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Century Insurance Co. of Canada v. Case Existological Laboratories Ltd.

Century Insurance Company of Canada, Commercial Union Assurance Company Ltd., Hartford Fire Insurance Company, Norwich Union Fire Insurance Company Ltd., Phoenix Assurance Company Ltd., Prudential Assurance Company Ltd., Switzerland General Insurance Company Ltd., Insurance Corporation of British Columbia (Defendants), Appellants; and
Case Existological Laboratories Ltd. (Plaintiff), Respondent;
and
Foremost Insurance Company (Defendant); and
R. Douglas Agencies (1971) Ltd. (Defendant).

[1983] 2 S.C.R. 47

Supreme Court of Canada

File No.: 17103.

1983: March 2, 3 / 1983: September 27.

Present: Ritchie, Dickson, McIntyre, Chouinard and Wilson JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

Insurance (Marine) -- Perils of the sea -- Loss -- Claim -- Vessel sinking due to negligence of insured's employee -- Whether the loss caused by a "peril of the seas".

Insurance (Marine) -- Risk insured -- Duty to disclose all material circumstances relative to the risk complied with -- Clause limiting risk breached -- Insurer not discharged from liability.

Respondent (the insured) claimed from the appellants (the insurers) an indemnity for the loss of its vessel. The vessel, a converted barge of unique design, partially open to the sea on her bottom and kept afloat by airtight deck, sank when a member of her crew negligently permitted an air pressure control valve to remain open so that the air no longer supported the platform and the vessel

completely submerged. The appellants disputed the claim maintaining that the loss did not arise from a "peril of the seas" and therefore was not within the risk insured by the policy. At trial, the judge concluded in favour of the appellants and dismissed respondent's action. The majority of the Court of Appeal set aside the judgment.

Held: The appeal should be dismissed.

The loss was covered by the policy. The fact that there was negligence on the part of a member of the crew did not exclude liability on the policy. An act is not negligent in itself but only in relation to a foreseeable risk of harm. If that foreseeable risk of harm is a peculiarly marine risk, then the act, coupled with its foreseeable consequence, is a fortuitous accident of the seas, a peril of the seas and the proximate cause of the loss.

Further, the respondent did not fail to disclose to the appellants all the circumstances which were material to the risk. By describing the vessel accurately in the report of the marine surveyor, the respondent discharged that obligation.

Cases Cited

Cohen, Sons and Co. v. National Benefit Assurance Co. (1924), 18 L1. L. Rep. 199; Canada Rice Mills, Ltd. v. Union Marine & General Insurance Co., [1941] A.C. 55, applied.

APPEAL from a judgment of the British Columbia Court of Appeal (1982), 133 D.L.R. (3d) 727, 35 B.C.L.R. 364, [1982] I.L.R. 1-1567, allowing respondent's appeal from a judgment of McKenzie J. (1980), 116 D.L.R. (3d) 199, [1981] I.L.R. 1-1335, dismissing an action on a marine insurance policy. Appeal dismissed.

David Brander Smith, for the appellants.
David Roberts, Q.C., and Peter Lowry, for the respondent.

Solicitors for the appellants: Bull, Housser & Tupper, Vancouver.
Solicitors for the respondent: Campney & Murphy, Vancouver.

The judgment of the Court was delivered by

RITCHIE J.:-- This is an appeal brought with leave of this Court from a judgment of the Court of Appeal of British Columbia whereby that Court had allowed an appeal from a judgment

rendered at trial by McKenzie J. dismissing the claim of the Case Existological Laboratories Ltd. (hereinafter referred to as the "insured") for indemnity under the terms of a hull policy insuring a certain vessel Bamcell II owned by the insured.

The facts giving rise to this claim are somewhat unusual if not bizarre but an "Agreed Statement of Facts" has been prepared and signed by counsel for all concerned so that many of the somewhat complicated features of the virtually unique constituents of the Bamcell II and the reasons therefor can be accepted as being undisputed.

