BETWEEN:

DONNACONA PAPER COMPANY LIMITED ..... APPELLANT;

AND

JOSEPH DESGAGNE ..... RESPONDENT.

1958
Oct. 30
1959
Mar. 2

Shipping—Damage at berth—Vessel invitee of wharfinger—Duty to warn.
The plaintiff's motor barge while docked alongside the defendant's wharf received damage by taking the ground at low tide so as to render her a total loss. In an action in damages brought by the plaintiff against the defendant in the Quebec Admiralty District, Smith, D.J.A., held that the barge was rendered a total loss due to the fact that the berth at which she docked was defective and unsafe. That the berth was owned and controlled by the defendant and the plaintiff's vessel was there as an invitee, and on business relating to that of the defendant. That the defendant had not established it had taken reasonable measures to make the berth safe for vessels docking at the wharf, or for the plaintiff's vessel in particular, nor had the defendant warned or notified the plaintiff of the unsafe condition of the berth and in the circumstances must be held liable for the loss and damage sustained as a consequence.

Held: (Affirming the judgment appealed from) that where the Court below had ample evidence on the matters of fact and good reasons on the question of law to justify its decision, an appellate tribunal ought not to disturb the decree. *Fraser v. S. S. Aztec* 20 (Can.) Ex.C.R. 450 at 452, followed.

APPEAL from the judgment of the District Judge in Admiralty for the Quebec Admiralty District.

The appeal was heard before the Honourable Mr. Justice Dumoulin at Quebec.

Jacques deBilly, Q.C. for appellant.

Maurice Jacques and *Leopold Langlois* for respondent.

DUMOULIN J. now (March 2, 1959) delivered the following judgment:

This is an appeal from a judgment, rendered on January 16, 1958, by the Honourable Arthur I. Smith, then sitting in Exchequer Court of Canada for the Quebec Admiralty District. The respondent's action to recover damages sustained by his vessel, supposedly due to negligence of the respondent, was allowed by the learned trial judge.

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Joseph Desgagné, plaintiff in the Court of first instance, a master mariner, owned and operated, at all material times, a motor vessel of small tonnage, 30 tons net, called the *St-Mathieu*.

On August 8, 1955, this barge loaded with a cargo of pulpwood, had berthed, some hours previous, at one of the appellant's wharves opposite Donnacona village, on the St. Lawrence river.

It is claimed that as the tide ran out, and on account of some unevenness or otherwise defective condition of her berth, the *St-Mathieu* grounding, was strained and damaged to such an extent that she became a complete loss.

Respondent alleges the customary rules of law obtaining in similar occasions: implied instructions to use this berth; a consequent representation, if not an actual warranty, that it was safe; that appellant had attended to its security in the absence of any warning to the contrary.

More precisely, paragraph 10, sub-paragraphs *a*) *b*) and *c*), of the statement of claim reproaches defendant below with having:

> *a*) Allowed . . . said vessel to be placed in a berth which he knew or had the means of knowing was not safe for her to lie in;
>
> *b*) Failed to take any or proper steps to ascertain whether the berth was safe before allowing the said vessel to be berthed therein;
>
> *c*) Failed to warn the master of the said vessel that the berth was unsafe or that he had not taken any or proper steps to ascertain that the berth was safe.

The defendant below admits owning and occupying this particular quay, when the mishap occurred, but from then on denies all other allegations, emphasizing that it received no remuneration for affording wharf facilities; that it was not owner or occupier of the river bed; that Captain Desgagné was well aware of the immediate conditions since he previously had moored his barge at this precise berth.

Furthermore, paragraph 13 of the amended defence reads:

> 13. Defendant had taken adequate steps to render the said berth safe.

Finally, the factual cause of the loss (amended defence, paragraph 18) is attributed to the *St-Mathieu's* ". . . bad state of repairs, and because . . . the greater part of its cargo

was stowed on deck and liable to capsize". Also the ship-master or his crew would have omitted necessary precautions when berthing the motor barge ". . . and more particularly failed to moor said vessel properly".

An ultimate repudiation of responsibility to maintain the berth in a fit or proper state concludes the statement of defence, paragraph 19. Needless to say the charge of pulp-wood was intended for delivery at the Donnacona Company's paper mill close by.

An interlocutory motion urged by appellant must now be disposed of before devoting further consideration to the merits of this appeal.

