KEYSTONE TRANSPORTS LIMITED (DEFENDANT) ..... APPELLANT;

AND

DOMINION STEEL & COAL CORPORATION, LIMITED (PLAINTIFF). RESPONDENT.

1942

* May 29, June 1.
* Nov. 3.

ON APPEAL FROM THE COURT OF KING'S BENCH, APPEAL SIDE, PROVINCE OF QUEBEC

Shipping—Damage to cargo—Goods damaged by contact with water coming through hold—Loosening of tarpaulins covering hatches—Weather conditions—Meaning of "perils of the sea"—Prima facie case—Proof of negligence—Water Carriage of Goods Act, 1936, 1 Edw. VII, c. 49.

In an action by the owner of a cargo for damage suffered through the goods coming into contact with water which came through one hold of the ship as the result of the loosening of the tarpaulins covering the hatches,

Held, reversing the judgment appealed from, Bond J. *ad hoc* dissenting, that, according to the facts and circumstances of the case, the appellant has established, and the trial judge so found, that, in view of the weather conditions existing at the time of the accident, the damage was due to a peril of the sea and that, therefore, the vessel and her owners were relieved of any responsibility.—There being more than a mere "*prima facie* case", it was upon the respondent to disprove it by proving negligence causing the loss, and, in this, it has totally failed.

A "peril of the sea" is not defined in the *Water Carriage of Goods Act, 1936,* and it would indeed be very difficult to give in a law a definition which would cover all the possible cases which may arise.

* PRESENT:—Rinfret, Kerwin, Hudson and Taschereau JJ. and Bond J. *ad hoc.*

1942

KEYSTONE TRANSPORTS LTD. v. DOMINION STEEL & COAL CORPORATION, LTD.

"Each case must be considered with reference to its own circumstances": *per* Lord MacNaghten in *Thames and Mersey Marine Insurance Co.* v. *Hamilton, Fraser & Co.* (12 A.C. 484).

"Perils of the sea" do not mean to cover only accidents peculiar to navigation that are of extraordinary or catastrophic nature, or arise from irresistible force: *Canada Rice Mills Ltd.* v. *Union Marine and General Insurance Co.* (67 Ll. L.R. 549).

An accident of navigation, in order to constitute a peril of the sea need not be as above described; it is sufficient that it be the cause of damage to goods at sea by the violent action of the wind and waves when such damage cannot be attributed to someone's negligence. The officers and members of the crew are not bound to take all the precautions that would inevitably prevent the accident and make its occurrence impossible; they are required to exercise the care that reasonably prudent men would exercise in similar circumstances. *Pandorf & Co.* v. *Hamilton, Fraser & Co.* (16 Q.B.D. 629; 6 Asp. 44), *The Vincent McNally* ([1929] 1 A.M.C. 161), *The Light No. 176* ([1929] 1 A.M.C. 554), and *Canada Rice Mills Ltd.* v. *Union Marine and General Insurance Co. (supra).*

Per Bond J. *ad hoc* (dissenting)—Under the circumstances of this case, the damage cannot be attributed to a peril of the sea. "The term 'peril of the sea' refers only to fortuitous accidents or casualties of the sea. It does not include the ordinary action of the winds and waves." (Scrutton, on Charter-parties and bills of lading, p. 268). Where a *prima facie* case of loss by perils of the sea is made, it is for the goods' owner to disprove it by proving negligence causing the loss. (Scrutton, p. 261). But, in this case, such a *prima facie* case has not been established. On the contrary, it was disclosed by the evidence that there had been negligence in the inspection of the wedges, notwithstanding the fact that the danger of their becoming loosened was a known and anticipated risk.

APPEAL from the judgment of the Court of King's Bench, appeal side, province of Quebec, reversing the judgment of the trial judge, Boyer J., and maintaining an action instituted by the respondent claiming $2,842.75 as damage to a shipment of kegs of nails, staples and wire on board the appellant's steamer *Keynor*.

The material facts of the case and the questions at issue are stated in the above head-note and in the judgments now reported.

Lucien Beauregard K.C. for the appellant.

C. Russell Mackenzie K.C. for the respondent.

The judgment of Rinfret, Kerwin, Hudson and Taschereau JJ. was delivered by

TASCHEREAU J.—The respondent, plaintiff in the Superior Court, claims from the appellant the sum of $2,842.76. It alleges in its declaration that at all material times it was the owner of a cargo of nails, staples and wire shipped on board the defendant's steamer *Keynor* at Sydney, N.S., on or about August the 11th, 1937, and bound for Fort William, Ontario. The goods which were received for carriage by the defendant in good condition, were found to be seriously damaged by water when they arrived at Fort William. The amount of $2,842.76 claimed by the plaintiff represents the difference between the sound value of part of this cargo and its salvage value.