It appears to me to be convenient to reproduce hereunder those portions of that Statement which are most relevant to the issues raised by this litigation:

> 2. The Plaintiff is a company of naval architects and marine engineers. In 1974 it entered into an agreement with an oceanographic institute affiliated with the University System of Georgia to construct and supply floating modules to be used in underwater studies that were to be conducted in Patricia Bay. The study was known as the CEPEX Project.
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> 3. Bamcell II was launched during August 1974. The hull was constructed of steel. It consisted of two compartments forward which were watertight, and four others, two midships, the bottoms of which were not intact, and two aft, which had no bottoms. The level of the water in these four compartments was maintained by air pressure. The pressure of the air in the four compartments was controlled and regulated by a series of valves. When the air pressure in the four compartments was reduced, the stern lowered in the water. When the air pressure in the four compartments was increased, the stern raised to a level position. The level of the water in the four compartments rose and fell accordingly. This permitted Bamcell II to be used for the purpose of deploying and recovering the modules which the Plaintiff was required to supply for the CEPEX Project.
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> 4. Acting as the Plaintiff's broker, R. Douglas Agencies (1971) Ltd. sought to place insurance coverage on Bamcell II and offered the risk to the defendant underwriters. Bamcell II was surveyed by Richard H. Meadows & Associates Ltd., marine surveyors, on August 30, 1974 and the attending surveyor (Mr. Meadows) prepared and issued a report. The risk was accepted by Coast on behalf of the underwriters it represented and by ICBC on September 20, 1974.
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> 5. Coast issued its Policy September 30, 1974. It was subscribed to by ICBC. The coverage was effective for one year as of September 20, 1974.

> 6. On March 8th, 1975, whilst Bamcell II was anchored in Patricia Bay, the Plaintiff's employee Mr. Richard Powell who was accompanied by James Halldorsen, a new employee, boarded Bamcell II. In order to lower the stern, Mr. Powell opened the valves controlling the pressure of air in the four aft compartments, allowing air to escape. He negligently permitted a valve or valves to remain open so that the air in the compartments was displaced by water in sufficient quantity that Bamcell II completely submerged.

The word "Coast" as used in the above statement of facts refers to the underwriting concern which accepted the risk on behalf of all the appellants except the Insurance Corporation of British Columbia which company subscribed separately to the same policy and thereby accepted the same risk.

The policy which was obtained covering the Bamcell II was in the form set out in the schedule to the Insurance (Marine) Act, R.S.B.C. 1979, c. 203. The language of the policy is sanctified by long usage in the marine insurance world and the operative words read as follows:

> TOUCHING the Adventures and Perils which the Assurers are contented to bear and do take upon themselves in this Voyage, they are of the Seas, Men-of-War, Fire, Enemies, Pirates, Rovers, Assailing Thieves, Jettisons, Letters of Mart and Countermart, Surprisals, Takings at Sea, Arrests, Restraints and Detainments of all Kings, Princes and People, of what Nation, Condition, or Quality soever, Barratry of the Master and Mariners, and of all other Perils, Losses and Misfortunes, that have or shall come to the Hurt, Detriment or Damage of the subject matter of this Assurance ... And it is agreed by us, the Assurers, that this Writing or Policy of Assurance shall be of as much Force and Effect as the surest Writing or Policy of Assurance heretofore made in Lombard Street, or in the Royal Exchange, or elsewhere in London.

The difference of opinion between the trial judge and the majority of the Court of Appeal in this case turns in great measure on the meaning and effect to be assigned to this paragraph of the policy and more particularly to the term "perils of the seas" as this phrase is incorporated therein and applied to the circumstances disclosed in the agreed statement of facts.

It is of first importance to note that the parties agree that the sinking of the Bamcell II was due to the fact that an employee of the insured (Powell) "negligently permitted a valve or valves to remain open".

There is a strong suggestion in the judgment of the learned trial judge that the sinking was attributable to the deliberate or intentional act of Powell in opening the valves in the first place, but the sixth paragraph of the agreed statement of facts makes it plain that it was the negligent failure to close the valves which precipitated the submerging of the Bamcell II.

