LEVAL & COMPANY INCORPORATED (*Plaintiff*)	APPELLANT;	1960 *Oct. 24
AND		1961 Jan. 24
COLONIAL STEAMSHIPS LIMITED (*Defendant*)	RESPONDENT.	

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA, QUEBEC ADMIRALTY DISTRICT

Shipping—Damage to cargo—Damage to ship brought about by peril or accident of the sea—Negligence in management of the ship—Control of ship not taken over by owner—Action taken by owner's assistant marine superintendent that of one of owner's servants—Water Carriage of Goods Act, R.S.C. 1952, c. 291, Art. IV, Para. 2(a) and (c).

The plaintiff company claimed for damage to a cargo of flax seed shipped by it from Port Arthur to Montreal. The cargo was trans-shipped at Port Colborne to the defendant's vessel "David Barclay". The plaintiff claimed that the defendant in breach of its undertaking and in

*PRESENT: Kerwin C.J. and Taschereau, Locke, Fauteux and Abbott JJ.

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dereliction of its duty failed to deliver the cargo in the same good order and condition in which it was received, but on the contrary on arrival in Montreal it was found to be wet, short and damaged. The defendant pleaded the *Water Carriage of Goods Act*, 1936, and alleged that the damage resulted from the fact that the "David Barclay" rubbed the starboard bank of the Soulanges Canal very heavily on its voyage from Port Colborne to Montreal.

The trial judge concluded that the damage to the ship resulting from the collision was occasioned or brought about by peril, danger or accident of the sea or navigable waters within the meaning of para. 2(c) of Article IV of the schedule to the *Water Carriage of Goods Act* and that it was negligence which related principally to the navigation or management of the ship under para. 2(a) of Article IV. The action was dismissed and the plaintiff appealed to this Court.

Held: The appeal should be dismissed.

Per Kerwin C.J. and Taschereau, Fauteux and Abbott JJ.: The principle, approved by the House of Lords in *Gosse Millerd Ltd. v. Canadian Government Merchant Marine*, [1929] A.C. 223, of distinguishing between want of care of cargo and want of care of vessel indirectly affecting the cargo was applicable in the present case. *The Glenochil*, [1896] P. 10; *Hourani v. Harrison* (1927), 32 Com. Cas. 305; *Kalamazoo Paper Co. v. Canadian Pacific Railway Co.*, [1950] S.C.R. 356, referred to. The steps taken by the master of the "David Barclay" related primarily to the safety and preservation of the vessel.

The contention that after the collision the ship's owners had intervened and taken over control of the vessel from the master was rejected. The defendant's assistant marine superintendent who, following receipt of a message reporting the accident, instructed the captain of the ship to proceed to Montreal was not the *alter ego* of the defendant. 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. *Lennard's Carrying Co. Ltd. v. Asiatic Petroleum Co. Ltd.*, [1915] A.C. 705, applied. The decision of the Supreme Court of the United States in *The Isis* (1934), 48 Ll. L. Rep. 35, is quite distinguishable, even if the decision might otherwise be relevant.

Per Locke J.: The failure, following the collision, to take steps to prevent the ingress of further water and also to get rid of the accumulation in the bilge was negligence in the management of the ship on the part of the master and, accordingly, the case fell within the exception in Article IV, para. 2(a) of the schedule of the Act. *The Rodney*, [1900] P. 112, referred to; *Kalamazoo Paper Co. v. C.P.R., supra*, applied.

The Isis, supra, had no application to the facts of this case, because there the question was whether the company had not by its action relieved the master of his responsibility for the voyage and taken charge. *Lennard's Carrying Co. Ltd. v. Asiatic Petroleum Co. Ltd., supra*, referred to.

APPEAL from a judgment of A. I. Smith D.J.A.[1], dismissing the plaintiff's action. Appeal dismissed.

C. Russell McKenzie, Q.C., for the plaintiff, appellant.

[1] [1960] Ex. C.R. 172.