It is not contested that the goods suffered damage by contact with water which came through hold no. 3, as the result of the loosening of the tarpaulins which covered the hatches.

The defendant, in its plea, alleges that the *Keynor* was tight, staunch and strong, that her hatches were well and sufficiently covered and protected, that she was sufficiently manned, and in every way fit to perform a voyage safely and that the cargo was in every respect properly arranged and stowed. It further alleges that it was a condition of the bill of lading, which was the contract between the parties, that the parties agreed to be bound by all its stipulations, exemptions and conditions, and that the said bill of lading was subject to the terms and provisions of and all the exemptions from liability contained in the *Water Carriage of Goods Act,* and it invoked all the provisions of the said *Water Carriage of Goods Act* of 1936 and, amongst other provisions, subsection (*c*) of section 2 of article 4 of the said Act which reads as follows:—

> 2. Neither the carrier nor the ship shall be responsible for loss or damage arising or resulting from:
>
> * * *
>
> (*c*) perils, danger and accidents of the sea or other navigable waters.

The defendant also alleges that during the voyage, the *Keynor* encountered in the Gulf of St. Lawrence, heavy and rough weather and that while covering the distance from Sydney to Cape Gaspé, she was labouring, pitching and rolling very heavily, her decks being continuously under water, and that if the cargo was damaged during

1942

KEYSTONE TRANSPORTS LTD. v. DOMINION STEEL & COAL CORPORATION, LTD.

Taschereau J.

the voyage, the damage was due to perils of the sea for which the defendant could not be held responsible in fact or in law.

In the Superior Court, Mr. Justice Boyer came to the conclusion that the weather encountered between Bird Rocks and Cape Gaspé was such as to constitute a "peril of the sea" relieving the vessel and her owners of responsibility for any damage to the cargo, and dismissed the action with costs.

The Court of King's Bench, Mr. Justice Galipeault dissenting, allowed the appeal.

The only question for consideration for this Court is whether the Court of King's Bench was right in holding that the appellant had not proved that the damage to the respondent's cargo was due to a peril of the sea. The respondent particularly stressed the points that there was no peril of the sea, and that if there were any, the damage to the cargo happened before any peril of the sea was encountered. There was no *causa causans* or causal connection between the alleged peril of the sea and the damage to the cargo.

The bill of lading contained, amongst others, the following condition:—

> This bill of lading shall have effect subject to the provisions of the *Water Carriage of Goods Act,* 1936, enacted by the Parliament of the Dominion of Canada, which shall be deemed to be incorporated herein, and nothing herein contained shall be deemed a surrender by the carrier of any of its rights or immunities or an increase of any of its responsibilities or liabilities under said Act.

The *Water Carriage of Goods Act,* of 1936 (1 Edward VIII, ch. 49, article 3, of the rules relating to bills of lading) provides for the responsibilities and liabilities of the carrier and states:—

> The carrier shall be bound, before and at the beginning of the voyage, to exercise due diligence to,
>
> (*a*) make the ship seaworthy;
>
> (*b*) properly man, equip, and supply the ship.
>
> (*c*) make the holds, refrigerating and cool chambers, and all other parts of the ship in which goods are carried, fit and safe for their reception, carriage and preservation.

Section 2 of article 3 then provides that:—

> Subject to the provisions of article 4, the carrier shall properly and carefully load, handle, stow, carry, keep, care for and discharge the goods carried.

Article 4 then deals with the rights and immunities of the carrier and, after stating that

> neither the carrier nor the ship shall be liable for loss or damage arising or resulting from seaworthiness, unless caused by want of due diligence on the part of the carrier,

section 2 of the said article provides that:—

> Neither the carrier nor the ship shall be responsible for loss or damage arising or resulting from,
>
> (*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;
>
> (*b*) fire, unless caused by the actual fault or privity of the carrier;
>
> (*c*) perils, danger, and accidents of the sea or other navigable waters.

and then there are thirteen other causes enumerated for which the carrier shall not be responsible and, finally, there is the Omnibus Clause (*q*), which reads as follows:—

> (*q*) Any other cause arising without the actual fault and privity of the carrier, or without the fault or neglect of the agents or servants of the carrier, but the burden of proof shall be on the person claiming the benefit of this exception to show that neither the actual fault or privity of the carrier nor the fault or neglect of the agents or servants of the carrier contributed to the loss or damage.

There is no dispute that the ship was seaworthy, that she was properly manned and equipped and that the carrier has properly loaded, stowed and kept the good carried.

The ship left Sydney on August the 11th at 7.30 o'clock in the morning. At that time, the weather was fair, and at Cape North a light wind was encountered. From Cape North to Bird Rocks, the voyage proceeded without incident of any kind and this last place, according to the evidence and entries in the log book, was reached that same night at 11.30 o'clock. The maximum speed of the *Keynor* is approximately 7·3 miles per hour, and she covered the distance of 108 miles from Sydney to Bird Rocks in 16 hours, travelling therefore at an average speed of 6 miles and three-quarters per hour. At that point the weather was clear but the southwest wind which was then blowing was becoming stronger. The *Keynor* which was following NxW course towards Cape Gaspé was not heading into the sea which was becoming to be rough, but was being struck by the waves on her left beam.

