NOTES

The "Algoway"

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Shipping — Negligence — Ship Grounded While Taking on Cargo — Doctrine of Identification.

An interesting problem affecting common carriers and cargo-owners has recently arisen. Suppose a vessel grounds alongside a wharf because of the negligence of both the vessel and the wharf owner. Can the owner of cargo laden on board the delinquent vessel recover from the wharf owner? Wells, D.J.A., recently rejected such a claim [1] and unhappily the Supreme Court of Canada, in finding the plaintiff carrier fully at fault, did not review this statement of imputed negligence.[2]

The action arose out of a grounding in the Lakehead Harbour of the ship "Algoway", owned by the plaintiff-carrier, while in the process of loading grain belonging to the second plaintiff. At first instance, Mr. Justice Wells dismissed the carrier's claim against the defendant elevator-owners because of contributory negligence. He also held that the carrier's contributory negligence bound the cargo-owners [3] and in consequence the cargo-owner's claim was defeated as well. In the Supreme Court, Ritche, J., in rendering the unanimous decision, held that the grounding arose from the sole negligence of the carrier;[4] thus no review was made of the doctrine of identification and Mr. Justice Wells' decision remains uncontradicted.

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[1] *The Algoma Central and Hudson Bay Railway Company and Parrish and Heimbecker Limited* v. *Manitoba Pool Elevators Limited and Lakehead Harbour Commissioners* (1964) Ex. C.R. 505.

[2] 1966 S.C.R. 359.

[3] (1964) Ex. C.R. 505 at 519.

[4] Implicit in such a disposition of the cargo owner's case was a reversal of the trial judge's finding that the occupier of the wharf and water-lot premises was in fact contributorily negligent, though of course in denying the appeal the court accepted the trial judge's findings of fact in every other respect.

The doctrine of identification had its first full-blown appearance in common law in 1849 in *Thorogood* v. *Bryan* [5] when the negligence of a driver of a vehicle was imputed to the passenger who thereby lost his remedy against the equally negligent third party. This decision which put passengers, for the purpose of taking the action, in the same position as the driver of the vehicle they were in,[6] received much serious criticism [7] before it was finally swept away in *The "Bernina"*.[8] Nevertheless, it was acknowledged that the actual assumption of control (as did not exist between passenger and driver) could be ground for identification.[9]

Can such a degree of control be found in a contract for carriage of goods by sea ? This finding is important in the present case for Wells, D.J.A. could only support his identification of the cargo-owners with the carrier's negligence on this basis. Unhappily, he himself gives no justification.[10] It is submitted that the authorities are to the contrary,[11] and that a cargo-owner cannot be identified with a carrier's fault.

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[5] 8 C.B. 115.

[6] *E.g.*, per Pollack P. in *Armstrong* v. *Lancashire and Yorkshire Railway Co.* (1875) L.R. 10 Ex. 47 at 52; per Lord Esher M.R. in *The "Bernina"* (no. 2) (1887) 12 P.D. 58 at 67.

[7] The editors of Smith's Leading Cases, Willes and Keating, strongly doubted its soundness in a note to *Ashby* v. *White*, Sm. L.C. (Editor's note), Vol. 1, 3rd ed., p. 132*a* and this note was adopted by all subsequent editors; Parke, B., whose casual dictum in *Bridge* v. *Grand Junction Railway* 3 M. & W. 244 was the basis of *Thorogood* v. *Bryan* 8 C.B. 115, questioned the latter case (per Lord Esher, M.R., in *The "Bernina"* (No. 2) (1887) 12 P.D. 58 at 71); Dr. Lushington refused to apply this doctrine in admiralty in *The "Milan"* (1861-2) 5 L.T.R. 590; Luss. 388; Bramwell, B., while following it in *Armstrong* v. *Lancashire and Yorkshire Railway Co.* (1875) L.R. 10 Ex. 47, justified it on a technical ground rather than on identification in *The "Bernina"* (No. 2) (1888) 13 A.C. 1 at 11; in the American Supreme Court, it was rejected in *Little* v. *Hackett*, 9 Davis Supr. Ct. U.S. 366.

[8] (1888) 13 A.C. 1 followed in *Canadian Pacific Railway Company* v. *Smith* (1921) 62 S.C.R. 134 at 137; 59 D.L.R. 373 at 375.

[9] *Ibid.*, p. 18, per Lord Watson.

[10] Mr. Justice Wells' brief reference to the problem (reported in part 5 of the headnote) is to be found on p. 519, the complete text of which reads as follows:

> 'It would therefore seem to me that because of the plaintiff's contributory negligence in this case, by which, in my opinion, the plaintiffs Parrish and Heimbecker are also bound, insofar as the defendants are concerned, these plaintiffs are not entitled to any recovery against the defendant elevator company."

[11] A synopsis of the problem is to be found in *The British Shipping Laws*, 11th ed., 1963, Vol. 3, pp. 1146-47.