Setting forth the remedy foreseen in s. 166 of the *General Rules and Orders in Admiralty,* this motion asserts that:

> WHEREAS two witnesses for the appellant, ERIC AUBRY CROCKER [the transcript of evidence reads: Crockett] and JAMES BARRYMAN had testified before the Court in the English language;
>
> WHEREAS the transcript of the evidence of those two English-speaking witnesses was hopelessly full of errors and omissions, which the attorneys of record, with the Court reporter, could not correct and rectify adequately;

With an inference of grievous and irremediable prejudice to appellant, were the case submitted with a transcript containing such errors and inaccuracies, it is moved to have Messrs. Crocker and Barryman " . . . heard again before the Registrar . . ." and the ensuing record filed as part of the proceedings. I reserved my decision on this point and directed counsel to proceed with the argument.

A careful perusal of the impunged testimonies convinces me that such a request cannot be entertained. True, Crocker's evidence (or is it Crockett?), as reproduced on pages 88 to 93, deserves the double qualification of incoherence and idiomatic nonsense. But, on the other hand, that of James Barryman, far more important (see transcript, pages 55 to 62 and 84 to 87), in his capacity of appellant's wharf superintendent, is readily understandable and satisfactorily covers, *inter alia,* all the ground in which Mr. Crocker's would-be version through no fault of his, was made to flounder.

Errors and inaccuracies mar only a testimony of mediocre purport, a shortcoming fully compensated elsewhere, which therefore does not becloud a fair appreciation of all essential factors.

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Adverting now to the subject-matter at issue, I would review that which impresses me as constituting the gist, in fact and law, of the learned trial judge's decision.

In pursuit of its industrial needs, Donnacona Paper Company, owned several wharves alongside which its suppliers could berth their lumber loaded schooners or barges, toll free. Mr. Leslie Palmer, one of appellant's vice-presidents (cf. pages 53 and 54), and Mr. James Barryman, wharf superintendent, make this clear (cf. p. 56).

For some few years past, the respondent had performed several trips to Donnacona, and this ill-fated call was the eighth one in 1955. However, as pointed out by the vessel's skipper, Gaudiose Desgagné, one of the owner's many brothers, never before, in 1955, had the *St-Mathieu* slipped into moorings close by the eastern or Old Wharf, at right angles with the newer quays (cf. p. 47). When asked if he was aware that the river bed had a much softer consistency some few feet off the wharf, Desgagné replies negatively, adding he received no warning of this danger, and that had he known of it, he surely would not have run the risk of his vessel grounding on an uneven or canting surface (cf. p. 44).

It is, I trust, a matter of general knowledge that most river beds consist of mud overlying streaks of jagged rock, the St. Lawrence being no exception to the rule. In shallow waters, along tidal wharves, this coating becomes shifting or disturbed by the ebb and flow, as also by the strain of grounding vessels, and the churning of propellers as they arrive or depart. Such are the prevalent conditions herein suggested.

I noted, and will summarize accordingly, the evidence of four defence witnesses, with their indication of remedial precautions resorted to.

Mr. Barryman says the river bottom affords, by the wharf, a coating of mud; that since the accident no dredging operations were undertaken on this spot, and in reply to a pointed question from his company's counsel, whether "...the ship was damaged by rocks there?", answers: "No." (cf. p. 61). This last assertion, nonetheless, leaves unrebutted a preceding one, at page 60, that he would

"... qualify the ground, as far as the grounding is concerned", as "...allright, but it is not too convenient for the bottom of the ships".

Fernando Ratté, a labourer in the company's employ, indicates it is customary, from the spring season on, to clear the muddy bottom by the wharves in order to prevent silting-up. Ratté also notes that occasional "lumps" develop, or in his own words: "Ça peut arriver qu'il y ait des bosses, ce que la mer entraîne, on ne voit pas tout le temps", (pp. 76, 77).

One Ubaldo Marcotte, then engaged in general maintenance jobs, explains why it became necessary to dredge the river ooze piling up after a certain time. This occurred, with consequent removals, about twice yearly. In 1955, up to July, one dredging was had (cf. pp. 67, 68).

The defendant below also called a nautical mechanic and former shipmaster, Gabriel A. Dufour, who claims a long-standing experience of local wharfing conditions at Donnacona.