The ship encountered very bad weather from Bird Rocks to Cape Gaspé, this is from 11.30 o'clock the night of the 11th of August, and this is how the witnesses describe the weather and the effect it had on the vessel.

1942

KEYSTONE TRANSPORTS LTD. v. DOMINION STEEL & COAL CORPORATION, LTD.

Taschereau J.

S. G. Williamson, master of the *Keynor*, says:—

A. We really did not get much bad weather till we got to Bird Rocks, and that was 11.45 p.m. Our bad weather was from Bird Rocks, to Cape Gaspé. That was covering the 12th.

Q. Will you describe the weather you encountered during this period?

A. After rounding Bird Rocks we struck this strong southwest wind with a very, very heavy sea, and periodically through the next 36 hours I used to head the ship in the sea, head her southwest in the sea for the mates to go around and inspect the decks, to see if everything was seaworthy.

Q. Why did you have to head her to the sea?

A. Because there was too much water coming over, otherwise it was too dangerous to put men on deck under the course we were steering.

Q. Why?

A. There was too much sea coming over.

Q. Would you describe what would be the action of the sea on the vessel?

A. Well, with a ship working—that is why we have those inspections, the working of the ship in the sea will cause those hatches wedges to loosen.

And further:—

Q. When you say shipping water, do you refer to the spray of the water over the deck?

A. We were not taking spray on that trip. We were taking seas, heavy water. Sometimes we had our deck covered with as much as six to eight feet of water, solid water and she would roll down in the trough of the sea.

Q. Do you mean to say her whole deck would be covered by sea?

A. Completely covered, until the sea would wash off and she would raise.

Robert Brash declared:—

Q. How did this weather compare to other voyages?

A. I have not seen any that was worse. That seemed to be a pretty bad trip to me.

And J. A. MacLean, who took pictures, says:—

Q. In your seven or eight years' experience of the sea, did you not have any opportunity to take pictures of that character?

A. No, not like that.

Q. What do you mean by not like that?

A. I never saw it bad enough to get a good picture like that, with the sea coming over.

And Raymond Savard says:—

Q. What would be the height of the waves that would be striking on the ship?

A. The water used to come up to our boom. That would be about seven or eight feet.

Q. When you say the water, would that be the spray or would it be the water in volume?

A. That would be the full force of the water. It would be all water. the full force of the water.

Q. Where was that force of water breaking on your ship?
A. On the hatch coamings.

J. M. Beak, the chief engineer on board the *Keynor*, says that from Bird Rocks to Cape Gaspé they went through very "dirty" weather and in his evidence he says:—

Q. Where did you get the gale of wind?
A. From Bird Rocks.
Q. I mean, was this gale of wind judged by yourself?
A. Oh, yes, by my own self. It was just what I would call a gale of wind for that class of ship. It would be smooth water for a big ship, but for this class of ship it was dirty weather, I mean, being low and loaded in the water.

Moreover, MacLean, who was an engineer on board the *Keynor* for seven years, took some pictures of the huge waves breaking on the deck of the ship. He does not remember exactly the position of the *Keynor* when these pictures were taken, but he says that it was approximately at half past eleven in the morning. This is obviously on the 12th of August, twelve hours after the ship had passed Bird Rocks, because, on the 11th, at that time, the ship had just left Sydney where the sea was calm, and on the 13th, at 11.30 a.m., she had reached a point beyond Cape Gaspé, and the storm had then subsided. These pictures, which have been produced as exhibits, show clearly huge waves breaking on the ship, covering the deck, and they corroborate the description made by the numerous witnesses who were on board.

It is also interesting to note that the engines of the *Keynor* were running at full speed, but the sea was so heavy that at certain moments, she was not doing better than two miles an hour. Furthermore, from the moment the ship left Bird Rocks to approximately the time when the pictures were taken, and when the log indicated a prevailing S.W. strong wind, at 12.45 p.m. on the 12th of August, the ship covered only 54 miles in 13 hours, or an average of a little over 4 miles per hour, instead of 7·3 which is the maximum speed, or 6 and three-quarters miles per hour, as she had covered from Sydney to Bird Rocks. There can be no doubt in my mind, that the ship from Bird Rocks to Gaspé encountered very heavy seas, and that the water covered completely her decks. I agree with the finding of the trial judge who says:—

1942

KEYSTONE TRANSPORTS LTD. v. DOMINION STEEL & COAL CORPORATION, LTD.

Taschereau J.

