Quebec 1966 / Nov. 18, 19 / Ottawa 1967 / Feb. 15

QUEBEC ADMIRALTY DISTRICT

BETWEEN:

CANADA STEAMSHIP LINES LIMITED ..... PLAINTIFF;

AND

JEAN-PAUL DESGAGNÉ ..... DEFENDANT.

Shipping—Verbal voyage charter—No bill of lading issued covering cargo loaded—Verbal arrangements—"Due diligence"—Responsibility of carrier—Water Carriage of Goods Act, R.S.C. 1952, c. 291, art. III, ss. 1(a), 3—Goods on board (ship)—Damages $33,099.93.

This is an action in damages to recover the value of steel plates stowed on deck and interlocked across the deck of the M/V *Fort Carillon* owned by the defendant.

While *en route* from Montreal to Lauzon, P.Q., the rudder of the vessel failed to function, the vessel listed to starboard and 148 of the steel plates stowed on deck fell over the side of the vessel and were lost.

Under the verbal charter arrangements between the plaintiff and the defendant, charter hire was to be and was paid by the charterer to the owner of the goods, on the basis of the quantity of the cargo shipped on board the vessel. The cargo was to be loaded and stowed by plaintiff under the supervision of the master of the ship, namely the defendant. The cargo was loaded partly under deck and 152 steel plates on deck. No bill of lading was issued covering cargo loaded on the vessel.

The plaintiff was obliged to pay and did pay to Davie Shipbuilding, as owner of the steel plates, the sum claimed, namely $34,533.51, the value of the steel plates lost overboard.

Subsequently, plaintiff recovered the sum of $1,283.58, representing the net salvage. Then the net loss sustained by the plaintiff amounts to $33,249 93 from which however must be deducted the sum of $150.00 for the cargo lost freight, forming a total loss of $33,099 93.

Held, The loss overboard of the steel plates resulted from the unseaworthiness of the vessel due to her being overloaded and poorly stowed having regard to her stability which were matters within the special knowledge and responsibility of the master of the vessel. The defendant, as master and owner of the ship, failed to exercise "due diligence" to make the vessel seaworthy.

2. That the *Water Carriage of Goods Act,* R.S.C. 1952, c. 291 and its rules, do not apply to the instant case, as the verbal contract of carriage between the plaintiff and the defendant was not covered by a bill of lading as required by the Act.

3. That as there was no bill of lading herein and none contemplated, the defendant cannot avail himself of the clause in his specimen bill of lading which provides that cargo carried on deck was at shipper's risk.

4. That as the charter arrangements were verbal and the cargo was to be loaded and stowed under the supervision of the master of the vessel, namely the defendant, the latter, as captain and owner of the ship acted imprudently and did not exercise "due diligence" required in ensuring the seaworthiness of his vessel, prior and at the beginning of the voyage.

5. As the *Water Carriage of Goods Act* cannot apply to the present contract of carriage of goods, the defendant cannot benefit from the modification of his common law absolute warranty or the duties he has under section 1675 of the Quebec Civil Code where it appears that the burden of the defendant is as great as the common law obligations arising in virtue of the warranty of seaworthiness.

6. That in the Court's view, the vessel in question was overloaded with reference to its freeboard and plimsoll marks. This was contrary to the *Canada Shipping Act* and the rules of elementary prudence and does not indicate "due diligence". Having not obtained the weight of the steel plates and of the general cargo in the hold of his vessel, the defendant, as captain, master and owner of the ship, should not have allowed the plaintiff to load the plates on board his vessel.

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7. That the participation of the employees of the plaintiff in the loading and stowing of the cargo cannot be "une fin de non-recevoir", as it cannot be construed to imply an agreement, the effect of which would be to release the shipowner, namely the defendant.

8. That it was sufficient that the unseaworthiness of the vessel existed at the end of the loading stage to involve the owner's liability.

9. Judgment for the plaintiff in the sum of $33,099 93.

ACTION for damages pursuant to loss of goods stowed and loaded on the deck of a vessel.

Peter D. Walsh for plaintiff.

Raynold Langlois for defendant.

NOËL J.:—This is an action flowing from the loss during transportation on board the M/V *Fort Carillon*, under a verbal voyage charter to plaintiff from defendant, Jean-Paul Desgagné, the owner as well as the master of the said vessel, of 152 steel plates, the property of Davie Shipbuilding. These steel plates were delivered to plaintiff as carriers in the latter part of August 1961, as part of shipments made respectively by the Algoma Steel Corporation, at Sault Ste-Marie, Ontario, in each case for carriage to Lauzon, P.Q., consigned to Davie Shipbuilding in accordance with the terms and conditions of bills of lading issued by plaintiff and produced as Exhibit 1 herein.