A rather verbose and somewhat exuberant person, Dufour describes the berth as one of the best, with a coating of mud six to seven feet thick, and a harmless rock spread underneath: "C'est comme si on aurait échoué sur de la plume; ... c'était du papier mâché..." (cf. p. 5). Despite this auspicious prelude, the eider-down touch came to an abrupt end, as one may gather from Dufour's further statement on page 8: "... du côté sud-ouest, il y avait un trou où c'était plus clair; si le bateau échouait sur ce trou-là, il aurait cassé en deux. C'était toutes des choses qu'il fallait savoir". This appraisal of the state of things was indeed vindicated throughout, with a trifling oddity: the good ship *St-Mathieu* instead of splitting in twain, elected to break open.

Another "old timer" who, during 25 years, navigated between the lower St. Lawrence, Donnacona and the upper reaches, Captain Joseph Harvey, cited by the respondent, is quite emphatic concerning some concealed perils at this place. Harvey is asked: "Vous avez été là combien de temps?" He replies: "Ça fait peut-être vingt (20), vingt-cinq (25) ans que je vais là." Next question: "D'après vous, pour entretenir l'échouage (grounding berth) comme celui de Donnacona, est-ce qu'il serait suffisant de dragger

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ça une (1) ou deux (2) fois par année?" Answer: "Non. Ah non. Ah non. Non, faudrait que l'échouage de Donnacona, la place où on se met les petits bateaux, faudrait que ce soit arrangé à tous les jours."

I am of the opinion that Barryman falls far within and Joseph Harvey somewhat beyond the objective mark; the former when he asserts dredging was superfluous, the latter in claiming this berth required a daily dragging. The upshot would be that soundings, at requisite intervals, though necessary, were practically omitted and no warning given.

Appellant also failed to show the ship's perilous listing, at low tide on August 8, resulted from a top-heavy cargo or improper mooring arrangements. Lumber stowed on deck did not exceed eight feet in height, a normal practice, according to the shipmaster G. Desgagné and Joseph Harvey (cf. pp. 41 and 26). As for the barge's attachment alongside the quay, it was attended to in the usual way: four cables being fastened, two astern and two at the bow. Captain Harvey corroborates Desgagné regarding the adequacy of this method.

The learned trial judge assuredly did not err in his conclusion of facts that the berthing space, extended to the *St-Mathieu,* hid a lurking insecurity which appellant took no steps to correct and made no attempt to disclose.

What would accordingly be the legal implications flowing from this set of facts?

Roscoe's Admiralty Practice, 5th Edition, page 85, procures a comprehensive analysis of the law in such matters. I quote:

> Harbour and dock authorities owe a duty to the owners of the vessels which they invite to enter and make use of the harbours, docks and berths under their control, to use reasonable care to ensure that such harbours and berths are reasonably safe for the vessels which they invite to them, or to give warning of any defect not known to the shipowners, or that they have not taken the steps necessary to satisfy themselves that the berth is safe, so as to negative the representation implied in the invitation to the vessel to make use of the berth. . . .
>
> A like duty is owed by a wharfinger to the vessels which he invites to make use of his wharf, although the berth at which vessels lie whilst alongside the wharf is not subject to his control. The duty extends to the occupier of a wharf, and to a wharfinger who received no direct benefit from the use of his wharf; in the latter case it is sufficient that he should enjoy some indirect advantage, such as the receipt of freight for the land carriage of goods discharged at his wharf. . . .

The duty is not an absolute duty in the nature of a warranty, but is limited to the taking of reasonable care to ensure the safety of the vessel.

Two well known precedents: the *Moorcock*[1] and *Grit* cases, the latter, more especially, have such analogy to the actual one that relevant excerpts will bear repetition, albeit reproduced in the decision below.

THE MOORCOCK

The defendants, wharfingers, in consideration of charges for landing and storing the cargo, agreed to allow the plaintiff, a shipowner, to discharge his vessel at the defendants' jetty, which extended into the River Thames, where the vessel must necessarily ground at low water. The bed of the river adjoining the jetty was vested in the Conservators. The defendants had no control over the bed of the river, and had taken no steps to ascertain whether it was or was not a safe place for the vessel to lie upon. The vessel, on grounding, sustained damage from the uneven condition of the bed of the river adjoining the jetty:—
Held, affirming the judgment of Butt, J., that the defendants were liable, for the use of their premises by the plaintiff could not, under the circumstances, be had without the vessel grounding, and the defendants must, therefore, be deemed to have impliedly represented that they had taken reasonable care to ascertain that the bottom of the river adjoining the jetty was in such a condition as not to cause injury to the vessel.