The cause of the loss becomes a significant factor in determining whether or not the risk here involved was such as to give rise to a valid claim for a loss by "perils of the seas" within the meaning of the policy.

The meaning of the phrase "perils of the seas" has been the subject of various interpretations over the years but the Schedule to the Insurance (Marine) Act (supra) contains a set of "Rules for Construction of Policy" which include the following:

> The term "perils of the seas" refers only to fortuitous accidents or casualties of the seas. It does not include the ordinary action of the winds and waves.

The learned trial judge was of the view that the negligent omission which is agreed to have occurred in this case was not a fortuitous accident or casualty and that the negligence which both parties agree to have resulted in the valves being left open was not a "peril of the seas" within the meaning of the policy. As will hereafter appear, Mr. Justice Lambert, speaking on behalf of the majority of the Court of Appeal expressed a different opinion and this is the difference which is so clearly reflected in the first ground of appeal to this Court which reads as follows:

> That the Court of Appeal for British Columbia erred in finding that the loss in this case was caused by a peril of the seas; and in particular:
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> (a) the Court of Appeal for British Columbia erred in finding that a peril of the sea can be created by the negligent omission of a crew member on board the vessel which results in the sinking of the vessel, without any contribution from the sea, which was a wholly passive agent, and,
> (b) the Court of Appeal for British Columbia erred in finding that it is enough that the risk of sinking is foreseeable and the risk of sinking is of a peculiarly marine nature.

In searching for the true meaning to be assigned to the phrase "perils of the seas" as it occurs in the policy, assistance may also be had from the language used in s. 57(2)(a) of the Marine Insurance Act, R.S.B.C. 1960, c. 231 which is reproduced in the reasons for judgment of Mr. Justice Lambert in the Court of Appeal and is now s. 56(2)(a) and which reads as follows:

> 57. (1) Subject to the provisions of this Act, and unless the policy otherwise provides, the insurer is liable for any loss proximately caused by a peril insured against, but, subject as aforesaid, he is not liable for any loss which is not proximately caused by a peril insured against.
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> (2) In particular

> (a) the insurer is not liable for any loss attributable to the wilful misconduct of the assured, but, unless the policy otherwise provides, he is liable for any loss proximately caused by a peril insured against, even though the loss would not have happened but for the misconduct or negligence of the master or crew;

The effect of this section when read in conjunction with the "Rules for Construction of Policy" contained in the Schedule is that in order to succeed in a claim under the perils of the seas provision the insured must establish that the proximate cause of the loss was a "fortuitous accident or casualty of the seas", and furthermore, the claim may succeed even though the loss would not have happened "but for the misconduct or negligence of the master or crew."

The most widely accepted definition of the phrase "perils of the seas" as it is found in marine insurance policies is that contained in the reasons for judgment of Lord Wright in Canada Rice Mills, Ltd. v. Union Marine & General Insurance Co., [1941] A.C. 55 at pp. 68-69 where he said:

> Where there is an accidental incursion of seawater into a vessel at a part of the vessel, and in a manner, where seawater is not expected to enter in the ordinary course of things, and there is consequent damage to the thing insured, there is prima facie a loss by perils of the sea. The accident may consist in some negligent act, such as improper opening of a valve, or a hole made in a pipe by mischance, or it may be that seawater is admitted by stress of weather or some like cause bringing the sea over openings ordinarily not exposed to the sea or, even without stress of weather, by the vessel heeling over owing to some accident, or by the breaking of hatches or other coverings. These are merely a few amongst many possible instances in which there may be a fortuitous incursion of seawater. It is the fortuitous entry of the seawater which is the peril of the sea in such cases. Whether in any particular case there is such a loss is a question of fact for the jury.

The last sentence of that quotation must in my view be taken as meaning that "Whether in any particular case there is such a loss is a question of fact for the jury" properly instructed as to the applicable law or for the trial judge who has properly instructed himself.