The plaintiff alleges that under the charter arrangements between plaintiff and defendant, charter hire was to be and was paid by charterer to the owner on the basis of the quantity of the cargo shipped on board the vessel, said cargo to be loaded and stowed by plaintiff under the supervision of the master of the vessel.

The plaintiff maintains that pursuant to the charter arrangements, the cargo loaded on board the vessel for the voyage in question, on September 12, 1961, between 7:00 a.m. and 10:00 p.m., consisted of 180 tons of general cargo which was stowed in the hold and 152 steel plates which were placed on the deck of the vessel; that the general cargo was loaded by stevedores in the hold under the supervision and to the knowledge of the master or mate and that the stevedores requested the master or mate as to the manner in which the 152 steel plates should be loaded as they measured between 30 to 49 feet in length, were between 3 and 5 feet in width between $\frac{1}{4}$ inch and $1\frac{1}{2}$ inches thick and weighed a total of approximately 235

tons; that because of their size they had to be loaded on the deck of the vessel and the stevedores were advised by the master that it would be in order for them to load on deck the total of the 152 steel plates.

The plaintiff states that the steel plates were stowed on deck and interlocked across the deck without lashing and in the manner indicated by the master or mate of the vessel.

While *en route* from Montreal to Lauzon, P.Q. in the vicinity of Contrecoeur, P.Q., on the night of September 12 and 13, 1961, the rudder of the vessel failed to function, the vessel listed to starboard and 148 of the steel plates fell over the side of the vessel and were lost. The weather at the time was excellent, with good visibility, light wind and no sea. After this mishap, the steering gear was tested and found to be in good order and no further difficulty was experienced during the remainder of the voyage to Lauzon where the vessel arrived on September 13, 1961 and discharged the four remaining plates.

Davie Shipbuilding, as owner of the steel plates, claimed the sum of $34,533.51 from plaintiff, the value of the steel plates lost overboard and under the terms of the bills of lading and the conditions of carriage, plaintiff was obliged to pay, and did pay, this amount to Davie Shipbuilding.

Plaintiff subsequently recovered an amount of $1,283.58, representing the net salvage payable to it in respect of recovery of part of the steel plates lost so that the net loss sustained by plaintiff amounts to $33,249.93.

The plaintiff alleges that the listing of the vessel and the loss overboard of the steel plates resulted from the unseaworthiness of the vessel due to her being overloaded and/or poorly stowed having regard to her stability, which plaintiff claims were matters within the special knowledge and responsibility of the master and mate and of the failure of defendant, as master and owner to exercise due diligence to make the vessel seaworthy.

The defendant, on the other hand, takes the position that the cargo, including the steel plates, were loaded under a verbal charter but that under the terms of this charter the cargo was to be loaded and, in fact, was loaded, partly under deck and partly on deck, stowed, secured and discharged by plaintiff free of all risk and expenses to defendant which, however, is denied by plaintiff; the defendant claims that during the loading and stowing operations at

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Montreal, plaintiff and all its agents or servants informed defendant that the on deck cargo totalled between 140 and 160 tons, which distribution of cargo, as between under deck and on deck, insured a good stability of defendant's vessel.

The defendant claims that when the vessel sailed at 20:55 hours on September 12, 1961, on her voyage to Lauzon, the vessel was then staunch, strong, well-manned, seaworthy and in every respect fit for the intended voyage and that if the vessel listed and lost the plates it was due to the fact that the said plates weighed 235 tons (which plaintiff realized only after the vessel's arrival in Lauzon) instead of the 140 to 160 tons mentioned by plaintiff prior to the voyage.

Defendant further states that since plaintiff, its agents, or its servants had informed and represented to defendant that the on deck cargo weighed 140 to 160 tons only and since they had failed to supply defendant with loading receipts in Montreal, the latter had to rely on the tonnage reported as loaded on deck by plaintiff, its agents or servants and that the vessel was rendered unstable prior to her departure from Montreal because of the sole negligence, carelessness and fault of plaintiff, its agents and servants who misled defendant in misrepresenting the weight of the cargo loaded on deck.

