St. John's 1966
June 15
Ottawa July 28

BETWEEN:

MUNN AND COMPANY LIMITED ..... PLAINTIFF;

AND

THE MOTOR VESSEL *SIR JOHN CROSBIE* ..... DEFENDANT.

ON APPEAL FROM DISTRICT COURT OF NEWFOUNDLAND ADMIRALTY DISTRICT

Shipping—Ship pressed against wharf by gale—Damage to wharf—Whether ship negligent—Findings of trial judge—Appeal—New cause of action put forward on appeal—Absolute liability—Harbours, Docks and Piers Clauses Act U.K., (1847) 10 & 11 Vic., c. 47—Whether applicable in Newfoundland.

Defendant ship which was moored to plaintiff's wharf in Harbour Grace Newfoundland after discharging a cargo of coal for plaintiff was pressed against the wharf by a gale, causing damage to the wharf. Plaintiff sued for damages alleging that defendant was negligent in failing to remove the ship from the wharf. The trial judge found that defendant was not negligent and dismissed the action. Plaintiff appealed and put forward as an alternative ground of appeal that defendant having deliberately preserved the ship at the expense of the dock was liable for the damage to the dock.

Held, the appeal must be dismissed.

(1) The finding of the trial judge that the defendant was not negligent was supported by the evidence.

(2) At common law a ship moored to a wharf at the invitation of the wharfinger is not under an absolute liability not to damage the wharf but is subject to the same duty of care with respect to the wharf as is a ship under way. *River Wear Comm'rs v. Adamson et al* (1877) 3 Asp. 521 applied; *Vincent v. Lake Erie Transportation Co.* (1910) 124 N.W. 221, discussed and distinguished.

(3) Sec. 74 of the *Harbours, Docks and Piers Clauses Act* (1847 U.K.) 10 and 11 Vic., c. 47, is not applicable in Newfoundland.

(4) The alternative ground of appeal founded on a cause of action not set up by the pleadings was not open to plaintiff. *Lamb v. Kincaid* (1906) 38 S.C.R. 516; *Esso Petroleum Co. Ltd. v. Southport Corp.* [1953] A.C. 218, referred to.

APPEAL from decision of Puddester D.J.A., Newfoundland Admiralty District, dismissing action for damages.

T. A. Hickman, Q.C. for appellant (plaintiff).

Hon. P. J. Lewis, Q.C. for respondent (defendant).

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JACKETT P. (THURLOW J. *concurring*):—This is an appeal from a judgment delivered by Puddester J., one of the District Judges in Admiralty for the District of Newfoundland, on June 30, 1964, in an action for damages sustained by the plaintiff's wharf, as the result of the defendant ship being pressed against the wharf by a wind of gale force. The defendant ship was at all material times moored at the wharf, where she had been discharging a cargo of coal belonging to the plaintiff. When the storm arose the strong southeasterly wind tended to push the ship away from the wharf but after some hours the wind shifted to southwest and west and at that stage caused the ship to be pressed against the wharf and thus to occasion the damage.

The action as pleaded, and as tried before the trial Judge, was clearly understood by all concerned to be an action based upon the negligence of the defendant in failing to remove the ship from the wharf and in failing to take in due time unspecified measures for avoiding damage to the wharf. The learned trial Judge held that the plaintiff had failed to establish that its damages were caused by negligence of the defendant and, accordingly, dismissed the action. On the appeal to the Exchequer Court of Canada, after hearing the submissions of counsel for the appellant on the question of negligence, we intimated to counsel for the respondent that we did not require to hear him on that question. In our view the findings of the learned trial Judge that the damage did not result from negligence on the part of those in charge of the defendant ship are well supported by the evidence. While the opinions of mariners may differ as to what might have been feasible or reasonable in the circumstances that prevailed at Harbour Grace on the occasion in question and while neither of us would necessarily have reached the same conclusion as the learned trial Judge had we tried the action and had the advantage of seeing the witnesses, it is impossible to say that it was not open to the learned trial Judge to reach his conclusion on the evidence before him.

Counsel for the appellant put forward an alternative argument in support of the appeal. This argument was based upon an alternative cause of action, which, admittedly, was not in the minds of the professional advisors of the appellant at the time of the proceedings before the Dis-

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trict Judge in Admiralty. It would appear that it first occurred to the appellant's advisors that an alternative cause of action was available to it when, upon Mr. Justice Puddester's judgment being reported, comments were made such as that which appears in connection with the report of his decision in 52 D.L.R. (2d), at pages 48 and 49. That reads as follows:

