated in accordance with the provisions of the Merchant Shipping Act, 1894, as amended by subsequent Acts.

Upon appeal to the Exchequer Court that decree was affirmed. The question at issue in the Courts below was whether the loss and damage took place without the actual fault or privity of the respondents and the question in this appeal is whether those Courts were right in deciding that they did take place without such fault or privity.

The facts of the casualty and the course of the proceedings in the damage action and in the present action must now be stated in somewhat greater detail.

The "Thordoc" was engaged by the appellants to load the cargo in question for carriage from a port at the head of Lake Superior to Montreal. The engagement was effected orally and by letter and was not embodied in a formal charter party with conditions or exceptions; but the Canadian Water Carriage of Goods Act (R.S.C. 1927, Ch. 207) applied to the case. Section 6 of that Act provides that "If the owner of any ship transporting merchandise or property from any port in Canada exercises due diligence to make the ship in all respects seaworthy and properly manned, equipped and supplied, neither the ship nor the owner, agent or charterer shall become or be held responsible for loss or damage resulting from faults or errors in navigation or in the management of the ship or from latent defect". The vessel loaded at Port Arthur and then, before proceeding on her voyage down the lake, called at the neighbouring port of Fort William to discharge some ships' boats belonging to the respondents which had been brought up the lake on the voyage made prior to the loading now in question. After the "Thordoc" had resumed her chartered voyage and after she had, whilst on that voyage, reached a point off Trowbridge Island the master, in order to make a course of N70E magnetic, a usual and proper course upon which to pass Point Porphyry, set a course by the ship's compass of N81E which was said to be the corresponding course to allow for the compass deviation on that heading. The compass in question had been newly installed in the ship some 2 months before the events now in question. The vessel did not make the desired course but one some 5 degrees more northerly and got on the rocks not far from Point Porphyry Lighthouse with disastrous results to herself and her cargo.

When the action for damage to cargo was brought by the appellants it succeeded before Demers J. (sitting then as a judge of the Superior Court) on two grounds: first that section 6 of the Water Carriage of Goods Act did not operate to free the owners of the "Thordoc" from responsibility because it had not been shown that due diligence had been exercised to make the vessel seaworthy in respect of her compass and its adjustment before she left Port Arthur: secondly

on the ground that the visit to Fort William was a deviation and was unreasonable and that its occurrence rendered the shipowners liable. Upon appeal to the Court of King's Bench the judgment was affirmed on the first ground. The second ground was not pronounced upon.

The course of proceedings in the present action must now be considered. The statement of claim after setting out the facts of the stranding proceeded thus:

> 6. The said stranding of the steamship "Thordoc" occurred without the actual fault or privity of her owner the plaintiff herein.
>
> 7. The said stranding of the steamship "Thordoc" occurred by reason of the improper navigation or management of the ship.
>
> 8. There is no claim for loss of life or personal injuries and the plaintiff does not know of any claim other than that of the defendant.

The statement of defence contained the following paragraphs:—

> 2. As to paragraph 6 the defendant denies the same.
>
> 3. As to paragraphs 7 and 8 the defendant admits the same.

For further defence the defendant pleads as follows:—

> 6. That the plaintiff's vessels "Thordoc" while proceeding on her voyage to Montreal referred to in para. 2 of the plaintiff's Statement of Claim deviated from her course and voyage and proceeded to the Port of Fort William in the Province of Ontario thereby constituting a deviation in law and in fact and further deviated by not proceeding on the usual and direct course to the Port of Montreal in the Province of Quebec.
>
> 7. That in addition and furthermore the stranding of the "Thordoc" and the resultant damage was due to her unseaworthiness in that her compass was not properly adjusted.

The action came on for trial, witnesses were called and, judgment being reserved by Demers J., the parties each submitted their case and arguments to the learned Judge in the form of a factum. The factum of the appellants was placed before their Lordships to make good a point urged on the appellants' behalf which was not expressly dealt with in the judgments rendered in the Courts below. The point urged was that there was fault in the owners in respect of the competency of the crew. The material part of the factum runs as follows:

> *Personnel.*
>
> The disaster involved what may almost be called a collision with a lighthouse. The plaintiff admits that an ignorant wheelsman was in charge of the ship but introduced no evidence as to whether or not any care or precaution had been exercised to ascertain whether this wheelsman was a man who could be placed in that responsible position.
>
> It is respectfully submitted that the fact of the ship having come into almost immediate collision with a lighthouse thrusts upon the plaintiff the burden of relieving itself from the inference that in addition to having a faulty compass there was fault on its part in having such an incompetent wheelsman in charge of the adventure; in other words, and as admitted by the plaintiff, "the entire adventure, the ship, her cargo and the lives of her officers and crew were left to the tender care of an ignorant wheelsman, a novice who purported blindly to follow 81 degrees on the compass".
>
> The plaintiff has failed to introduce any evidence in explanation or excuse in that regard. The record discloses no answer. It is respectfully submitted that the plaintiff has failed to discharge the burden of proving that it was without fault or privity in the happening of this unfortunate disaster.