The defendant finally alleges that although no bill of lading was issued covering cargo loaded on the *Fort Carillon*, the terms and conditions of defendant's regular bill of lading (a specimen of which is filed as Exhibit D-1) should apply to the cargo carried on the voyage and this bill of lading provides *inter alia* that cargo carried on deck was at shipper's risk in any event as it contains the following paragraph:

> CARGAISON EN PONTÉ.—Les marchandises couvertes par ce connaissement peuvent être arrimées sur ou sous le pont à la discrétion du voiturier; et lorsqu'elles sont chargées en pontée elles sont, en vertu de cette disposition, censées être déclarées comme étant ainsi chargées en pontée, et ceci même si aucune mention spécifique à cet effet n'appert à la face de ce connaissement. Relativement à cette cargaison en pontée, le voiturier n'assume aucune responsabilité quant aux pertes, avaries ou aux retards résultant de toutes causes que ce soit, y compris la négligence ou le mauvais état de navigabilité au départ ou à n'importe quel moment du voyage.

The defendant is a member of a cooperative called les Cabotteurs Unis de Québec (The Quebec United Coasters)

and act as shipping agents for a number of ships, whose manager in the province of Quebec is a Captain Philippe Byers. The latter established that not only was there no written contract in this case but that bills of lading were never prepared for use with Canada Steamship Lines in charters of this nature. Captain Byers stated that arrangements were made with the plaintiff company, a shipping firm through its traffic manager Rosario J. Paquin in 1961 to carry the cargo handled by the plaintiff from Montreal down river. The agreement was that the Cooperative would provide the plaintiff with a vessel or vessels on reasonable notice for a minimum quantity per voyage of 400 tons and if the cargo exceeded 400 tons, the Cooperative would provide a larger vessel. The vessel would be paid on a tonnage basis, the loading wharfage and discharging of cargo to be paid by the plaintiff and to be carried out by the latter's stevedores. Captain Byers admitted that the stevedores usually place cargo on board ship under the instructions of the master of the ship and that in general, it falls to the master of the ship and chief officer to indicate where certain types of cargo should go. He added that if the stevedores place or distribute badly, the master should and would interfere. Captain Byers also pointed out that although it is customary to load cargo on deck, it is important to ensure that a proper ratio of cargo is placed in the hold and on deck. He also stated that before it is possible to load a ship, it is virtually essential that whoever is in charge of loading and stowing speak to the master and mate who must be fully aware of the nature of the cargo to be placed on board. Indeed at the beginning of loading, there is usually a conference with the captain or his representative in order to determine where the cargo is to be placed and he then knows the nature of the cargo within limits. In order to enable the stevedores to do this, the booking agent must, however, give him information and he should have in hand documents which give him some detail of the cargo. According to Captain Byers, these documents are usually summarized and placed on a piece of paper, distributed to those concerned and given to the vessel at the pre-loading meeting where everyone has a copy. On the other hand, although plaintiff was entitled to be given a bill of lading by the master of the vessel, none was asked for, Captain Byers adding, however, that had one been required

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the Quebec United Coasters' long form (specimen Exhibit D-1) would have been supplied and used. Captain Byers received the information with respect to the weight of the cargo carried by the *Fort Carillon* only after the loss of the plates, i.e. the day following the departure of the vessel from Montreal. He added that his agreement with Rosario J. Paquin, traffic manager for the plaintiff in 1961, was based on recognized terms and conditions which govern all of the transportation carried out by its members and that there was never any doubt in his mind as to the terms of the agreement which were the same as those which had obtained in the past for transportation effected for the plaintiff by the ships of the Cooperative. He also stated that under "shippers load and count", which was one of the terms of the agreement between the plaintiff and the Cooperative, the shippers had to provide figures to establish charges as the vessel being paid on this basis, the captain must know what weight goes on board. The captain would normally obtain this information from the stevedores or the shipper's agent or agents.

Prior to the instant voyage, Captain Byers states that he was informed by telephone that between 430 to 435 tons would be loaded adding, however, that the initial quantity only took care of the minimum quantity, the charterer having the right to use the ship to its capacity.

Rosario J. Paquin, plaintiff's freight manager in 1961, stated that the agreement with the Quebec United Coasters was that the plaintiff would supply the men to load the vessel and this is what was done, its stevedores taking the cargo from the wharf and placing it on board the vessel according to the instructions of the crew. He admitted that the plaintiff company is a shipper which loads and unloads vessels and places cargo in the hull or on the deck of vessels by means of a competent personnel on the wharf with a manager, an assistant manager, six or eight foremen and a large number of stevedores (they had 350 men in 1961) which it employs and pays. Eleven of the plaintiff's men loaded the *Fort Carillon* but he does not know whether the captain of the *Fort Carillon* had given them instructions or not as to where the cargo was to be placed on the vessel on September 12, 1961.