L. Lalande, Q.C., for the defendant, respondent.

The judgment of Kerwin C.J. and of Taschereau, Fauteux and Abbott JJ. was delivered by

THE CHIEF JUSTICE:—This is an appeal by the plaintiff, Leval & Company Inc., from a judgment of the District Judge in Admiralty for the District of Quebec[1], dismissing the appellant's action against Colonial Steamships Limited, for damage to a cargo of 96,599.3 bushels of No. One Canada Western Flax Seed. This cargo was part of a total of 422,038.8 bushels shipped by the appellant on November 1, 1955, from Port Arthur, Ontario, to Montreal, Quebec, pursuant to a Canadian Lake Grain Bill of Lading, with "trans-shipment Port Colborne &/or Kingston &/or Prescott, Ont.". The bill of lading provided that all the terms, provisions and conditions of the Canadian *Water Carriage of Goods Act,* 1936, and of the rules comprising the schedule thereto, were, so far as applicable, to govern the contract contained in the bill of lading, which was to have effect, subject to the provisions of the rules as applied by the said Act. In due course the cargo of 96,599.3 bushels was trans-shipped at Port Colborne on the respondent's vessel "DAVID BARCLAY".

The relevant provisions of the *Water Carriage of Goods Act,* 1936, and the schedule thereto of Rules Relating To Bills Of Lading are the same as are contained in the *Water Carriage of Goods Act,* R.S.C. 1952, c. 291, and schedule. Section 2 of that Act enacts:

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

Rule 2 of Article III of the schedule provides:

> 2. Subject to the provisions of Article IV, the carrier shall properly and carefully load, handle, stow, carry, keep, care for and discharge the goods carried.

Rule 2, paras. (*a*) and (*c*) of Article IV of the schedule read as follows:

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

[1] [1960] Ex. C.R. 172.

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(a) act, neglect, or default of the master, mariner, pilot or the servants of the carrier in the navigation or in the management of the ship,

.....

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

The statement of claim contained no allegation of negligence on the part of the respondent, but claimed that the respondent, in breach of its undertaking and in dereliction of its duty in the premises implied by law, failed to deliver the 96,599.3 bushels of flax seed in the same good order and condition as received by it at the time of shipment, which said goods arrived in Montreal wet, short and damaged. In its defence the respondent alleged that any alleged damage arose or resulted from the fact that the "DAVID BARCLAY" rubbed the starboard bank of the Soulanges Canal very heavily on its voyage from Port Colborne to Montreal and the respondent invoked all of the terms, conditions and provisions of the Act and Rules and, in particular, Rule 2, paras. (a) and (c) of Article IV.

Admittedly the "DAVID BARCLAY" was in seaworthy condition when she sailed from Port Colborne. The evidence led on behalf of the respondent shows that when the vessel reached a point about two miles east of Lock No. 5 in the Soulanges Canal she sheered suddenly and struck a stone on the starboard bank of the canal. The particulars of the collision and of what transpired thereafter are correctly set forth in the following extracts from the reasons for judgment at the trial:

The collision with the canal-bank occurred at about 2:00 A.M. on November 10th and the mate Fournier, who was on the bridge at the time, immediately sent a man to take soundings in No. 2 bilge, where water was found to an approximate depth of 14 feet. The pumps were put in operation and the Master, who was asleep in his cabin, was called.

It was noted that the ship had a slight list to starboard. She proceeded however to Lock No. 4 where it was ascertained that her draft had not altered since the first soundings taken and she therefore continued down to Lock No. 3, where the Master communicated with the Canal Superintendent and requested the services of a diver. The vessel then descended to Lock No. 1, where she was joined by a diver and the Assistant Canal Superintendent who ordered her to proceed to the foot of the canal. These instructions were complied with and the vessel on reaching the Eastern end of the canal was turned about and moored to the bank. Her draft was again checked and it was found not to have altered.