On its course between Bird Rocks and Gaspé, the boat encountered a strong wind blowing on its quarter and heavy seas which rolled over its deck constantly, thus preventing any one from crossing from one turret to the other without risk of life, except when the boat was deflected from its course and headed against the wind.

It was while the ship was labouring under such adverse and violent elements, that it was discovered that the tarpaulins covering hatch on hold no. 3 had loosened, thus permitting the infiltration of salt water in the ship. It was Robert Brash, the mate of the *Keynor,* who noticed it first. He does not remember exactly the date and the hour, but the evidence of Williamson and Savard reveals that it was at noon, on the 12th of August, a little after the time when MacLean took the pictures that leave no room for doubt as to the prevailing conditions of the elements. The sea was so rough when this discovery was made, that the members of the crew could not walk on the deck to tighten them, and the course of the ship had to be altered in order to facilitate their task.

Do these conditions constitute a peril of the sea? The respondent submits that they do not, because there was nothing unusual or of an unexpected nature in the weather which can bring the appellant within the exception of the law. It is true that some witnesses have stated that this kind of weather had already been encountered in the Gulf and that strong wind has to be anticipated in that vicinity, but I do not think that this is the true test.

A peril of the sea is not defined in the Act, and it would indeed be very difficult to give in a law a definition which could cover all the possible cases which may arise.

As Lord MacNaghten said in the case of *Thames and Mersey Marine Insurance Co.* v. *Hamilton, Fraser & Co.* (1):—

> Your Lordships were asked to draw the line and to give an exact and authoritative definition of the meaning of the expression "perils of the seas" in connection with the general words. For my part I decline to attempt any such task. I do not think it is possible to frame a definition which would include every case proper to be included, and no other. I think that each case must be considered with reference to its own circumstances, and that the circumstances of each case must be looked at in a broad common sense view and not by the light of strained analogies and fanciful resemblances.

(1) (1887) 12 App. Cas. 484, at 502.

And from the following authorities it can be seen that the submission of the respondent cannot be accepted as being the true interpretation of the law.

It was held in *Pandorf & Co.* v. *Hamilton, Fraser & Co.* (1):—

In a seaworthy ship, damaged goods caused by the action of the sea during transit, not attributable to the fault of anybody, is a damage from peril of the sea.

In the same case, in the Court of Appeal (2), Lord Isher says:—

Therefore, perils of the sea are those perils which are peculiar to carrying on business on the sea; they obviously, therefore, include the violence of the sea itself; they include the danger which is caused by being on the sea by reason of the action of other elements acting upon the sea.

In *Vincent McNally* (3) it was held:—

The theory that to constitute a peril of the sea a storm must be of such intensity as not to be anticipated, is one that finds no support in law. Damage is caused by a peril of the sea within a contract of affreightment when the cause of the entrance of the water is not unseaworthiness or negligence or ordinary wear and tear, but the unusual stress of water or the violent action of the elements. Where a recently overhauled barge encountered in October, 1929, in the Chespeake, a storm so severe that tarpaulin hatch covers and strongbacks were carried away, so that the cargo was met with sea water, such damage was caused by a peril of the sea.

In *Lighter No. 176* (4):—

A peril of the sea need not be something of a catastrophic nature, but is something arising from the violent action of the elements rather than from weakness within the vessel.

At page 558, one of the judges said:—

But this, it has been held, does not mean that the peril must be extraordinary in the sense of arising from causes which are uncommon and could not be reasonably anticipated. It means rather that the peril must result from the violent action of the elements as distinguished from their normal influence upon the fabric of the vessel. Casualties which may and not consequences which must.

The latest pronouncement of the Judicial Committee of the Privy Council settles definitely the question, and sets aside many old contentions to the effect that the words "perils of the sea" were meant to cover only accidents peculiar to navigation that are of extraordinary or catastrophic nature, or arise from irresistible force.

(1) (1885) 16 Q.B.D. 629.
(2) (1886) 6 Asp. 44, at 45.
(3) [1929] 1 A.M. Cas. 161.
(4) [1929] 1 A.M. Cas. 554.

1942

KEYSTONE TRANSPORTS LTD. v. DOMINION STEEL & COAL CORPORATION, LTD.

Taschereau J.

In the case of *Canada Rice Mills Ltd.* v. *Union Marine and General Insurance Co. Ltd.* (1) it was held that:—

It must be predicated that where damage is caused by a storm, even though its incidence or force is not exceptional, a finding of loss by perils of the sea may not be justified.