> EDITORIAL NOTE: This case may be usefully compared with a decision of the Supreme Court of Minnesota, *Vincent v. Lake Erie Transportation Co.* (1910), 124 N W. 221 (see also *Wright's Cases on Torts*, 3rd ed., p. 125) which, although virtually identical on the facts, reached an opposite conclusion on the question of liability for the damage occasioned. In the *Vincent* case defendant's ship was moored to the plaintiff's wharf for the purpose of discharging cargo when a severe storm blew up and there too the captain deliberately decided to keep it moored to the wharf, rather than cast off, with the result that the wharf was damaged when the ship was thrown against it by the wind and waves. The plaintiff complained that it was negligence on the part of the captain to remain moored at the wharf when it became apparent that the storm was to be more than usually severe but, as in the instant case, the Court decided that, on the contrary, such a course would have been highly imprudent and that it was only good judgment and prudent seamanship to hold the vessel fast to the dock. However, the Minnesota Court held that the defendant was nevertheless liable to pay for the damage that was caused. In other words, although the defendant's ship was privileged to remain at the wharf and use it as a sanctuary (and if the plaintiff had cast it off, to its damage, the plaintiff would be liable therefor), the defendant could not also demand that the plaintiff should bear the expense of so preserving the defendant's property. Such a solution, conferring only an "incomplete" privilege upon the defendant, as distinct from an absolute immunity, seems to be both sound and just. As stated by O'Brien J., in the *Vincent* case (p 222):
>
> > "...here those in charge of the vessel deliberately and by their direct efforts held her in such a position that the damage to the dock resulted, and, having thus preserved the ship at the expense of the dock, it seems to us that her owners are responsible to the dock owners to the extent of the injury inflicted...
> >
> > This is not a case where life or property was menaced by any object or thing belonging to the plaintiffs, the destruction of which became necessary to prevent the threatened disaster. Nor is it a case where, because of an act of God, or unavoidable accident, the infliction of the injury was beyond the control of the defendant, but is one where the defendant prudently and advisedly availed itself of the plaintiffs' property for the purpose of preserving its own more valuable property, and the plaintiffs are entitled to compensation for the injury done."

The appellant has two hurdles to pass in order to succeed on this alternative ground. First, it has to be decided whether the alternative cause of action can be put forward as a ground for judgment when it was not raised in the

Court below. Second, it must be decided whether there is such an alternative cause of action and whether it is applicable to the facts of this case.

We find no support in the authorities referred to by counsel for the appellant for his submission that a rule of absolute liability applies in a situation of this kind and we have come to the conclusion that, apart from statute (and no statute has been brought to the Court's attention which would have any application to the facts in this case), the responsibility or duty of the defendant ship to take reasonable care to avoid damage to the plaintiff's property, to which it was at the plaintiff's invitation or with its permission moored, was no greater than that which would have been applicable had the ship at the material time been under way. With respect to a ship under way the common law is set out in *River Wear Commissioners v. Adamson and Others*[1] per Lord Blackburn at page 528, where he says:

> The common law is, I think, as follows: Property adjoining a spot in which the public have a right to carry on traffic is liable to be injured by that traffic. In this respect, there is no difference between a shop the railings or windows of which may be broken by a carriage on the road, and a pier adjoining a harbour, or a navigable river, or the sea, which is liable to be injured by a ship. In either case the owner of the injured property must bear his own loss, unless he can establish that some other person is liable to make it good; and he does not establish this against a person merely by showing that he is owner of the carriage or ship which did the mischief, for that owner incurs no liability merely as owner; but he does establish such a liability against any person who either wilfully did the damage, or neglected that duty which the law casts upon those in charge of a carriage on land, and a ship, or a float of timber, on water, to take reasonable care, and use reasonable skill to prevent it from doing injury, and that this neglect caused the damage; and if he can prove that the person who has been guilty of this negligence stood in the relation of servant to another, and that the negligence was in the course of his employment, he establishes a liability against the master also.

The question to be decided, therefore, is whether the defendant "wilfully did" the plaintiff's damage or whether it "neglected that duty which the law casts upon those in charge of . . . a ship . . . to take reasonable care, and use reasonable skill to prevent it from doing injury, and that this neglect caused the damage; . . . "

In this case, there is no suggestion that the defendant wilfully did the damage. The plaintiff's submission throughout was simply that the defendant master had

[1] (1877) 3 Aspinall's Reports of Maritime Cases, 521 (H.L.).

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failed to move the ship from the wharf which in our opinion is in substance an allegation of neglect of a duty to remove her. We have already reached the conclusion that the finding of the learned trial Judge, that the appellant failed to establish that the respondent was guilty of negligence in that respect, must be affirmed. There is, therefore, no liability apart from statute.

Some question arose during the course of argument as to whether the statute under consideration in the *River Wear Commissioners v. Adamson et al* case—namely, section 74 of the *Harbours, Docks and Piers Clauses Act*,[1] might be part of the laws of England which were introduced into Newfoundland and might therefore be part of the laws of Newfoundland. However, an examination of that statute, particularly the preamble thereof, shows that it was only to apply to such harbours, docks and piers as were authorized by an Act of Parliament passed after 1847 where such Act contained a declaration that the 1847 Act was to be incorporated therewith. We were informed that a legislature was established in Newfoundland in 1832 and it seems unlikely that the Act of the British Parliament passed in 1847 would ever have been made effective in Newfoundland. In any event, we were not referred to any enactment purporting to make it applicable in Newfoundland generally or to the plaintiff's wharf.