A driver descended and went along the entire length of the vessel in an effort to locate the hole through which the water had entered the bilge. At the end of one hour he surfaced and reported that he had been unable

to find any hole or break in the vessel's skin. Captain Sauvageau however was not satisfied and requested him to go down and make a second examination which he did and after an hour and a half he reported that he had again failed to find any hole or break in the vessel's side. A further check of the vessel's draft satisfied the Master that it remained unchanged. He had two or more telephone conversations with the Defendant's Assistant Marine Superintendent, Captain Walton, in the course of which the collision and the results of the diver's exploration were reported. On the basis of these reports the Master was instructed by Walton to proceed to Montreal.

The vessel left Cascades around noon on the 10th of November and tied up at Elevator No. 2 in the Harbour of Montreal around 10 o'clock that evening. It was found that her draft had not altered and around 8 o'clock the following morning she commenced to discharge cargo. However, in the afternoon, it was notice for the first time that water was finding its way from No. 2 bilge into No. 2 cargo hold and a tarpaulin was hung against the starboard side of the vessel with the hope that the suction created by the pressure of the water through the hole in the ship's side might draw the tarpaulin against the break and thus prevent the further entry of water.

There is evidence to the effect that little water had actually gained access to the cargo prior to the commencement of unloading and this is accounted for by the fact that so long as the cargo maintained pressure against the "limber boards" at the top of No. 2 bilge water could not enter the hold but as soon as this pressure was removed water was permitted entry.

In rebuttal, the appellant called two expert witnesses who testified that, in their opinion, the failure to locate and stop immediately the hole which was finally discovered in the vessel and the fact that the "DAVID BARCLAY" continued on to Montreal, although it was known that the vessel was leaking, amounted to negligence and lack of good judgment.

A consideration of the evidence suggested to me that at no time was there any negligence in the navigation or management of the ship on the part of those in charge of her. The trial judge was inclined to the opinion that there was such negligence subsequent to the collision with the bank of the canal, but he concluded that in any event the damage to the ship resulting from the collision was occasioned or brought about by peril, danger or accident of the sea or navigable waters within the meaning of para. 2(*c*) of Article IV of the Schedule to the Act and that it was negligence which related principally to the navigation or management of the ship under para. 2(*a*) of Article IV. The contention on behalf of the appellant is that the damage to her cargo was not the direct result of the collision

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but was caused by the failure and negligence of those in charge of the vessel following the collision to properly care for and protect the cargo in compliance with Article III (2).

In *Gosse Millerd Limited v. Canadian Government Merchant Marine*[1], it was held by the House of Lords that negligence in the management of the hatches was not negligence in the management of a ship, but they referred to a number of earlier decisions and approved the principle laid down by a Divisional Court in *The Glenochil*[2]. That principle was accepted by the Supreme Court of the United States in cases arising under the American *Harter Act* and was affirmed and applied by the Court of Appeal in *Hourani v. Harrison*[3].

Their Lordships pointed out in the *Gosse Millerd* appeal that there might be cases on the border line "but if the principle is clearly borne in mind of distinguishing between want of care of cargo and want of care of vessel indirectly affecting the cargo, as Sir Francis Jeune puts it, there ought not to be very great difficulty in arriving at a proper conclusion".

The same principle was applied by this Court in *Kalamazoo Paper Co. v. Canadian Pacific Railway Co.*[4], in an action by the insurers of the cargo of a ship damaged by striking a rock and later beached to prevent sinking. The action was to recover damages alleged to have been suffered by the cargo after the beaching, owing to the failure on the part of the captain to direct the use of all available pumping facilities to prevent the entry of further water into the hold and away from the cargo. It was held that this was neglect of the master in "the management of the ship" within the meaning of para. 2(*a*) of Article IV of the rules.

That principle is applicable in the present case. I agree with the trial judge that the steps taken by the master of the "DAVID BARCLAY" related primarily to the safety and preservation of the vessel. As he points out the ship's no. 2 starboard bilge filled rapidly and remained filled, notwithstanding the operation of the vessel's pumps; the ship developed a list which caused the master concern for

[1] [1929] A.C. 223.
[2] [1896] P. 10.
[3] (1927), 32 Com. Cas. 305.
[4] [1950] S.C.R. 356, 2 D.L.R. 369.

the safety of his vessel; and the testimony of one of the experts called on behalf of the appellant shows that in his opinion the ship was in jeopardy following the collision.