Paquin stated that he would ordinarily get the weight of the cargo to be shipped from freight bills through one of the plaintiff's employees, Vadeboncoeur, but that after a phone call to the Quebec United Coasters for a vessel the weight could change as more freight would come in.

Paquin was on the dock when the loading of the *Fort Carillon* started but was not there all the time as there were other ships to load and he would move from ship to ship supervising the operations. J. W. Wood, as general agent of the plaintiff in 1961 also supervised the loading and unloading of ships. He states that he had occasion to speak to Captain Desgagné, master and owner of the *Fort Carillon* about placing some cargo in the ship and other cargo on the deck, but he is not sure whether he spoke to the captain of the different weights of the cargo. He adds that he ordinarily would check weights to decide where to place the cargo after conferring with the captain and he would then tell his foreman about it. He stated that bills of lading were never issued to the captain and that the only way the latter could find out the weight of the merchandise would be to ask the foreman or the clerks.

Wood stated also that when the cargo to be shipped on the *Fort Carillon* was determined in the morning, the captain did not know if he could load all of the steel plates and he was told that when he would tell the plaintiff's employees to stop they would stop loading. The greater part of these steel plates could not be stowed in the hold of the ship as they were too long and had to be placed on deck and in answer to counsel for the defendant's question as to whether he had any objection to these plates being carried on deck, or to the manner they were stowed thereon, stated that he had none. He also does not remember whether he had indicated to the captain the weight of the general cargo or of the steel plates.

Captain Desgagné, the owner and master of the vessel, stated that he tried to obtain the quantity and weight of the cargo from Leroux, one of the plaintiff's foremen, but the latter could not tell him. He adds that he did not have any contact with the plaintiff's employees (which he calls "les boss") because they spoke English only. He requested information from some of the plaintiff's employees, a checker, who told him that a bill indicating the weight

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would be sent to Quebec the next day. He then asked for an estimate and the man could not give him one. Although someone told him they would try to get this information, he obtained none. He then adds that he heard of the quantity and tonnage on board his ship only when he reached the Davie Shipyards in Lauzon the next day. He was not able to support the allegation in his defence that employees of the plaintiff had guaranteed that there were 140 to 160 tons of cargo on deck.

Captain Bouchard, the second mate, looked after the loading and the dunnage on September 12, 1961 and according to Wood, at one stage, stopped the use of dunnage on deck while Captain Desgagné went around the ship asking questions and checking from time to time the stowing of the cargo.

The evidence clearly discloses that no representations were, at any time, made by the plaintiff's employees to defendant that the deck cargo totalled between 140 to 160 tons as alleged by defendant in its written plea and this allegation must be disregarded.

The evidence also establishes that under the charter arrangements between the parties herein, the cargo was to be loaded and stowed by plaintiff under the supervision of the master of the vessel and the limitation of liability claimed by defendant for cargo on deck would apply only if the Court came to the conclusion that the proper inference to be drawn from the facts of this case was that the agreement was for the carriage to be made under the terms of a bill ot lading, that that bill of lading was that of the defendant and that its terms applied to the circumstances of the present case; otherwise, the terms would be those implied by law only.

Counsel for the plaintiff in argument took the position that the *Water Carriage of Goods Act* (R.S.C. 1952, chapter 291) and its rules do not apply to the present case as the verbal contract of carriage between the plaintiff and defendant was not covered by a bill of lading as required by article 1 of the schedule thereof, whereas counsel for the defendant argued that the Act applied. Should the Act apply it would reduce the defendant's obligation of an absolute warranty of seaworthiness to that of one of "due diligence" only under Article IV, section 1 of the schedule of the Act.

The "due diligence" provision is contained in Article III of the Rules which provides that,

1. The carrier shall be bound, before and at the beginning of the voyage, to exercise due diligence to,

(a) make the ship seaworthy;

. . .

and in paragraph 3 of the Act which states that:

3. There shall not be implied in any contract for the carriage of goods by water to which the Rules apply any absolute undertaking by the carrier of the goods to provide a seaworthy ship.

