

1923  
 April 23.

## TORONTO ADMIRALTY DISTRICT

CANADA STEAMSHIP LINES, LTD. . . . . PLAINTIFF;  
 AND  
 CANADIAN NORTHERN RAILWAY. . . . . DEFENDANT.

*Shipping—Collision—Negligence caused by using a protection for a dock for purpose not intended—Risk thereby undertaken.*

The Master of the ship *Emperor* in making a landing at the defendant's dock came purposely in contact with a cluster of piles placed in the water by the defendant to protect the angle of the dock and about three feet distant therefrom, intending to use them to shove the bow of his ship outward so as to clear the angle, with the result that the ship and dock were both injured.

*Held*, such an obstruction to navigation cannot be made use of by the Master of a ship for a purpose other than that for which it was intended, except at his own risk, and the Master is not absolved from blame by the fact that the obstruction is insufficient to fulfill the object for which it was designed. In the result the plaintiff's action failed and the plaintiff was held liable for the damage to the dock.

ACTION (in personam) for damages by the plaintiff against the defendant, suffered by reason of one of the plaintiff's vessels coming into collision with the defendant's dock in Port Arthur, with a counter-claim by the defendant for resultant damages to the dock.

April 19, 1923.

The case was heard before the Honourable Mr. Justice Hodgins at Toronto.

*Francis King, K.C.* for plaintiff.

*D. L. McCarthy, K.C.* and *A. J. Reid, K.C.* for defendant.

The facts of the case are set out in the reasons for judgment.

HODGINS, L.J.A. now (April 23, 1923) delivered judgment.

On the 16th May, 1921, the SS. *Emperor* of the plaintiff's line, a ship of 525 feet in length, 56 beam, and 31 feet in depth, with 180,000 bushels of wheat, when coming into dock in Port Arthur harbour for the balance of her cargo (about 170,000 bushels) came into collision with the defendant's dock. For the damage she suffered this action is brought while the defendants counter-claim for the injury done to their dock. I agree that under these circumstances the defendants invited the ship to come to their

dock and their duties are set out in such cases as the *Bearn* (1); *The Moorcock* (2) per Butt J.; *The Queen v. Williams* (3); *The Calliope* (4) per Lord Watson; *Butler v. McAlpine* (5) per Fitzgibbon L.J., and *Scrutton v. Attorney General of Trinidad* (6), all of which were recently considered by the Divisional Court here in the action of *Great Lakes SS. Co. v. Maple Leaf Milling Co.* (7).

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The dock to which the ship was proceeding was a new cement dock reinforced by 80-pound steel rails embedded in its face below the top, the ball of each rail protruding three-quarters of an inch along the face. As it was intended to continue this dock the ends of the rails were cut off sheer with the side of the dock. According to plan Exhibit 2 a narrow water passage ran between that side and the old dock which does not appear in Exhibit 4, but in each the alignment of the old dock is shown not so far out as the new dock by about seven feet. About three feet from the corner of the new dock, and opposite the line of division between the docks, the defendants as owners of the new cement dock, for the purpose of protecting the angle of that corner had planted in the soil of the harbour a cluster of about 30 wooden piles which came out slightly beyond the line of the dock produced or about three feet. These piles were tied together by a steel cable tightly clinched and clamped, and were a prominent object.

The ship after some manoeuvring on her way in got alongside and close enough to the old dock to land some seamen on it by means of a 14-foot boom from the ship's side. This boom came out from the same part of the ship as that damaged by the collision which part I shall for convenience call the "shoulder" of the ship. It is about 75 feet from the stem and where the beam was the full 56 feet, but just beginning to turn in towards the stem. The distance of the shoulder from the old dock at that moment is given by the mate as six or seven feet, and the stern or near the stern as 10 or 12 feet. He says the boat was gradually coming in. The second mate who was standing 75 feet from the stern says that the side where he stood

(1) [1906] P.D. 48.

(4) [1891] A.C. 11.

(2) [1889] 14 P.D. 64.

(5) [1904] 2 Ir. R., Q.B.D. 445.

(3) [1884] 9 A.C. 418.