Lord Wright said at pages 556 and 557:—

The view of Sloan J.A. seems to be that there was no peril of the sea because in his opinion the weather encountered was normal and such as to be normally expected on a voyage of that character, and that there was no weather bad enough to endanger the safety of the ship if the ventilators had not been closed. But these are not the true tests. In the House of Lords in the *Xantho* (2), which was a bill of lading case but has always been cited as an authority on the meaning of the same words in policies of marine insurance (see *per* Lord Bramwell in *Hamilton, Fraser & Co.* v. *Pandorf & Co.* (3) Lord Herschell said at page 509:—

"The purpose of the policy is to secure an indemnity against accidents which may happen, not against events which must happen. It was contended that these losses only were losses by perils of the sea, which were occasioned by extraordinary violence of the winds or waves. I think this is too narrow a construction of the words, and it is certainly not supported by the authorities or by common understanding."

* * *

In *Thames & Mersey Marine Insurance Company Limited* v. *Hamilton, Fraser & Co.* (4), Lord MacNaghten said that it was impossibe to frame a definition of the words. In *Hamilton, Fraser & Co.* v. *Pandorf & Co.* (3) where a rat gnawed a hole in a pipe, whereby sea water entered and damaged the cargo, there was no suggestion that the ship was endangered, but the damage to the cargo of rice was held to be due to a peril of the sea. There are many contingencies which might let the water into the ship besides a storm and in the opinion of Lord Halsbury in the case last cited any accident that should do damage by letting in sea water into the vessel should be one of the risks contemplated.

* * *

The accident may consist in some negligent act, such as the improper opening of a valve, or a hole made in a pipe by mischance, or it may be that sea water is admitted by stress of weather or some like cause bringing the sea over openings ordinarily not exposed to the sea, or, even without stress of weather, by the vessel heeling over owing to some accident or by the breaking of hatches or other coverings. These are merely a few among many possible instances in which there may be fortuitous incursion of sea water. It is the fortuitous entry of the sea water which is the peril of the sea in such cases. Whether in any particular case there is such a loss is a question of fact for the jury.

* * *

On any voyage a ship though she need not necessarily encounter a storm, and a storm is a normal incident on such a passage as the *Segundo* was making, but if in consequence of the storm cargo is damaged by the

(1) (1940) 67 Ll. L.R. 549.
(2) (1887) 12 App. Cas. 503.
(3) (1887) 12 App. Cas. 518 at 527.
(4) (1887) 12 App. Cas. 484, at 502.

incursion of the sea, it would be for the jury to say whether the damage was or was not due to a peril of the sea. They are entitled to take a broad common sense view of the whole position.

How slight a degree of the accidental or unexpected will justify a finding of loss by perils of the sea is illustrated by *Mountain* v. *Whittle* (1), where a houseboat, the seams of which above the water-line had become defective, was towed in fine weather and in closed water in order to be repaired. A powerful tug was employed and this caused a bow wave so high as to force water up into the defective seams. There was no warranty of seaworthiness. "Sinking by such a wave," said Lord Sumner, at page 630, "seems to me a fortuitous casualty; whether formed by passing steamers or between tug and tow, it was beyond the ordinary action of wind and wave, or the ordinary incidents of such towage."

In the same way, storms at sea may be frequent, in some cases seasonal, like typhoons in the China Seas; a ship may escape them, and they are outside the ordinary accidents of wind and sea. They may happen on the voyage, but it cannot be said that they must happen.

From these authorities it is clear that to constitute a peril of the sea the accident need not be of an extraordinary nature or arise from irresistible force. It is sufficient that it be the cause of damage to goods at sea by the violent action of the wind and waves, when such damage cannot be attributed to someone's negligence.

The respondent has stressed the point that in the log book the expressions "fresh wind" and "strong wind" are employed. These flexible words used by the officer in charge of the log to describe the weather at 12.00 noon and 12.45 p.m. on the 12th of August, convey only an indefinite and vague idea of the existing conditions. Although the terms used may not be adequate, they do not contradict the rest of the evidence adduced to the effect that the waves were sufficiently high to cover the bridge. And, moreover, a peril of the sea, as we have seen by the authorities cited *supra,* may arise as the consequence of a wind, the violence of which does not amount to more than the description found in the log book, even if accepted in its most restricted meaning.

I believe that the appellant has succeeded, and the trial judge has so found, in establishing that there has been a peril of the sea. There is even more than a mere "*prima facie* case". It was then upon the respondent to disprove it, by proving negligence causing the loss—in this, it has totally failed.

Before leaving the port of Sydney, the usual inspection was made; the hatches were covered with tarpaulins

(1) [1921] 1 A.C. 615.

1942

KEYSTONE TRANSPORTS LTD. v. DOMINION STEEL & COAL CORPORATION, LTD.

Taschereau J.

fastened in the usual proper way. The wedges were driven in tight, and everything on deck was in good condition and seaworthy. After the ship had left Sydney, frequent inspections were made, as often as twice every watch, and when the wedges were found loose on account of the action of the sea, they were tapped with a hammer and driven in further. When the sea was too heavy, and it became impossible for the crew to go on the bridge to do this particular work, the course would be altered to head the ship into the waves, and thus allow the men to fasten the loosened tarpaulins.