The above citation of an admission by the respondents is from a factum of the respondents in the earlier cargo action. Such factum was not available on the argument of this appeal. The sentence quoted is not complete but its purport appears to be an argument in support of a contention that not the compass and incorrect knowledge of its deviation by the navigating officers, but wrong action in the wheelsman in adhering to his orders was the cause of the trouble.

The issues of fact and law being thus specified and defined the learned Judge gave judgment for the respondents and granted the decree. He held that there was no fault in the plaintiffs. As regards the compass he held this on the ground that although the compass was not properly adjusted, a competent adjuster had been appointed. As regards deviation he thought that apart from other possible reasons this disappeared from the case by reason of the judgment of the Court of King's Bench in the cargo action. As regards the wheelsman he did not refer to this in his notes or reasons for judgment; but when the evidence relating to this was being led he had made an observation which would afford a sufficient reason for a decision adverse to the appellants upon this point. When Mr. Paterson, the president of the respondent company, was under examination the following passage appears in the shorthand note:

> " Mr. McKenzie (of counsel for appellants): But what I want to know is if the putting of a novice in charge of the lives of a crew and property was a right thing to do?
>
> His Lordship: The captain did that.
>
> Mr. McKenzie: That is what I am asking Mr. Paterson.
>
> Q. You do not know? A. No I never saw him (the wheelsman) before.
>
> By the Court: Q. You are relying on the captain? A. I am relying on Mr. Hall to put the right captain."

The learned judge seems thus to have indicated the view that the choice of a wheelsman lay with the captain and that the captain was the person who had exercised that choice. Mr. Hall who was referred to in the above cited passage was a director and vice-president of the respondent company and its general manager at any rate as regards the shipowning part of its business. He had been appointed to take charge of that part of the business because of his previous knowledge of and experience of shipping. As regards the "Thordoc" it would be correct to say that he was in the position of ship's husband. He unfortunately died in 1930 and therefore was not available at any stage of the litigation between the parties.

Upon appeal to the Exchequer Court the judgment of Demers J. was affirmed. As regards reasons: Maclean J., who gave a reasoned judgment in which Angers J. concurred, did not deal expressly or at all, save in so far as it was involved in the affirmance of the judgment below, with the competency of the crew and the wheelsman. He dealt with what he described as the two principal grounds put forward in support of the appeal, viz., unseaworthiness in respect of the compasses and deviation.

As to both of these points the learned judge held that there was no fault or privity of the owners. Deviation, which Demers J. had thought was covered by previous decision between the parties, was discussed and as their Lordships think rightly discussed in the judgment on the basis that it was not res judicata. In determining the question of deviation in favour of the respondent company various reasons were considered and assigned, some of which, as will later be seen, in their Lordships' view need not be considered or decided by this Board.

So the matter stood when this appeal was argued. Before dealing with the specific points involved the general scope and effect of section 503 of the Merchant Shipping Act, 1894, may be briefly stated. Its scope and effect is not to excuse or except a shipowner from liability for tort or breach of contract, but to limit the amount for which he can be liable for the faults of others than himself. The meaning of fault and privity in section 502 of the Act, which in that respect is identical with section 503, has been authoritatively declared by the Court of Appeal and the House of Lords in the case of *Lennard's Carrying Company, Ltd.* v. *Asiatic Petroleum Company, Ltd.* [1914] 1 K.B. 419 and [1915] A.C. 705. "The words actual fault or privity infer something personal to the owner, something blameworthy in him as distinguished from constructive fault or privity such as fault or privity of his servants or agents" (*per* Buckley L.J.). "Actual fault negatives that liability which arises solely from the rule respondeat superior" (*per* Hamilton L.J.). So in the case of a company "It must be the fault or privity of somebody who is not merely a servant or agent for whom the company is liable upon the footing respondeat superior but somebody for whom the company is liable because his action is the very action of the company itself" (*per* Lord Haldane L.C.). The burden of showing that no such fault or privity subsisted was said in *Lennard's* Case to rest upon the shipowners and the respondents here did not seek to question that proposition as applying to the present case. But another and very important principle is to be derived from a consideration of the section, namely, that the fault or privity of the owners must be fault or privity in respect of that which causes the loss or damage in question, a proposition which was acted upon and illustrated in *Lennard's* Case.

Having thus stated the principles involved their Lordships can now deal with the points which arise on the facts of the present case.