(6) [1920] 90 L.J.P.C. (N.S.) 30.

(7) [1922] Ont. W.N. 203; [1923] 3 D.L.R. 308.

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was about 10 feet from the old dock. It will thus be seen that the shoulder of the bow would be about in line with the face of the new dock produced, the ship lying at an angle to the face of the old dock.

Having landed the men in this fashion the ship continued to go forward and the master intended that she should rub the piles so that her bow should get a shove off sufficient to take her past the angle of the new dock when she would have to be straightened up to lie alongside it. The master said he could not from his position on the bridge see the water space between his ship and the old dock, but the mate could. He, however, did not shout loud enough to inform the master. He appears, as does the master, to have acted on the belief that the piles were stout enough to fend them off. Instead of this being the case they bent well back from the impact and the ship came on and into the corner of the new dock. It damaged the cement there and one rail came away sufficiently to pierce the hull of the vessel and run in under where the mate was standing about 16 feet. This is the damage sued for, and the negligence is said to be the misleading position and appearance of the piles inducing the master in effect to assume an invitation for their use as a fender to assist his ship to avoid contact with the dock. It is suggested that they were really part of the dock and the invitation as including the use to which they were put by the master in what he did. Evidence was given that similar clusters of piles were used in different lake ports for this purpose. The master frankly says that in his then position he would have struck the end of the dock if the piling was not there and that there was nothing accidental about it; he ran against it to push the ship out. The mate agrees in this.

My conclusion on the facts is that the master was desirous of landing his men on the old dock and manoeuvred his ship for that purpose, getting her into a somewhat awkward position with respect to the new dock alongside which he intended to lie. This position was with his shoulder in a line with the face of the new dock, and his stern outside that line so that he would have in some way to get the ship's bow and shoulder past the end of the new dock. To do this he used the piles for a purpose for which

they were neither designed nor sufficient, resulting in the ship coming in contact with the new dock. If the experience of Albinson, master of the *Laketon* is to be considered the *Emperor* must have struck the piles a severe blow, as the *Laketon* on the occasion referred to rubbed against them and they only bent back one foot or 18 inches, and then came back, allowing the ship to scrape along the cement dock.

The mistakes amounting to negligence which the master of the *Emperor* made, were, to my mind, four in number; first in laying his ship opposite the old dock in a bad position for the new dock due to his desire to get close enough to drop his men on it; secondly in coming in contact with the piles with such force as to bend them aside, and push past to the new dock; thirdly in not reversing his course till he could make his way past the corner of the new dock on a fairly straight course instead of using the piles to assist him when he was unaware of their resisting power or the purpose which they were intended to serve; fourthly, though there is little evidence on this point, in not approaching the new dock, which he admits he regarded as one usually dangerous to a steel ship, and therefore difficult to approach, by a different and, therefore, safer course, a manoeuvre which is not shown to be impossible to accomplish in that harbour, the channel alongside the dock being about 200 feet wide.

I know of no rule or practice which allows a ship to use for its own purposes an obstruction to navigation placed separate and distinct from the dock which the ship intends to use without experience of its strength, or knowledge of why it is there. I conceive that the duty of the master under these circumstances is to avoid such an obstruction and to so handle his ship as to make his contact with the dock to which he is going without striking or rubbing along such a projection above the water of the harbour unless he is prepared to take the risk of what may happen.

For these reasons I think the action fails and must be dismissed with costs.

For the same reason it seems to me that the counter-claim of the defendants should succeed.

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The fact that the piles were insufficient to fulfil their purpose of protecting the end of the dock is not one that can be urged by a ship as absolving it from blame where the user of them is for quite a different object and where the ship's course and momentum cause them to be struck so forcibly as to require greater strength and resisting power than such a protection usually calls for.

There should be judgment on the counter-claim for damages to be assessed by the Registrar to whom it is referred to ascertain the damages. The costs of the counter-claim down to and including the trial will be paid by the plaintiffs in so far as the ordinary costs of the action do not cover them, as, however, they must do in this case to a very large extent.

Judgment may be entered for these damages and the costs of the reference upon the making of the Registrar's report.

*Judgment accordingly.*

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