Under these circumstances, no negligence can be imputed to the officers and crew who were watchful and alert, and they cannot, therefore, be held liable, if by no breach of their duty vigilantly performed, there was an infiltration of water in hold no. 3. They were not bound to take all the precautions that would inevitably prevent the accident and make its occurrence impossible. They were required to exercise the care that reasonably prudent men would exercise in similar circumstances.

It has been argued that the crew did not discover immediately the damaged condition of the tarpaulins. The failure to make such an immediate discovery does not amount to negligence under the prevailing conditions of the weather, and even if it did, there is no evidence, and the burden was upon the respondent, that there was any undue delay.

But the respondent further submits, that even if a peril of the sea has been established, the damage to the goods was caused before such peril was encountered.

I fail to appreciate this argument; on the contrary, I see a *causa causans* between the peril of the sea and the damage caused to the goods.

It was at noon on the 12th of August that it was noticed that the tarpaulins were loose. At that time the weather was bad, and the waves were battering the ship persistently since many hours; although there had been frequent inspections on the morning of the 12th of August, (two every watch) it was only at that time that it was found that some wedges were gone. It seems to me that there can be no other inference to be drawn except that there is a clear relation between the peril of the sea and the damage caused.

I would allow the appeal, and restore the judgment of the trial judge with costs throughout.

BOND J. *ad hoc* (dissenting)—This is an appeal from a judgment of the Court of King's Bench, appeal side, for the province of Quebec, dated 30th April, 1941, reversing by a majority, a judgment of the Superior Court, and maintaining an action instituted by the respondents, claiming $2,842.75 as damage to a shipment of kegs of nails, staples and wire on board the appellant's steamer *Keynor*, on a voyage from Sydney, N.S., to Fort William, Ont., during the month of August, 1937.

The cargo was delivered in a damaged condition as a result of the incursion of sea water into no. 3 hold, where the cargo was stowed.

In support of its action, the respondent company set up the contract of carriage evidenced by bills of lading, the value of the shipment, the damaged condition on arrival at destination, the consequent loss arising, and prayed for judgment accordingly.

The appellant, by its plea, denied liability, invoking the *Water Carriage of Goods Act, 1936,* and alleging that it had fulfilled all its obligations under that Act; that the ship, in a seaworthy condition, left Sydney on the 11th August, 1937, at about 7.30 a.m., and all went well until August 12th at 12 a.m., when the vessel encountered a strong southwest wind and heavy seas, until arrival at Cape Gaspé on August 13th about 5 a.m.; that the vessel rolled heavily, taking in heavy bodies of water; that, in order to enable the officers and crew to go on deck and look at the hatches to see whether the battens holding the tarpaulins on the hatches were secured, and the wooden wedges holding the battens were tight, and to tighten them if necessary, the ship's course was altered, and the ship headed into the sea on several occasions during that period; that, at approximately noon on August 12th, the officer on watch noticed that the tarpaulins on no. 3 hatch had become loose, and, upon inspection, it was found that several wedges on the forward end of the hatch had gone, and that the tarpaulins were loosened, allowing water to enter the hold, and also that the "booby hatch" had been sprung by heavy seas; that the tarpaulins were immediately refastened, and new wedges inserted. The appellant contends that the damage to the cargo was the result of a peril of the sea, and invokes the terms of the *Water Carriage of Goods Act,* exempting it from liability in such cases.

1942

KEYSTONE TRANSPORTS LTD. v. DOMINION STEEL & COAL CORPORATION, LTD.

Bond J. *ad hoc*

By its answer to plea, the respondent joined issue generally, but alleged specifically that the ship was not seaworthy as alleged, nor as required by law.

The fact of the damage to the cargo, and the amount of such damage not now being in dispute, the substantial question that calls for discussion is whether the appellant has established that the loss is to be attributed to a peril of the sea, without fault being attributable to the officers or crew; in other words, the loss being established as a result of the incursion of sea water, has the appellant brought itself within the exceptions mentioned in the Act as relieving it from responsibility?

The Act provides (I Edw. VIII, ch. 49, schedule, rules relating to bills of lading, art. III, 2):

> Subject to the provisions of Art. IV the Carrier shall properly load, handle, stow, carry, keep, care for and discharge the goods carried.

Article IV enumerates the exemptions from liability that the carrier may invoke. Those relied upon in the present case appear to be:—

> Article IV (2). Neither the carrier nor the ship shall be responsible for loss or damage arising or resulting from:
>
> (*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.

This ground is not now apparently relied upon and, indeed, probably could not be successfully invoked in view of the decision of the House of Lords in *Gosse Millerd, Ltd.* v. *Canadian Government Merchant Marine, Ltd.* (1).