Lord Esher, M.R. commented as follows:—

Now the owners of the wharf and the jetty are there always, and if anything happens in front of their wharf they have the means of finding it out, but persons who come in their ships to this wharf have no reasonable means of discovering what the state of the bed of the river is until the vessel is moored and takes the ground for the first time.

What, then, is the reasonable implication in such a contract? In my opinion honest business could not be carried on between such a person as the respondent and such people as the appellants, unless the latter had impliedly undertaken some duty towards the respondent with regard to the bottom of the river at this place. If that is so, what is the least onerous duty which can be implied? In this case we are not bound to say what is the whole of the duty. All we have got to say is whether there is not at least the duty which the learned judge in the court below has held does lie on them and to be implied as part of their contract. The appellants can find out the state of the bottom of the river close to the front of their wharf without difficulty. They can sound for the bottom with a pole, or in any way they please, for they are there at every tide, and whether they can see the actual bottom of the river at low water is not material. Supposing at low water there were two feet of water always over the mud, this would make no difference. Persons who are accustomed to the water do not see the bottom of the water with their eyes, they find out what is there by

[1] [1889] 14 P.D. 64, 66, 67.

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sounding, and they can feel for the bottom and find out what is there with even more accuracy than if they saw it with their eyes, and when they cannot honestly learn what they are desiring to learn without this, it is implied that they have undertaken to see that the bottom of the river is reasonably fit, or at all events that they have taken reasonable care to find out that the botom of the river is reasonably fit for the purpose for which they agree that their jetty should be used, that is, they should take reasonable care to find out in what condition the bottom is, and then either have it made reasonably fit for the purpose, or inform the persons with whom they have contracted that it is not so. That I think is the least that can be implied as their duty, and this is what I understand the learned judge has implied, and then he finds as a matter of fact that they did not take reasonable means in this case, and in that view also I agree. I therefore think the appellants broke their contract, and that they are liable to the respondent for the injury which his vessel sustained.

The *Grit*[1] case, as already indicated, has many striking aspects in common with the instant one; comparable conditions prompted Hill J. in Probate Division, to apply the doctrine of "invitee".

It was held:

(1) That, although the defendants did not charge dues for the use of the wharf, they derived benefit therefrom by reason of the freight earned for the land carriage of the cargo, and that they were in the position of persons who had invited vessels to use the wharf; that they owed a duty, therefore, if they had not taken steps to see that the berth alongside the wharf was safe for vessels to ground in, to warn that they had not done so.

Hill J. then proceeded to elaborate those statements of law and I quote from his speech:

In my judgment the defendants did invite the *Grit* to load at the wharf and came under the liabilities of those who own a wharf but not the bed of the river alongside the wharf, and invite ships to load at the wharf. Further, the defendants knew that ships which loaded at the wharf often did take the ground and, by their servant the stationmaster, knew that the *Grit* was of a size to take a cargo of 280 tons, and they knew, or ought to have known, that the *Grit* was likely in the ordinary course to take the ground. Their duty therefore extended to the safety of the ship as a ship which might take the ground when alongside the wharf. The duty is defined in *The Moorcock* (14 P.D. 64, 70). In that case Bowen L.J. said: "I think if they let out their jetty for use they at all events imply that they have taken reasonable care to see whether the berth, which is the essential part of the use of the jetty, is safe, and if it is not safe, and if they have not taken such reasonable care, it is their duty to warn persons with whom they have dealings that they have not done so" . . .

[1] [1924] P.D. 246, 252.

Numerous other decisions to a like effect could be added to those above.

I also fully agree with Audette J., who spoke thus, *in re Fraser v. S.S. Aztec*[1]:

> Sitting as a single judge, in an Admiralty Appeal from the judgment of a judge of first instance assisted [or not] by two assessors, while I might with diffidence, feel obliged to differ in matter of law and practice, yet as regards pure questions of fact, I would not be disposed to interfere . . . unless I came to the conclusion that it was clearly erroneous.
>
> Indeed, as said by Lord Langdale, in *Ward vs Painter* (1839, 2 Beav. 85): "A solemn decision of a competent judge is by no means to be disregarded, and I ought not to overrule without being clearly satisfied in my own mind that the decision is erroneous".