In view of the fact that not only was there no written contract of any nature in this case but that bills of lading were never prepared for use with the plaintiff in charters of this nature generally and that arrangements were always verbal, continued from year to year over a long period of time between the Cooperative for its members and the plaintiff, it is hard to see how one can reach the conclusion that the *Water Carriage of Goods Act* could apply even in the light of *Pyrene Co. Ltd. v. Scindia Navigation Co. Ltd.*[1] where, although no bill of lading was issued, it was at least contemplated by the parties that one would issue or even in the light of *Anticosti Shipping Company v. Viateur St-Amand*[2] where also, although no bill of lading was issued, Rand J. at page 374 concluded from the evidence that "the shipping clerk's authority was to accept articles for transportation on the basis only of the Company's bill of lading following which he proceeded to fill out the standard form with the required matter" or finally in the light of *Great Lakes Paper Co. v. Paterson Steamships Ltd.*[3] where, although goods on board ship were damaged before the bill of lading was issued, the defendant's rights were held to fall to be determined as if a bill of lading had been issued, as the loading of the cargo contemplated the issuance of a bill of lading.

In the instant case, there was not only no bill of lading issued, nor any at any time contemplated, nor was there any similar document of title; there was not even, as already mentioned, a written contract of any nature.

It follows, of course, that as there was no bill of lading herein, and none contemplated, the defendant cannot avail

[1] [1954] 2 Q B 402. [2] [1959] S C R. 372.
[3] [1951] Ex. C.R. 183.

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himself of the clause in his specimen bill of lading form (Exhibit D-1) which provides that cargo carried on deck is at shipper's risk. The decision of the House of Lords in *McCutcheon v. David MacBrayne Ltd.*[1] aptly applies to this situation in holding that a mere oral contract of carriage did not incorporate the respondent's ordinary written conditions excluding liability contained in its contract form although such conditions were referred to in the invoice on which the receipt was written. I should add that I do have considerable doubt that such a clause would, in any event, cover damage to cargo or loss thereof caused by the unseaworthiness of the vessel where due diligence could not be established. I must, therefore, conclude that the terms governing this particular carriage of goods contract are those implied by law only.

As the *Water Carriage of Goods Act* cannot apply to the present contract of carriage of goods, it also follows that the defendant cannot, therefore, benefit from the modification of his common law absolute warranty or the duties he has under section 1675 of the *Quebec Civil Code*[2] where it appears to me that the burden of the defendant is as great as the common law obligations arising in virtue of the warranty of seaworthiness. I should add, however, that the result of the present action would be no different even if the *Water Carriage of Goods Act* applied to this case because I must, from the evidence, conclude that the captain of the vessel, who also is its owner, did not here demonstrate (as I will enlarge upon later) the due diligence required in ensuring the seaworthiness of his vessel necessary to allow him to claim the benefit of the statute when the ship departed on September 12, 1961, from Montreal with its cargo of steel plates and although she may have been seaworthy before loading, she no longer was seaworthy, as admitted by defendant in his plea, when she departed from the wharf in Montreal on her trip to Lauzon, P.Q.

It is indeed sufficient that the unseaworthiness of the vessel existed at the end of the loading stage to involve the

[1] [1964] 1 All E.R. p. 430.

[2] 1675 They (carriers) are liable for the loss of things entrusted to them, unless they can prove that such loss or damage was caused by a fortuitous event or irresistible force, or has arisen from a defect in the thing itself.

owner's liability as clearly indicated in *A. E. Reed and Company, Limited v. Page, Son and East, Limited, et al*[1] at p. 749:

> ...I think, inasmuch as wrong loading, excessive loading, can amount to unseaworthiness, and constitute unseaworthiness, if the vessel is at the end of the loading stage so overloaded as to be a danger to herself and her cargo, that then there is a breach of the warranty which I find exists, that she shall be fit to complete or enter upon and carry out the next stage of the contract.

Lord Sumner in *F. O. Bradley and Son Limited v. Federal Steam Navigation Co. Limited*[2] points out the relativity of the obligation of diligence in the transportation of cargo by sea when at p. 268 he states that:

> In the law of carriage by sea neither seaworthiness nor due diligence is absolute. Both are relative, among other things, to the state of knowledge and the standard prevailing at the material time.