In that case, the Lord Chancellor (Lord Hailsham) said at p. 234:—

> But even if it can be assumed that the negligence in dealing with the tarpaulins was by members of the crew, such negligence was not negligence in the management of the ship, and, therefore, is not negligence with regard to which art. IV, rule 2 (*a*) affords any protection.

The real ground relied upon by the appellant is to be found in subsection (*c*) of section 2, of art. IV, namely:

> 2. Neither the carrier nor the ship shall be responsible for loss or damage arising or resulting from:—
>
> (*c*) perils, danger and accidents of the sea or other navigable waters.

Subsection (*q*) should also be referred to, namely:

> (*q*) any other cause arising without the fault or neglect of the servants of the carrier, but the burden of proof shall be on the person claiming the

(1) [1929] A.C. 223.

benefit of this exception to show that neither the actual fault or privity of the carrier nor the fault or neglect of the agents or servants of the carrier contributed to the loss or damage.

It is clear from the evidence, and, indeed, admitted, that some of the wedges holding the batten bars in place were forced out by the action of the waves sweeping over the deck and, as a consequence, the tarpaulins covering the hatch of no. 3 hold, and which were kept in place by these battens, became loose, thus permitting the water to enter the hold. This was a contingency that evidently could be foreseen. It was something that was quite likely to occur unless precautions were adopted. The precautions were to inspect these wedges from time to time and keep them tight by blows with a hammer, when required. Such inspection was made according to the "protest", about every six hours. The mate (Brash) testifies that the hatches were inspected twice every watch, but later on he said, in answer to the question:

Was there anything that you could do to prevent these wedges from loosening up? Answer. No. We did as much as we could, which was to inspect them once in a while, and tap them with a sledge hammer, and drive them in further.

The master, (Williamson), testified as follows:—

Q. Before I proceed further: from the time you left Sydney was there anything to be done to make sure that the hatches were properly battened down and that the wedges were tight and kept tight?

A. You mean leaving port?

Q. After you left port proceeding on the voyage?

A. Just the usual mate's inspection, unless the weather warrants that we have to send him along the deck and inspect more often.

Q. What does that inspection consist of?

A. Checking all the wedges to see if they are tight and that everything is sea-worthy on deck.

And, again, the master said:

* * * it is all up to the man on duty; if he thinks that he has gone long enough without inspection, he simply hauls her to.

These periodic inspections were evidently of vital importance to guard against an incursion of water, but, from the above extracts from the evidence, these inspections were somewhat of a routine or perfunctory character. In order to carry them out in rough weather, it was necessary to take the ship off her course and head her into the sea. The master testified on this point as follows:—

Q. How long would it take before these tarpaulins could be fixed and the hatch made tight again?

1942

KEYSTONE TRANSPORTS LTD. v. DOMINION STEEL & COAL CORPORATION, LTD.

Bond J. *ad hoc*

A. Oh, a matter of ten minutes, but for an inspection, for the men to go along like that, I think almost every time we had, during the weather like that, I was heading—about half an hour, would take them that length of time to go around the hatches.

The SS. *Keynor* was a reinforced canal boat (Dolphin canal type), and though duly licensed for the coasting trade, would roll more than a salt water boat. There was nothing to protect the main deck from the sea in the shape of bulwarks; (*per* Savard, the second mate); and the water would go right across the entire deck when the ship rolled.

The discovery that these tarpaulins had worked loose was made at noon on the 12th August, according to the ship's protest, and also according to the testimony of the master. The ship left Sydney on the morning of the 11th, and, consequently, the perils of the sea invoked on behalf of the appellant must have occurred prior to noon on the 12th August, that is, the day following her departure. On this point, the master testified as follows:—

> We really did not get much bad weather till we got to Bird Rocks, and that was 11.45 p.m. Our bad weather was from Bird Rocks to Gaspé. That was covering the 12th. After rounding Bird Rocks, we struck this strong heavy west wind with a very, very heavy sea.

The ship reached Bird Rocks at 11.30 p.m., on the 11th, and Brion Island at 4 a.m. on the 12th. It was at noon on that day that Brash, the mate, when passing along the deck to go to a meal, noticed that some of the wedges had worked loose, and one of the booby hatches had sprung.

The master (Williamson) gave his evidence on the 26th May, 1939, that is, a year and nine months after the event. He emphasized the heavy weather encountered after leaving Bird Rocks till off Cape Gaspé. But the ship reached Bird Rocks at 11.30 p.m., on the 11th, and Brion Island at 4 a.m. on the 12th, and the entry in the ship's log describes the wind as merely "fresh". The first entry of the wind as "strong" is at 12.45 p.m. on the 12th, after the discovery.

The engines were kept at full speed all the time, and her speed not appreciably affected. If, as claimed, the decks were constantly awash, as might be expected in boats of this type, extra precaution was called for, and more frequent inspections made. Between 4 a.m. and noon on the 12th, it was daylight, yet the discovery of the loose

tarpaulins was made quite casually by the mate while on his way to his mid-day meal. It was apparently not observed from the bridge.