The Court below had ample evidence on the matters of fact and good reasons on the question of law to justify its decision; therefore an appellate tribunal ought not to disturb the decree.

The appeal will be dismissed with costs, including those on appellant's interlocutory motion.

Judgment accordingly.

Reasons for judgment of Smith D.J.A.:—

The plaintiff sues to recover damages alleged to have resulted from the total loss of its motor-vessel *St. Mathieu*. It is alleged that on or about August 7, 1955, the said vessel while berthed with a full cargo alongside the wharf at Donnacona, known as the "Quai aux barges" or "Le Vieux Quai", which wharf was owned and occupied by the defendant, took the ground at low tide and owing to the uneven and defective state of the said berth was so strained and damaged that she became a total loss.

It is alleged that the defendant impliedly ordered the said vessel to use the said berth to await her turn to discharge cargo and by so doing warranted that the said berth was safe for the said vessel and that the defendant had taken all reasonable means to make it safe, or that he would give plaintiff due notice if said berth was unsafe. The plaintiff alleges, moreover, that it was the duty and obligation of the defendant to take all reasonable measures to make it safe and/or to give notice to the plaintiff if it was or became unsafe. In particular, it is alleged that the defendant was at fault, in that:

a) He allowed the said vessel to be placed in a berth which the defendant knew or had means of knowing was not safe for her to lie in;

b) Failed to take any or proper steps to ascertain whether the berth was safe before allowing the said vessel to be berthed therein;

[1] 20 (Can.) Ex. C.R. 450 at 452.

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c) Failed to warn the master of the said vessel that the berth was unsafe or that he had not taken proper steps to ascertain that the berth was safe;

The plaintiff concludes accordingly that the defendant be held liable in respect to the damage sustained by the plaintiff.

For plea to the plaintiff's action, the defendant declares that it is ignorant as to plaintiff's ownership of the said vessel; it is admitted that at all material times the defendant was the owner or occupier of the said wharf, but denies all the other allegations of plaintiff's statement of claim, and, in particular, denies that the defendant was the owner or occupier of the said berth.

The defendant alleges, moreover, that it received no remuneration from the plaintiff for the use of the said wharf and that the defendant was not the owner or occupier of the river bed. It is alleged that the plaintiff had berthed his said vessel at the said wharf on previous occasions and was fully aware of the condition of the berth and/or had full opportunity to ascertain its condition at both high and low tides.

The defendant alleges that it had taken adequate steps to render the said berth safe; that the condition of same could be examined easily at low and high tide and that it had previous to October 29, 1955, examined the said berth which at that time was safe for the plaintiff's vessel. It is alleged that the vessel had berthed on numerous occasions preceding October 29, 1955, and no accident had occurred or been reported to the defendant, who had no reason to believe that the said berth was unsafe.

The defendant alleges that the plaintiff's said vessel was in a bad state of repair and had been remodelled and that, in particular, her bottom had been altered and the deck raised several feet, with the result that the balance of the vessel was defective and it was the remodelling and bad state of repair of the said vessel which caused the disaster.

The defendant alleges that the plaintiff's vessel by reason of its construction and the fact that the greater part of its cargo was stowed on deck was liable to capsize, and the plaintiff and its employees failed to take the necessary precautions when berthing the vessel to insure against such an eventuality and, in particular, failed to moor the vessel properly.

It is alleged that the defendant was under no obligation to maintain the said berth and furthermore that if same was unsafe and defective, which is denied, it was due to the fact that vessels berthing there had left the said berth when the tide was still low, or was due to the tide and sea or to other causes over which the defendant had no control and could neither foresee or prevent.

For answer to defendant's statement of defence, the plaintiff prays acte of the various admissions contained in same and in the particulars furnished in respect thereof and otherwise denies the allegations of said defence. The plaintiff alleges, moreover, that the said vessel was properly constructed, was in an excellent state of repair, properly loaded and moored, the whole in accordance with the usage normally practiced for such vessels engaged in that trade in the St. Lawrence River.

The *St. Mathieu*, with a full cargo of pulpwood, arrived at Donnacona on the evening of August 7, 1955, and tied up alongside the quai known as "Le Vieux Quai" or "Le Quai aux Barges" at about 11:00 p.m. (approaching high tide).

