

CASES

DETERMINED BY THE

EXCHEQUER COURT OF CANADA

AT FIRST INSTANCE

AND

IN THE EXERCISE OF ITS APPELLATE JURISDICTION

BRITISH COLUMBIA ADMIRALTY DISTRICT
BETWEEN:
MIDDLEPOINT LOGGING COM- }
PANY LIMITED ..... } PLAINTIFF,

1955
Sept. 6 & 7
Sept. 14

AND

I. D. LLOYD, carrying on business }
under the firm name and style of }
LLOYD'S TOWING COMPANY, } DEFENDANTS.
and the said LLOYD'S TOWING }
COMPANY, and HARRY MUDGE }

Shipping—Action for breach of contract—The Canada Shipping Act, R.S.C. 1952, c. 29, s. 657—Defendant not entitled to limitation of liability.

In an action for damages for breach of contract for the failure of defendant to carry safely plaintiff's goods the Court found that defendant was wholly to blame for the loss sustained by plaintiff.

Held: That defendant was not entitled to limitation of liability under the Canada Shipping Act since he had not proved that the occurrence giving rise to the loss was without his fault or privity.

ACTION for damages for breach of contract.

The action was tried before the Honourable Mr. Justice Sidney Smith, District Judge in Admiralty for the British Columbia Admiralty District, at Vancouver.

C. C. I. Merritt for the plaintiff.

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*B. W. F. McLoughlin* for defendants I. D. Lloyd and  
 Lloyd's Towing Company.

*J. S. Maguire* and *J. Leighton* for defendant Harry  
 Mudge.

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

SIDNEY SMITH D.J.A. now (September 14, 1955) delivered the following judgment:

This is a claim for damages for breach of contract. The damages were allegedly sustained by the plaintiff in consequence of a failure on defendants' part to carry safely the plaintiff's Lorain shovel, Model SP-254, from Comox to Halfmoon Bay, a distance of 50 miles across the Strait of Georgia, British Columbia.

The shovel had been loaded on a small barge *L.T.C.O.* (length 51½ feet, breadth 18 feet, of 43 tons gross) owned by defendant I. D. Lloyd, trading under the firm name of the defendant company, and who now may be referred to simply as Lloyd. The barge was of the landing craft type, and was being towed by the tug *Janicella*, also owned by Lloyd. In charge of both was the defendant Mudge—a young man 22 years of age and uncertificated. He was alone. Lloyd had handed the whole undertaking over to this lad and bothered no more about it.

It would seem tug and barge left Comox during the evening of 8th March 1954, but put back on account of weather conditions. They departed again next morning about eleven o'clock. Mudge said there was then only a light wind and calm sea, and that these ideal conditions prevailed during the voyage. I would be inclined to doubt this. His pleadings say the wind was "north west 4". This indicates a moderate wind of some 15 miles per hour. When he was off the north end of Texada Island, about 15 miles from Comox, he noticed the after end of the barge becoming lower in the water. He accordingly ran for near-by Blubber Bay and had just reached there about half an hour later when the barge overturned to starboard and spilled her load. Salvage operations were later carried out and the shovel retrieved, overhauled and repaired. All these expenses are included in the plaintiff's claim.

On the evidence I find that the disaster was caused by an influx of water into the barge due to the craft's being inadequate for this voyage with the load she carried. That is the view of Captain Stacey, an experienced ship-master and surveyor whose testimony I accept. It may be noted that her freeboard aft at the commencement of the passage was no more than four to five inches. It is significant too that Lloyd failed to appreciate the weight to be carried. He stated that he "understood" it to be 17 tons. He so informed Mudge. It was nearly 23 tons. Overloading may have contributed to the disaster. I find the barge unseaworthy. *City of Alberni* (1).

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I felt rather sorry for Mudge. He impressed me as a likeable, well-meaning lad, and I think plaintiff's counsel said as much. In the box he was plainly nervous and out of his depth; hesitated and faltered over his answers; at times seemed to guess at them to break the waiting silence. He is not to blame for this. He had some former experience with this barge but did not claim to be a seaman. During the years he had done occasional jobs for Lloyd of a like but minor nature. On this occasion he was engaged to tow the barge to Halfmoon Bay and back for an hourly wage of one dollar and a half—a labourer's hire. The condition of the barge was no concern of his. I am satisfied he did his best, but his testimony cannot be regarded as wholly reliable. I refer in particular to what he said about the sounding of the tanks.

The submission made for Lloyd was that the plaintiff was responsible for the loading, that it was improperly performed, that during the voyage the shovel slipped aft along the deck of the barge forcing the stern under water, and thus causing all the trouble. With full appreciation of the able presentation of his case by Mr. McLoughlin, I am unable to give effect to any of these contentions. There was considerable evidence as to the manner of loading and securing. I find the plaintiff had no responsibility for this, other than for the mechanical operation of the shovel. The rest was carried out under the supervision of Mudge.

Defendant Lloyd claims limitation of liability under Section 657 of the Canada Shipping Act. In my view he has not met the conditions necessary for such a finding. He has

(1) (1947) 63 B.C.R. 262.

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not discharged the onus of proving that the occurrence was without his fault or privity, *City of Alberni (supra)* at page 273. He appears to entertain curious notions of his obligations as an owner whose barge is used for the carriage of others' goods. He seems to think that without notice of any defect nothing need be done. The barge had capsized in June 1952 and had been duly repaired. Since then he had made no inspection either personally or by surveyor. The uncontradicted evidence shows that this will not do; that the barge should have been dry-docked for inspection at least once a year.

The action as against defendant Mudge is dismissed with costs; otherwise judgment will go for the Plaintiff with costs; limitation of liability is refused; the learned registrar will assess the damages.

*Judgment accordingly.*