Under such circumstances, can the damage be attributed to a peril of the sea?

The term "perils of the sea" (*c*), whether in policies of insurance, charterparties, or bills of lading, has the same meaning (*d*), and includes:—

> Any damage to the goods carried caused by sea-water, storms, collision, stranding, or other perils peculiar to the sea or to a ship at sea, which could not be foreseen and guarded against by the shipowner or his servants as necessary or probable incidents of the adventure (*d*). If a *prima facie* case of loss by perils of the sea is made, it is for the goods owner to disprove it by proving negligence causing the loss (*e*).
>
> (Scrutton on Charterparties and Bills of Lading. 14th ed., page 267).

The foregoing definition was adopted in the case of *Canadian National Steamships* v. *Baylis* (1).

The difficulty in framing an exhaustive definition of the term was referred to in *The Thames and Mersey Marine Insurance Company Ltd.* v. *Hamilton, Fraser & Co.* (2), but Lord Bramwell said:—

> I think the definition of Lopes, L.J., in *Pandorf* v. *Hamilton* (3) very good: "In a seaworthy ship, damage to goods caused by the action of the sea during transit, not attributable to the fault of anybody".

As pointed out in Carver's "Carriage by Sea" (s. 87, p. 139):—

> Upon this, it must be remarked that the losses need not be extraordinary, in the sense of arising from causes which are uncommon. Rough seas, which are characteristically sea perils, are common incidents of a voyage. But damage arising from them, whether by their beating into the ship, or driving her on the rocks, is within the exception, if there has been no want of reasonable care and skill in fitting out the ship and in managing her.

Again in *Canada Rice Mills, Limited* v. *Union Marine & General Insurance Company* (4), Lord Wright said:—

> In the same way, storms at sea may be frequent, in some cases seasonal, like typhoons in the China Seas; a ship may escape them, and they are outside the ordinary accidents of wind and sea. They may happen on the voyage, but it cannot be said that they must happen. In their Lordships' judgment, it cannot be predicated that where damage is caused by a storm, even though its incidence or force is not exceptional. a finding of loss by perils of the sea may not be justified.

(1) [1937] S.C.R. 261, at 263.
(2) (1887) 12 App. Cas. 484.
(3) (1885) 16 Q.B.D. 629.
(4) (1940) 67 Ll. L.R. 549, at 557.

1942

KEYSTONE TRANSPORTS LTD. v. DOMINION STEEL & COAL CORPORATION, LTD.

Bond J. *ad hoc*

That case, it should be noted, was an action on a policy of insurance and, while the definition of the term "perils of the sea" therein used, is the same as in a bill of lading, the consequences or results are not necessarily identical, for the peril may, in a bill of lading case, be due to negligence which is immaterial in a contract of insurance (*per* Lord Wright in *Canada Rice Mills* v. *Union Marine & General Insurance Company* (1).

It has been pointed out that each case must be decided upon the facts disclosed by the evidence, and thus the case of *Donaldson Line Co. Limited* v. *Russell and Sons Ltd.* (2) can readily be distinguished. In that case, a wave of unusual character boarded the ship during a gale in an unusual manner at a peculiar position, sweeping out suddenly the wedges, and at the same time causing considerable damage to other parts of the ship in the immediate vicinity.

In the case now under consideration there was merely a "fresh" wind, and a gradual loosening of the wedges which could have been discovered by more frequent or regular inspection.

> The term "peril of the seas" refers only to fortuitous accidents or casualties of the sea. It does not include the ordinary action of the winds and waves. (Scrutton, p. 268).

In the case of *Canadian National Steamships* v. *Baylis* (3), it was said:—

> * * * it was incumbent upon the appellants (ship-owners) to acquit themselves of the onus of showing that the weather encountered was the cause of the damage, and that it was of such a nature that the danger of damage to the cargo, arising from it, could not have been foreseen or guarded against as one of the probable incidents of the voyage.

Where a *prima facie* case of loss by perils of the sea is made, it is for the goods' owner to disprove it by proving negligence causing the loss. (Scrutton, p. 261). In the present instance, such a *prima facie* case has not been established within the definition

> damage to goods caused by the action of the sea during transit, not attributable to the fault of anybody.

(1) (1940) 67 Ll. L.R. 549, at 557. (2) (1939) Q.R. 68 K.B. 135.
(3) [1937] S.C.R. 261, at 263.

On the contrary, there appears to have been negligence in the inspection of these wedges, notwithstanding the fact that the danger of them becoming loosened was a known and anticipated risk.

The appeal should be dismissed.

Appeal allowed with costs.

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Solicitors for the respondent: *Montgomery, McMichael, Common & Howard.*