After the conclusion of the trial counsel for the appellant referred the trial judge to a decision of the Supreme Court of the United States, *The Isis*[1], and raised the contention for the first time that after the collision the ship's owners had intervened and taken over control of the vessel from the master. As the trial judge points out there was no such allegation even though in its reply the appellant included the following general averment:

> The Plaintiff specifically states that at the appropriate and material times the Defendant failed to satisfy and discharge all its statutory duties and obligations required to be performed and discharged by the Defendant under the terms of the said Water Carriage of Goods Act, and puts the Defendant upon the strict proof of any defence afforded thereunder.

This was not a sufficient pleading within Admiralty Rules 70 and 215 and Exchequer Court Rule 93 and the point might well be disposed of on that ground alone. However, I proceed, as did the trial judge, to consider the general proposition and its applicability. I agree with him that the circumstances in *The Isis* case are quite distinguishable from those with which we are concerned, even if the decision might otherwise be relevant.

Captain James S. Walton, called on behalf of the respondent, was its assistant marine superintendent stationed at Port Colborne where the respondent had its head office. He had received a message from Captain Sauvageau reporting the accident and what had been done and Captain Walton instructed the captain of the ship to proceed to Montreal, in view of the fact that there had been no change in the list or the draft. Captain Walton was not the *alter ego* of the respondent and as the decision of the House of Lords in *Lennard's Carrying Company Limited v. Asiatic Petroleum Company Limited*[2], shows, 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.

The appeal should be dismissed with costs.

[1] (1934), 48 Ll. L. Rep. 35. [2] [1915] A.C. 705 at 713.

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LOCKE J.:—It is common ground that the "David Barclay" was seaworthy when she sailed from Port Colborne, and the finding of the learned trial judge that the damage caused to the ship by striking the canal bank while passing through the Soulanges Canal was occasioned or brought about by a peril or accident of the sea, within the meaning of Art. IV, para. 2(*c*) of the *Water Carriage of Goods Act*, R.S.C. 1952, c. 291, is not questioned.

The evidence shows that the diver employed to examine the hull following the accident, but before the ship left the Canal for Montreal, failed to find the hole caused by the collision which allowed water to enter the no. 2 starboard bilge to a depth of 14 ft. Subsequent examination of the hull after the discharge of the cargo, as declared by the protest and the survey report, showed that the bilge strake on the starboard side had been holed. According to the witness Walton, the assistant marine superintendent of the respondent, it was a crescent-shaped hole about 6 inches long and 3 inches wide. The appellant called two experienced ships' masters who gave evidence to the effect that, in view of the obvious fact that the hull had been holed and there being 14 ft. of water in the bilge, temporary repairs, either by blocking the hole externally by wedges or by placing a tarpaulin around the approximate position of the leak, should have been made before the ship sailed from the Canal for Montreal. Nothing, however, turns upon this since the appellant's case is that the damage to the grain was suffered after the ship had docked at the elevator in Montreal harbour and during the process of unloading.

According to the records, there was 14 ft. of water in the bilge at 23.30 o'clock on November 10, 1955. The "David Barclay" was then moored at the elevator where it was intended to discharge the cargo of flax. The unloading commenced on the following morning at 8 o'clock. Since it was evident that the hull had been holed to permit the water to enter the bilge in such quantities, it is, in my opinion, clear that a duty rested upon those in charge of the ship to take steps to prevent the ingress of further water and also to get rid of the accumulation in the bilge. It had already been demonstrated on the previous night, following the collision, that the bilge pumps on the vessel

were insufficient to pump out the bilge but this, presumably, would not have been so if, as suggested by the witness Crocker with whose evidence the witness Finch agreed, a tarpaulin had been stretched across that portion of the hull where it was holed. If the bilge pumps were found to be insufficient, additional pumps could have been employed. However, nothing was done and the evidence shows that after the operation of moving the flax commenced, relieving the pressure upon the limber or bilge boards, the water escaped from the bilge into the no. 2 cargo hold damaging the flax. While there may have been some trifling damage to the grain before the unloading commenced, practically all of it was caused in this manner.