The issue of identity of cargo-owners and carriers was decided in 1861 in *The "Milan"*[12] more than twenty-five years before the rejection of the *Thorogood* v. *Bryan doctrine.* Dr. Lushington was faced with the proposition that this doctrine should be extended to identify cargo-owners with carriers. Anticipating it being overruled, he doubted its validity, noted its obscurity and refused to follow it. He indicated that the inexistence of control by the cargo-owner over the carrier made identification impossible.

> "The owner of a ship has the appointment of the master and other officers, and the active control over them; if the law be violated by his agents, there is no injustice in visiting the consequences on him, he alone can take precautions against the occurrence of negligent or erroneous navigation; whereas, to visit the errors of the master and crew upon the owner of cargo is to inflict a loss upon one who has no power, directly or indirectly, to prevent the misconduct which occasioned the disaster." [13]

> "I cannot conceive a responsibility for an act done where the individual has not, either by himself or by his agent, any power of interference or control." [14]

Although this decision was followed in many instances,[15] it was sometimes doubted whether Dr. Lushington had indeed rejected the doctrine of identification[16] because he had awarded the same proportion of damages to both carrier and cargo-owner.[17] This doubt was finally cleared up in 1911 with Lord Atkinson succinctly holding that *The "Milan"* had rejected the doctrine of identification as between carriers and cargo-owners.[18]

Although *The "Milan"* rule as to apportionment of damages was restricted to collision,[19] it is submitted that this never meant that the rejection of imputed negligence was similarly restricted. Mr.

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[12] Luss 388; (1861-2) 5 L.T.R. 590.

[13] *Ibid.*, 593.

[14] *Ibid.*, 594.

[15] *The "Eliza Keith"* (1877) 3 Que. L.R. 143 at 146-7; per Jessel, M.R. in *Chapman* v. *Royal Netherlands Steam Navigation Co.* (1883) 10 Q.B.D. 521 at 538, 545; per Butt, J. in *The "Vera Cruz"* (1884) 9 P.D. 88 (on appeal on another point *ibid.*, 96); per Jeune, P. in *The "Harvest Home"* (1904) P.D. 409 at 418 (on appeal on another point (1905) P.D. 177).

[16] Per Jeune, P. in *The "Frankland"* (1901) P.D. 161 at 167; per Lord Esher, M. R. in *The "Bernina"* (no. 2) (1887) 12 P.D. 58 at 83 (on appeal at (1888) 13 A.C. 1) quoted favourably by Sir Gorrel Barnes in *The "Circe"* (1906) P.D. 1 at 9-10; per Vaughn Williams, L.J. in *The "Drumlanrig"* (1910) P.D. 249 at 260.

[17] Following *Hay* v. *Le Neve* (1824) 2 Shaw's Scot. App. Cases 395 (H.L.); *Maddox* v. *Fisher* sub nom *The "Independence"* 14 Moo P.C.C. 103.

[18] *The "Drumlanrig"* (1911) A.C. 16 at 23-24; approved in *Morrison S.S. Co.* v. *Greystoke Castle* (1947) A.C. 265.

[19] *The "Devonshire"* (1912) A.C. 634.

Justice Wells has, however allowed identification in a non-collision case. This creates an anomolous situation. A cargo-owner could at once be identified and at once not be identified with a delinquent vessel which had been sunk as a result of the joint tortfeasance of that vessel, of another vessel, and, for example, a lighthouse keeper. Can it logically be argued that a cargo-owner can have, and not have, control (the basis of identification) contemporaneously ? It does seem clear that a cargo-owner is not to be identified with its negligent carrier, whether the loss is occasioned by a collision or by some other happening. At least, this was clear until the recent decision of Wells, D.J.A.

It is submitted that it was unfortunate that the Supreme Court did not see fit to correct the lower court and indicate that in such a case the innocent cargo-owner could effect full recovery from the elevator-owner. This accords with the principle that, when an Admiralty case does not involve a collision between two or more ships, in the absence of statutory relief, one looks to the common law doctrine of complete recovery from either both or one of the joint tortfeasors [20] as each of them has breached a separate duty of care to the cargo-owner. Relief is to be in full because the apportionment provisions of the Canada Shipping Act only apply to cases involving collisions between vessels.[21] Neither can statutory apportionment come from provincial enactments, e.g., Ontario Negligence Act for the Federal Government has occupied the field by the enactment of The Canada Shipping Act.[22]

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[20] *The "Zeta"* (1893) A.C. 468; *The "Devonshire"* (1912) A.C. 634; *The "Sparrow's Point"* (1951) S.C.R. 396 at 404;*Gartland Steamship Company* v. *The Queen* (1960) S.C.R. 315 at 326-7.

[21] Per Judson, J. in *Gartland Steamship Company* v. *The Queen* (1960) S.C.R. 315 at 327.

[22] R.S.C. 1952, Ch. 29; *R.* v. *Nisbet Shipping* (1953) 1 S.C.R. 480. It is noteworthy that the Crown, in virtue of the prerogative, can take advantage of such provincial enactment. See *Gartland Steamship Company* v. *The Queen* (1949) S.C.R. 510 at 515, 520, 521.