At about 5:00 a.m. the following morning, it was noted that the vessel was canting somewhat to port (away from the wharf). During the hour or hour and a half which followed, the *St. Mathieu* continued to cant more and more to port and when she finally grounded at low tide she canted completely over onto her port-beam in such a manner that she was so strained and damaged as to be rendered a total loss.

It is established that the wharf at which plaintiff's vessel docked was owned and controlled by the defendant and that the *St. Mathieu* was carrying a cargo destined for the defendant's plant.

The evidence satisfies me that the *St. Mathieu* was moored at the said wharf in the generally accepted manner and that she was there at the implied invitation, or at least with the permission, of the defendant and on business relating to the latter.

The plaintiff complains that the wreck of the *St. Mathieu* was caused by the uneven, defective and dangerous condition of the berth due to the fact that the river bottom at that point was uneven, the sound or stable portion of the river bed close to the wharf being considerably higher than that part further away from the wharf, with the result that when the vessel grounded at low tide, as she was bound to do, she tipped or canted away from the said wharf.

Captain Gaudiose Desgagné, Master of the *St. Mathieu,* testified that after the vessel had grounded he walked on the river bed and made an inspection of it and of the vessel's bottom. His testimony, which is corroborated by the testimony of the plaintiff and of Ross Desgagné, a member of the crew of *St. Mathieu,* is that although there was soft mud, mixed with sawdust and bark on the river bed which made it appear level, beneath the said mud and debris, there was a solid base which was considerably higher close to the wharf than it was further away. According to these witnesses it was this unevenness in the river bed which caused the *St. Mathieu* to cant over onto her port-beam when she grounded.

The testimony of the witnesses abovenamed was to some extent corroborated by that of the witnesses Dufour and Marcotte heard on behalf of the defendant, who testified that the use made by vessels of the said berth often had the effect of causing unevenness on the river bed and stated that they knew that from time to time one or more holes had existed in the river bed at or close to the place where the *St. Mathieu* was berthed. Dufour also acknowledged the danger of damage to a vessel grounding at a place where such a hole or unevenness existed.

On the other hand the defendant produced two witnesses who purported to attribute the accident to the fact that the *St. Mathieu* had been improperly moored and, in particular, tied up too close to the wharf. Neither of these witnesses however saw the *St. Mathieu* at her berth prior to the grounding and their testimony appeared to be little more than mere surmise or supposition. Furthermore, the testimony of several witnesses heard on behalf of the plaintiff was that the *St. Mathieu* was properly loaded and moored in accordance with the approved practice.

Several witnesses heard on behalf of the defendant testified that the river bed where the *St. Mathieu* grounded, being perfectly level and covered with mud, provided a safe and excellent berth. The testimony of these witnesses however was based solely upon a visual inspection. None of them had ever

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taken soundings and consequently were without knowledge of what lay below the soft mud and water.

I am convinced that although the bed of the river at low tide may have appeared to be level, this appearance was attributable to the fact that the river bed was covered with soft mud, mingled with sawdust and bark which filled all of the holes and unevenness in such a way as to conceal these irregularities, the existence of which could only have been ascertained by soundings.

The weight of the evidence justifies the conclusion that the river bed at the place where the *St. Mathieu* was berthed was in fact uneven and that the canting and consequent damage to the plaintiff's vessel was brought about by the fact that she took the ground at a berth which was unsafe for a vessel of her type.

It appears to be well established that the owners or persons having control of a wharf who invite vessels to make use of such wharf owe such vessels the duty of taking reasonable care to ascertain and assure that the bottom of the river adjoining same is in such a condition as not to cause injury to or endanger vessels berthing there.

The Moorcock[1]

The defendants, wharfingers, in consideration of charges for landing and storing a cargo, agreed to allow the plaintiff, a shipowner, to discharge his vessel at the defendant's jetty which extended into the River Thames, where the vessel must necessarily ground at low water. The bed of the river adjoining the jetty was vested in the Conservators (not in the defendant). The defendants had no control over the bed of the river and had taken no steps to ascertain whether it was or was not a safe place for the vessel to lie upon. The vessel on grounding sustained damage from the uneven condition of the bed of the river adjoining the jetty.