In my opinion, the failure to take these steps was negligence in the management of the ship on the part of the master and, accordingly, the case falls within the exception in Art. IV, para. 2(*a*) of the schedule. To fail to do so was, in my opinion, "improper handling of the ship as a ship", to adopt the language of Gorell Barnes J. in *The Rodney*[1], which affected the safety of the cargo.

The conditions existing as the "David Barclay" lay at the elevator dock were very similar to those which existed after the second stranding of the "Nootka" in *Kalamazoo Paper Co. v. C.P.R.*[2]. The facts dealing with that aspect of the matter are stated at pp. 372 and 373 of the report. The cargo there was pulp and the ship first ran aground on Cross Island and remained there until the following tide and, as she was making a small amount of water when she became free, it was decided to proceed to Quatsino Wharf and run her aground there. The trial judge found that only a comparatively small amount of water had entered the vessel at the time of the second grounding and it was after this that the water entered the vessel which caused the damage to the cargo. The negligence in failing to employ other available pumps, in addition to the bilge pump, to prevent this was held to be negligence in management within the meaning of the article in question. The judgments in that case consider the authorities at length and, in my opinion, the principle upon which it was decided applies to the present matter.

[1] [1900] P. 112 at 117.
[2] [1950] S.C.R. 356, 2 D.L.R. 369.

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In the reasons for judgment delivered by the learned trial judge, reference is made to an argument advanced on the part of the plaintiff based upon the decision of the Supreme Court of the United States in *The Isis*[1], where, after the vessel had grounded in the course of its voyage, the ship owners had resumed control of the ship relieving the master from responsibility during the continuance of the voyage. The contention made on behalf of the appellant was that the act of Walton, the assistant marine superintendent of the defendant, in directing the master to proceed after the collision amounted to a resumption by the owners of the direction of the ship. The point was not argued in this Court, though in the appellant's factum it is said that the learned trial judge had misconstrued the decision in *The Isis*.

Had it been the intention of the appellant to raise this point, it should have been distinctly raised by way of a reply to the statement of defence and this was not done. But, apart from this, the case has no application to the facts of the present matter since nothing in the nature of a resumption of control of the ship by the owners took place. The master communicated with Walton and informed him of the condition of the ship and Walton instructed him to proceed. But, so far as the evidence disclosed, Walton was simply another servant of the respondent company and if he was negligent in giving these instructions the exception applies.

The learned trial judge referred in dealing with this aspect of the matter to the judgment of the House of Lords in *Lennard's Carrying Co. Ltd. v. Asiatic Petroleum Co. Ltd.*[2] In that case the question was whether a loss at sea had happened without the actual fault or privity of the owners, a limited company, within the meaning of s. 502 of the *Merchant Shipping Act*, 1894. This case has recently been considered in this Court in *Marwell Equipment Ltd. et al. v. Vancouver Tug Boat Co. Ltd.*[3] In *Lennard's* case Lord Haldane, at p. 713 of the report, said that the fault referred to must be that 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

[1] (1934), 48 Ll. L. Rep. 35. [2] [1915] A.C. 705.
[3] [1961] S.C.R. 43, 26 D.L.R. (2d) 80.

the company is liable because his action is the very action of the company itself. The principle acted upon in *The Isis,* while in some respects similar, was not the same, but rather whether the company had not by its action relieved the master of his responsibility for the voyage and taken charge.

I would dismiss this appeal with costs.

Appeal dismissed with costs.

Attorney for the plaintiff, appellant: *C. Russell McKenzie,* Montreal.

Attorneys for the defendant, respondent: *Beauregard, Brisset, Raycraft & Lalande,* Montreal.