There is no question from the evidence that the *Fort Carillon*, although seaworthy before loading, was rendered unseaworthy in being so loaded as to become top heavy at the beginning of the voyage with the result that the vessel listed in clear weather, the steel plates slid off the deck and were lost because of the instability of the vessel and the only thing that could protect the defendant under the *Water Carriage of Goods Act* would be that the owner of the vessel or his agents and employees had showed due diligence in making the vessel seaworthy at the beginning of the voyage. That, as already mentioned, the defendant has not been able to establish such due diligence here will appear from an examination of the manner in which the overloading on deck of the *Fort Carillon* took place. I should, however, before going into this matter, determine what the words "due diligence" mean. In *Grain Growers Export Co. v. Canada Steamship Lines Limited*[3] at pp. 344-345 Hodgins J.A. stated that:

> ...The ship-owner warrants the seaworthiness, and the seaworthiness is a necessary condition of the carriage. Its absence, as has already been pointed out, increases the danger from the perils mentioned in sec. 6, and I read "exercises due diligence to make the ship in all respects seaworthy" as meaning not merely a praiseworthy or sincere, though unsuccessful, effort, but such an intelligent and efficient attempt as shall make it so, as far as diligence can secure it.

[1] [1927] 1 K.B. 743. [2] (1927) 137 L.T. 266.
[3] 43 O.L.R. 330.

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The obligation on the carrier to use due diligence to make the ship seaworthy must be not only by the shipowner but also by all its servants and agents. (Cf. *Dominion Glass Company Limited v. The Ship Anglo Indian*[1])

In *Re Unus Shipping Co.*[2] Ross J. clearly sets down the requirements of due diligence when he states:

> ...As I read the authorities the obligation to use due diligence to make a ship seaworthy is not confined to the owners as such, but extends to those persons employed by the owners to see that the ship is seaworthy, and any lack of due diligence on the part of such persons will be imputed to the shipowner.

In *Smith, Hogg and Company, Limited v. Black Sea and Baltic General Insurance Company, Limited*[3] the House of Lords decided that a shipowner was liable for loss or damage to goods, however caused, if his ship was not in a seaworthy condition when she commenced her voyage and if the loss would not have arisen but for that unseaworthiness. Lord Wright, at p. 1001 of the above decision, went so far as to state that:

> ...The unseaworthiness, constituted as it was by loading an excessive deck cargo, was obviously only consistent with want of due diligence on the part of the shipowner to make her seaworthy.

Under article IV of the schedule to the *Water Carriage of Goods Act*, whenever loss or damage has resulted from unseaworthiness, the burden of proving the exercise of due diligence is on the carrier and the question is whether Captain Desgagné has discharged that burden. I am afraid that from the evidence I cannot arrive at a conclusion that he has. The vessel, indeed, was overloaded with reference to its freeboard and plimsoll marks. On this point James Linton Thacker, a marine surveyor, was heard on behalf of the plaintiff. This witness stated that two days after the sailing he was given figures by Captain Desgagné which indicated that the vessel was overloaded beyond its freeboard and plimsoll marks. Captain Desgagné testified differently at the trial, but this was five years after the event and in view of the manner in which he checked the freeboard and plimsoll marks of his vessel by merely peering over the side thereof employing a flashlight, this evidence is not too convincing. There is no question in my mind that

[1] [1944] S.C.R. 409 at 421. [2] [1937] 2 D.L.R. 239 at 254.
[3] [1940] A.C. 997.

the vessel sailed when it was overloaded, having regard to its freeboard, contrary to the *Canada Shipping Act* and elementary prudence and this does not indicate due diligence, although it should be stated that the overloading of a vessel *per se* will not necessarily and always make a ship unstable or unseaworthy even though in some cases it will; the instability here, however, was not caused by overloading but by loading cargo on deck which was too heavy compared to the cargo in the hold, thus rendering the ship tender as far as its stability was concerned, and it may well be here that the settling down of the ship in the water due to it being merely overloaded did not cause the loss.

Captain Desgagné took the position at the trial that it was not possible for him to know the ratio of the weight of the cargo on deck and in the hold and that although the plaintiff should have told him this, and he had asked for this information, he was not able to obtain it. He admitted he had been advised by Captain Byers, of the Cooperative, that he would get a load of approximately 450 tons (in fact 436 tons were loaded of which 239 tons of steel plates on deck and 197 tons in the hold) and that two weeks previously he had carried 354 tons of steel of approximately the same dimensions and bundled in the same position. I believe that he should, under the circumstances, by merely looking at the steel plates, have realized that he was faced here with a situation which required his personal attention and positive diligence. He indeed is the one to determine whether the stability of his vessel will be affected by a stowage of cargo which, to all intents and purposes, should have appeared to him as being not only bulky but extremely heavy. He stated that he attempted to get its weight but was unsuccessful. It is not, in my view, sufficient for him to have merely asked, in order to discharge his burden of due diligence herein and he should have here made it his business to obtain an answer from someone who could have given it. Now, although he did not receive from the plaintiff's employees all the cooperation they could and should have given him herein, I still cannot reach the conclusion that his attempts to get the information are sufficient to indicate that he has discharged here his obligation of due diligence because his actions herein are far short of the standard of conduct required in the circumstances from a captain of a vessel whose admitted responsibility with

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regard to the stability of his vessel is his alone. He, in my view, should have obtained the weight of the steel plates and of the general cargo in the hold of his vessel and if he could not get such weight, he should not have allowed the plaintiff to load the plates on board his vessel.