Held: affirming the judgment of Butt J.; That the defendants were liable for the use of their premises by the Plaintiff, could not under the circumstances be had without the vessel grounding, and the defendant must therefore be deemed to have impliedly represented that they had taken reasonable care to ascertain that the bottom of the river adjoining the jetty was in such a condition as not to cause injury to the vessel.

LORD ESHER, M.R. page 66:

Now the owners of the wharf and the jetty are there always, and if anything happens in front of their wharf they have the means of finding it out, but persons who come in their ships have no reasonable means of discovering what the state of the bed of the river is until the vessel is moored and takes the ground for the first time. What then is the reasonable implication in such a contract?

In my opinion honest business could not be carried on between such a person as the respondent and such people as the appellants, unless the latter had impliedly undertaken some duty towards the respondent with regard to the bottom of the river at this place. If that is so, what is the least onerous duty which can be implied? In this case we are not bound to say what is the whole of the duty. All that we have got to say is whether there is at least the duty which the learned judge in the court below has held does lie on them and is to be implied as part of their contract. The appellants can find out the state of the bottom of the river close to the front of their wharfs without difficulty. They can sound for the bottom with a pole, or in any way they please, for they are there at every tide, and whether they can see the actual bottom of the river at low water is not material. Supposing at low water there were two feet of water always over the mud, this would make no difference. Persons who are accustomed to the water do not see the bottom of the water with their eyes, they find out what is their sounding and they can feel the bottom and find out what is there with much more accuracy than if they saw it with their eyes and when they cannot honestly

[1] 14 P. 64.

learn what they are desiring to learn without this, it is implied that they have undertaken to see that the bottom of the river is reasonably fit, or at all events that they have taken reasonable care to find out that the bottom of the river is reasonably fit for the purposes for which they agree that their jetty should be used, that is, they should take reasonable care to find out in what condition the bottom is, and then have it made reasonably fit for the purpose, or inform the persons with whom they have contracted, that it is not so, That I think is the least that can be implied as their duty. . . .

The Grit:[1] In the case of *The Grit* the defendants were the owners of the wharf but not of the river bed. They collected no charges from the plaintiff for use of the said wharf. The vessel took the ground and was damaged by reason of the presence of stones on the river bottom.

Held: (1) That although the defendants did not charge dues for the use of the wharf they derived benefit therefrom by reason of the freight earned for the land carriage of the cargo and that they were in the position of persons who had invited vessels to use the wharf; that they owed a duty, therefore, if they had not taken steps to see that the berth alongside the wharf was made safe for vessels to ground in, to warn they had not done so.

HILL J. at page 252:

In my judgment the defendants did invite The Grit to load at the wharf and came under the liabilities of those who own a wharf but not the bed of the river alongside the wharf, and invite ships to load at the wharf. Further, the defendants knew that ships which loaded at the wharf often did take the ground and their servant the station-master, knew that The Grit was of a size to take a cargo of 280 tons, and they knew, or ought to have known, that The Grit was likely in the ordinary course to take the ground. Their duty therefore extended to the safety of the ship as a ship which might take the ground when alongside the wharf. The duty is defined in the Moorcock: In that case Bowen J. said: I think if they let out their jetty for use they at all events imply that they have taken reasonable care to see whether the berth, which is the essential part of the use of the jetty, is safe, and if it is not safe, and if they have not taken reasonable care, it is their duty to warn persons with whom they have dealings, that they have not done so.

See *The Bearn*[2]. Also *The Kate*[3].

Roscoe's Admiralty Practice, 5th Edition, p. 85:

Harbour and dock authorities owe a duty to the owners of the vessels which they invite to enter and make use of the harbours, docks and berths under their control, to use reasonable care to ensure that such harbours and berths are reasonably safe for the vessels which they invite to them, or to give warning of any defect not known to the shipowners, or that they have not taken the steps necessary to satisfy themselves that the berth is safe, so as to negative the representation implied in the invitation to the vessel to make use of the berth.

A like duty is owed by a wharfinger to the vessels which he invites to make use of his wharf, although the berth at which vessels lie whilst alongside the wharf is not subject to his control. The duty extends to the occupier of a wharf, and to a wharfinger who received no direct benefit from the use of his wharf; in the latter case it is sufficient that he should enjoy some indirect advantage, such as the receipt of freight for the land carriage of goods discharged at his wharf.