As to deviation: Whoever ordered the vessel to proceed to Fort William, and assuming that it was a deviation and was ordered by somebody whose fault, if it were a fault, was the fault of the respondent company, it is manifest that it had nothing whatever to do with the loss of, or damage to cargo now in question. At the time of the stranding any deviation was over and past and the "Thordoc" was at a place and on a course proper for her voyage from Port

Arthur to Montreal. Contract exceptions laid down in respect of one voyage may be rendered inapplicable and ineffective if by deviation the contract voyage is departed from and altered; see *Thorley* v. *The Orchis S.S. Company* [1907], 1 K.B. 243 and *Tate and Lyle, Ltd.* v. *Hain Steamship Company* 39 Com. Cas. 259; but the question here is a different one namely was the improper navigation of the ship, which it is common ground was the cause of the loss and damage, a cause in respect of which the respondent company can be said to be in fault because there had previously been a deviation. Their Lordships are of opinion that a negative answer to this question is the only possible or proper answer to be returned. The other matters dealt with in the Exchequer Court under the head of deviation need not therefore be considered or decided.

As to the condition of the compass: In this respect again the question in this action under the statute is not the same as the question in the cargo action previously heard between the same parties. In that former action the question was whether the condition of the exercise of due diligence to make the vessel seaworthy had been fulfilled as it was necessary that it should be fulfilled to bring into operation the protective provisions of section 6 of the Water Carriage of Goods Act. The condition is not fulfilled merely because the shipowner is personally diligent. The condition requires that diligence shall in fact have been exercised by the shipowner or by those whom he employs for the purpose —see *Dobell* v. *Rossmore Steamship Company* L.R. [1895] 2 Q.B. 408. Therefore with regard to the " Thordoc " in the cargo action want of diligence in the compass adjuster who adjusted the compasses or in the captain who said he checked or verified the adjuster's work would be material and a finding adverse to the shipowner could be arrived at upon the ground of want of diligence in these persons. In this action personal fault or privity of the respondents being essential both Courts have found that the respondent company which employed a compass adjuster of repute and proved that before the accident it knew from his account requiring payment for his work that the work had been done, was entitled to be satisfied. The appellants did not attempt before their Lordships to attack this finding or to support the appeal on any question of the improper state of the compass.

There remains the question of the crew. It was sought on the argument of this appeal to extend the attack beyond that on the helmsman to an attack on the officers, the captain and the second mate who was in charge of the navigation at the material time. But although it is true that the burden of proof generally is on plaintiffs proceeding under this section, yet in the course of proceedings the issues or topics of fact upon which proof is requisite may become so defined as to dispense a plaintiff from further dealing with matters falling outside the area so defined. Here the appellants properly gave notice by their statement of defence of certain topics they would raise and

properly also gave notice by the passage in their factum which has been cited of another matter which had emerged and upon which they would rely. But nothing with regard to the competence of the master or second officer appears in either of those documents or in the notes of evidence. These officers were apparently certificated officers and engaged as such, and the stranding was admitted to be caused by improper navigation, which prima facie seems to their Lordships to be much more consistent with negligence than with any other assumption and which at all events does not necessarily lead to any inference of incompetence in these officers. Moreover, it is in evidence that the master engaged the officers under him and there is nothing to support an inference that the respondents were in fault for allowing him to do so or in fault for engaging the master himself. Neither Court below expressly dealt with this point by judgment or interlocutory observation. If it was mentioned to them they must be taken to have decided against the appellants upon it and their Lordships do not think they have either the duty or the materials, in the circumstances of the case, to entertain an appeal from the decision on this ground.

There remains the question of the wheelsman. It is unnecessary to decide whether he was incompetent. It is not correct to say that he was in charge of the vessel. He was steering it and keeping the course he was told to keep. There was a lookout man and the second officer was in charge of the vessel and its navigation. There was indeed negligence, great negligence, in the navigation, but it is at least open to question whether far the greater part of the responsibility did not rest elsewhere than with the wheelsman and whether it would be just or fair to describe him as incompetent. However that may be, and their Lordships do not decide any such matter, it is sufficient to say that their Lordships agree with Demers J. that the engagement of the wheelsman and the putting of him at the wheel at the stage of the voyage now in question were alike the responsibility and the work of the captain. Even if the captain were wrong in either respect that was not the fault of the respondent company.

Their Lordships will for these reasons humbly advise His Majesty that this appeal should be dismissed with costs.

41743—3A) Wt 8151—17 120 5/37 P. St. G. 338

In the Privy Council.

ROBIN HOOD MILLS LIMITED

v.

PATERSON STEAMSHIPS LIMITED

DELIVERED BY LORD ROCHE

Printed by HIS MAJESTY'S STATIONERY OFFICE PRESS,
Pocock Street, S.E.1.

1937