The evidence of Captain Thacker, and even of Captain Byers, suggests that the defendant herein acted imprudently and did not use due diligence.

Captain Thacker stated, and he was endorsed on this point by Captain Byers, that a safe stability formula for the on deck and the in the hold loading of cargo would be one third on deck and two thirds below. Here, of course, the proportion of cargo, as already mentioned, was way off this ratio with 239 tons on deck and 196 tons in the hold and that the deck cargo was indeed excessive appears from the fact that it took but a very slight movement to unbalance the vessel.

Captain Byers who admitted that it falls on the master and chief officer of the vessel to indicate where certain types of cargo should go, stated that in the circumstances of the present case, he would have insisted and endeavoured to obtain the weight of the cargo.

Asked whether he would have conducted stability tests before sailing had he captained the vessel, he answered (not having the transcript of the evidence, the following are from my notes at the trial and may not be verbatim):

> No, not some form of stability tests. There would be circumstances where a test should be made. This may have caused some doubt into my mind (the 249 tons on deck and 187 in the hold). Under the circumstances, I might have done the same as the captain did and sailed. I would have taken a chance.

He then added later that someone working for himself, such as Captain Desgagné, who owned the vessel, is prepared to take greater risks than if employed by the owner. Here again I cannot hold that the captain of this vessel was discharging his obligation of "due diligence" if he was, as indicated by the witness, "taking a chance".

There is some evidence here to indicate that Captain Desgagné took a further chance at the end of the loading operations when, according to J. W. Wood, he finally decided, after some hesitation, to take the balance of the steel as cargo. Indeed, not long before the termination of loading, Wood stated that he enquired as to whether the

loading should cease and heard the captain say he would take the balance of the steel as cargo which, of course, he did. This would indicate a momentary consideration at least of the situation and (in view of the obvious considerable weight and bulk of the steel plates, and his ignorance of their weight) what I would call a heedless recklessness in accepting the balance of the cargo. This, again, I must say is also far from the "due diligence" required of a captain of a vessel.

There is, however, here a strong suggestion that Captain Desgagné did know the approximate weight of the steel plates on the deck of his vessel and, of course, if such is the case, he cannot, in any way, be held to have discharged the burden of having shown due diligence in providing a seaworthy vessel for the voyage. The protest made by the captain on September 14, 1961 (i.e., two days after the loss) before Percy Flynn, a commissioner of the Superior Court, contains a description of the events which led to the loss of the steel plates. Counsel for the defendant objected to the production of this document on the basis that it was not signed by the captain, nor were its contents couched in the language (French) in which the captain had expressed his protest. In view of the manner in which this document is made, I would have been prepared to disregard it entirely were it not for the fact that Captain Desgagné admitted that he had given to Mr. Flynn the facts as disclosed in the protest and that for all intents and purposes, it contained the information he had expressed in French including the pertinent information that "approximately 230 tons of steel" has fallen overboard. It therefore appears that around noon on September 14, 1961, the captain knew within nine tons the weight of the cargo on the deck of his vessel prior to the mishap.

When examined, Captain Desgagné stated that he had obtained the above information from a clerk or "Receveur" at the Davie Shipyards, in Lauzon, when he delivered the remaining four plates but he was not able to identify this clerk. From the evidence of Frank Findlay, the plaintiff's general agent in Quebec City, as well as Maurice Conway, the plaintiff's purchasing agent and Alphonse Desjardins, a foreman at the Davie Shipyards, in Lauzon, it would appear that Captain Desgagné could not have obtained the information of 230 tons of on deck cargo from the ship-

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yards because there was no one at Davie Shipyards at that time who knew or could possibly determine the actual or approximate weight of his deck cargo, and the only inference the Court can draw from the evidence is that the captain knew all along the approximate weight of the on deck cargo and, therefore, no defence of due diligence is possible here.