In so far as *Vincent v. Lake Erie Transportation Company,* the Minnesota decision referred to by the Dominion Law Report editor, is concerned, upon a careful reading of the judgment of the Court delivered by O'Brien J., we are satisfied that it has no application to the facts of this case. The portion of his judgment which sets out his view of the law reads as follows:

> The situation was one in which the ordinary rules regulating property rights were suspended by forces beyond human control, and if, *without the direct intervention of some act by the one sought to be held liable,* the property of another was injured, such injury must be attributed to the act of God, and not to the wrongful act of the person sought to be charged. If during the storm the Reynolds had entered the harbor, and while there had become disabled and been thrown against the plaintiffs' dock, the plaintiffs could not have recovered. Again, if while attempting to hold fast to the dock the lines had parted, without any negligence, and the vessel carried against some other boat or dock in the harbor, there would be no

[1] 1847, 10 and 11 Victoria, chapter 27.

liability upon her owner. But here those in charge of the vessel deliberately and by their direct efforts held her in such a position that the damage to the dock resulted, and, having thus preserved the ship at the expense of the dock, it seems to us that her owners are responsible to the dock owners to the extent of the injury inflicted.

(Italics added).

In that case, therefore, liability was based upon the fact that those in charge of the vessel "deliberately and by their direct efforts held her in such a position that the damage to the dock resulted". The principle applied was that the ship, having been preserved at the expense of the dock, the owners of the ship were responsible to the dock owners to the extent of the injury inflicted.

In this case, not only was there no allegation in the pleadings, but it was not established, that at any point of time those in charge of the vessel took any steps to preserve the ship at the expense of the wharf. There was evidence that additional bow and stern lines were made fast when the wind was still southeasterly and tending to push the ship away from the wharf but it does not appear that this was done to protect the ship at the expense of the wharf or that in the circumstances of wind and weather then prevailing damage to the wharf was to be expected from further securing the ship in her position. On this point the trial Judge found that it was by no means certain at that time that to ride out the storm at the wharf would necessarily cause damage to the wharf. The defendant ship was there as an invitee and it would not be trespass for her to be pushed by the wind into contact with the wharf. Save on the possible hypothesis that damage to the wharf was to be expected by such pressing there could, as we see it, be no liability arise therefrom, and even if damage were to be expected from the ship remaining there and such a liability could arise it would, in our view, sound in negligence rather than in trespass. On the question of what was reasonably foreseeable, it is not without significance that no action was taken by the plaintiff either to terminate the defendant's invitation to remain moored to its property or to require the ship to leave the wharf. Nor is it established that the ship would not have been held without the additional lines. In fact the additional lines had nothing to do with the damage since they had no effect in pressing or even holding

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the ship against the wharf. In the *Vincent* case, the damage was caused by pounding, and the renewing of the lines as they chafed or parted held the ship in a position where she could pound against the wharf. Here there is no evidence of renewal of lines to hold the ship in position to press against the wharf after she began to do so, and there is thus no material fact upon which liability might be based beyond that of the master's decision in the circumstances not to move the ship away from the wharf. A decision not to move may be evidence of neglect if in the circumstances there is a duty to move, but it is not in itself an act of trespass.

In the circumstances, it is not necessary to come to any conclusion as to whether the principle upon which the *Vincent* case was based is part of the law applicable in the province of Newfoundland. If we had to come to any conclusion on this point, we are inclined to the view that we would adopt the position taken by the dissenting judges in the *Vincent* case, Lewis and Jaggard JJ., as indicated in the judgment of Lewis J., where he said:

> I am of the opinion that one who constructs a dock to the navigable line of waters, and enters into contractual relations with the owner of a vessel to moor the same, takes the risk of damage to his dock by a boat caught there by a storm, which event could not have been avoided in the exercise of due care, and further, that the legal status of the parties in such a case is not changed by renewal of cables to keep the boat from being cast adrift at the mercy of the tempest.

However, even if the principle upon which the *Vincent* case was decided were otherwise applicable in this case, we are of opinion that the point is not open to the appellant on this appeal because the facts constituting the cause of action, that is to say, acts done by the defendant in the emergency for the preservation of the ship at the expense of the wharf, were not pleaded and were not in issue when the case was being tried before Mr. Justice Puddester. Had those facts been alleged, they might have been put in issue by the statement of defence and the defendant might have adduced with regard thereto evidence that would have completely altered the conclusions that one might otherwise draw from the evidence now before the Court. That evidence, it must be remembered, was adduced with regard to the issues raised by the pleadings as presently constituted

and it is to be presumed that the attention of the parties and of their counsel was on those issues and not on issues that had not been raised. Compare *Lamb v. Kincaid*[1] per Duff J. (as he then was) at page 539, and see also *Esso Petroleum Co. Ltd. v. Southport Corporation.*[2]

We are therefore of the opinion that the appeal fails. It is dismissed with costs.

[1] (1906) 38 S.C.R. 516.

[2] [1953] A.C. 218.