The duty is not an absolute duty in the nature of a warranty, but is limited to the taking of reasonabe care to ensure the safety of the vessel.

The plaintiff, having established that his vessel was damaged by the defective and dangerous condition of the river bed at the berth provided by the defendant, the latter, in order to escape liability, was obliged to prove either that: a) it had taken all reasonable measures to render the said berth safe and proper; or b) that it has

[1] [1924] P. 266.

[2] [1906] P. 48 at 76.

[3] [1935] P. 100.

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given plaintiff due warning of the unsafe and defective nature of the said berth.

It was not pretended by the defendant that any notice or warning was given to the plaintiff. On the contrary the defendant, by its plea, merely denies that the said berth was in any way defective or dangerous.

It remains to determine whether the defendant has discharged the burden of proving that it exercised all reasonable measures to provide a berth which was safe for the vessels making use of the said wharf, and, in particular, for the *St. Mathieu.*

Not only does the proof show that the river bed at the said berth was uneven and unsafe at the time of the grounding of the *St. Mathieu* and that it was this unevenness which brought about the loss of the said vessel, but there is evidence that it was known to the defendant that as a result of the action of the water and of the repeated berthing and manoeuvring of numerous vessels at or near the said berth, there was a tendency for the river bed close to the wharf to become raised and elsewhere to develop humps and holes or depressions. Such even is the testimony of various witnesses heard on behalf of the defendant, notably Marcotte, Ratté and Dufour.

That the defendant was well aware of this tendency and that it recognized that some action to prevent the development of such unevenness on the bed of the river was necessary is shown by the evidence and, in particular, by the testimony of Marcotte and Ratté.

Nothwithstanding this knowledge however no soundings were taken by the defendant and there is no evidence that any measures were adopted during the months immediately preceding the accident either to determine the condition of the berth or to insure that it was safe for vessels docking there.

In fact, very little attempt was made to show that any care or attention had been devoted to the condition of the river bed at the place where the *St. Mathieu* grounded and such evidence as was submitted was merely to the effect that it was a practice of the defendant to do dredging twice a year. The witness Marcotte however, who testified as to this practice, had to admit that he did not know whether dredging had, in fact, been done at the place of the accident in 1955 prior to the loss of the *St. Mathieu,* but he thought not.

The witness Berryman, Wharf Superintendent for the defendant, and the person who was in charge of dredging, was unable to state when dredging had last been done prior to the accident.

There is therefore no actual proof that any dredging or other work had been performed on or in respect of the said berth during the year 1955 up to the time of the loss of the *St. Mathieu,* or that any steps were taken to insure that the said berth was safe.

Even if the Court were to accept the statement of Marcotte and others that it was the custom to dredge twice during a season, the first dredging being done in the spring, and even if dredging had been done at that place in the spring preceding the accident, this in itself, in my opinion would not have constituted the care and attention required of the defendant. This is borne out by the testimony of the witness Harvey (Page 102). Moreover, it is obvious that without soundings it would have been impossible to judge the effect of any dredging which may have been done, or to form any reliable opinion as to

the actual condition of the river bed either prior or subsequent to such dredging.

CONSIDERING that the weight of the evidence supports the conclusion that the *St. Mathieu* was rendered a total loss due to the fact that the berth at which she docked was defective and unsafe;

CONSIDERING that the wharf at which the *St. Mathieu* berthed was owned and controlled by the defendant and that the plaintiff's said vessel was there as an invitee, and on business relating to that of the defendant;

CONSIDERING that the defendant has not established that it had taken reasonable measures to make the said berth safe for vessels docking at the said wharf, or for the plaintiff's vessel in particular, nor had the defendant warned or notified the plaintiff of the unsafe condition of the said berth;

CONSIDERING that in such circumstance the defendant must be held liable for the loss and damage sustained as a consequence of the wrecking of plaintiff's said vessel;

DOTH MAINTAIN plaintiff's action AND DOTH CONDEMN the defendant to the payment of the damages sustained by the plaintiff as a result of the said accident, with interest and costs; and in the event of the parties failing to agree as to the amount of such loss and damage, DOTH REFER the present case to the Registrar of this Court in order that he, with the assistance of merchants, if necessary, may take account of such loss and damage and establish the amount thereof.

Judgment accordingly.

January 16, 1958.