I now come to the defendant's last argument which is that the plaintiff here is not the owner of the goods but the shipper and an experienced loader and stower. Although the loading and stowing was under the supervision of the master of the vessel, it was carried out by the plaintiff's employees. The latter's participation in the operations, according to the defendant, would prevent the plaintiff from now complaining of the stowage and the securing of the cargo on the deck of the vessel and from claiming payment of the value of the steel plates lost in the voyage.

The defence herein contains no specific allegation that the plaintiff's participation in the stowing and loading would preclude him from complaining of the defective stowage and from claiming reimbursement of the amount paid by the plaintiff to the consignee of the plates, the defendant having merely stated *inter alia* at paragraph 2 of its defence that the cargo

> ...was under the terms of said verbal charter, to be loaded and in fact was loaded, partly under deck and partly on deck, stowed, secured and discharged by plaintiff free of all risks and expenses to defendant.

This, of course, is a somewhat different argument from the one voiced by counsel for the defendant in argument, when he dealt with the effect of the shipper's or charterer's participation in the loading and stowing of cargo.

In view of the power of the Court to allow, or even to order the amendment of the pleadings herein under section 73 of the *General Rules and Orders of the Admiralty Act*, the matter could even at this late date, be raised in the pleadings and I would do so if I felt that some useful purpose could be served by so doing.

In view of the conclusion to which I must, however, arrive at, no useful purpose could be served by doing this here because the participation of the employees of the plaintiff in the loading and stowing of the cargo herein cannot be "une fin de non-recevoir" as it cannot be construed to imply an agreement, the effect of which would be

to release the shipowner, who here happens also to be the captain of the vessel, from his obligation not only to supervise the proper and safe stowage of the cargo but also to see that its weight on deck and below is distributed according to a ratio which would ensure the stability of the vessel for the voyage and, thereby, its seaworthiness. I cannot indeed find here that the plaintiff or its employees or representatives knew and appreciated the risk to which the cargo was exposed by reason of the manner in which it was stowed and that with such knowledge had agreed to accept such risk and release the defendant from the above mentioned obligations.

I cannot do so because here the sole person qualified in navigation to establish the stability of the vessel and the manner in which the cargo should be loaded to ensure this stability is Captain Desgagné himself who has a specific duty in this regard.

I do not believe that the defendant can even find any assistance in the view expressed by Smith J.A. in *Mannix Ltd. v. N. M. Paterson & Sons Ltd.*[1] where, in dealing with a loss of cargo on deck breaking loose in heavy weather, the shipper having participated in the stowage of the cargo, he stated:

> It may well be that there are cases in which the shipper, who has participated in or approved the stowage and securing of the cargo, is precluded from later complaining of such stowage. For example, when the shipper is fully aware, or it is patent, that stowage of a particular type of cargo in a particular manner or place will expose that cargo to damage, e.g., contamination, and nevertheless participates in and approves stowage in that manner, such shipper may be precluded from claiming in respect of damage to cargo due to said stowage.

I fully agree with what Smith J.A. says here but I do not believe that it can assist the defendant in any manner because once again the loss here was not caused by merely bad stowage but by excessive stowage on deck affecting the stability of the vessel which is, as already mentioned, a matter of navigation within the province of the captain of the vessel of which the plaintiff, or its employees, would be ignorant of. In *Canadian Transport Company, Limited v. Court Line, Limited*[2] where by the terms of a charter party the charterers were to "load, stow and trim the cargo at their expense under the supervision of the captain," (which is similar to the agreement in the present case) Lord Atkin

[1] [1965] 2 Ex. C.R. 107 at p. 113. [2] [1940] A.C. 934.

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clearly sets down the obligation of the captain to ensure the seaworthiness of his vessel during loading operations when at pp. 937-938 he said:

> . . .The supervision of the stowage by the captain is in any case a matter of course; he has in any event to protect his ship from being made unseaworthy; and in other respects no doubt he has the right to interfere if he considers that the proposed stowage is likely to impose a liability upon his owners.

I cannot, therefore, under the circumstances of the present case reach the conclusion that the conduct of the shipper as to stowage here was such that it would support a plea of leave and licence by the shipper and this argument must, therefore, fail.

The value of the steel plates lost herein after deduction of the amount recovered through salvage is $33,249.93 from which, however, must be deducted (as agreed to by the parties at trial) the amount of $150 for the cargo lost freight; this forms a sum of $33,099.93 and to this sum the defendant must be condemned.

The defendant will be entitled to the costs of the amendment of plaintiff's action whereby paragraph 15 was added to its statement of claim which the Court fixes in the sum of $100 and there will be judgment for the plaintiff in the sum of $33,099.93 with interest dated from the service of the action and costs