Like Mr. Justice Lambert I subscribe also to what was said by Bailhache J. in Cohen, Sons & Co. v. National Benefit Assurance Co. (1924), 18 Ll. L. Rep. 199 at p. 202 where he was considering the case of the sinking of a submarine because workmen negligently left a valve open. The learned judge there said:

> In my view, the unintentional admission of sea water into a ship, whereby the ship sinks, is a peril of the sea. There is no warranty in this policy against negligence; there is no exception of negligence; and the fact that the unintentional admission of water into the ship is due to negligence is, in my

> opinion, totally and absolutely immaterial. There is a peril of the sea whenever a ship is afloat in the sea, and water from the sea is unintentionally admitted into her which causes a loss, either to the cargo or to the ship.

In the course of the reasons for judgment which he delivered on behalf of the majority of the Court of Appeal Mr. Justice Lambert observed:

> Both parties agree that the fact that there was negligence on the part of a member of the crew does not exclude liability on the policy. This rule goes back as far as Dixon v. Sadler (1839), 5 M. & W. 405, 151 E.R. 172, and is now codified in para. 57(2)(a) of the Marine Insurance Act, which I have already set out. But counsel for the insurers says that in addition to the negligence, there must be an operating peril of the seas of some category peculiar to marine operations, and counsel for the assured says that a sinking caused by a negligent act is a sufficient fortuitous accident of the sea.
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> . . .
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> In my opinion, the resolution of this narrow issue rests on an analysis of the negligent act. An act is not negligent in itself but only in relation to a foreseeable risk of harm. If that foreseeable risk of harm is a peculiarly marine risk, then the act, coupled with its foreseeable consequence, is a fortuitous accident of the seas and a peril of the seas and the proximate cause of the loss.
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> That conclusion is sufficient to decide the first issue in this appeal. In this case there is no doubt that it was the risk of the Bamcell II sinking, and causing loss by that sinking, that made the failure to close the deck valves a negligent omission when there was a duty to act. When that negligent omission is coupled with its foreseeable consequence, the proximate cause of the loss in this case was a peril of the seas and, as such, covered by the policy.

I am in respectful agreement with the last quoted paragraphs taken from the reasons for judgment of Mr. Justice Lambert and I am satisfied that in the result they are sufficient to decide the issues raised by the first ground of appeal in favour of the respondent.

The next substantial ground of appeal alleges that the Court of Appeal erred in not finding that a state of unseaworthiness existed in the vessel with the privity of the insured and that putting to sea in such an unseaworthy state constituted a bar to recovery for a peril of the sea and therefore a bar from recovery under the policy in question.

Once again I find myself in agreement with Mr. Justice Lambert in finding that the loss here in question was caused by the negligence of the crew rather than by unseaworthiness of the vessel.

In this regard I respectfully adopt the following passages from the majority judgment of the Court of Appeal:

> In my opinion, the allegations made by the insurers do not relate to the seaworthiness of the vessel. It is true that the vessel would sink if the deck valves were left open, but a conventional ship would also sink if the sea cocks were opened. In that sense both are inherently unseaworthy since they are heavier than water.
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> The allegations of unseaworthiness are really allegations of lack of due diligence on the part of the assured. As such, if they were established they would produce a defence to a claim under the Inchmaree clause. But they do not convert the negligent act of the member of the crew to something else, and they do not prevent if from being, with its foreseeable consequence, the proximate cause of a loss by a peril of the seas.
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> In my opinion, the allegations with respect to a defence of unseaworthiness do not establish that defence in this case.

In the case at bar the respondent formally abandoned any claim under the so-called Inchmaree clause which therefore plays no part in these proceedings.

The next allegation contained in the Notice of Appeal is that the Court of Appeal erred in construing a clause in the policy containing the words "WARRANTED that" as a suspensive condition and not a true warranty. Before considering this ground it appears to me to be necessary to recite the terms of the clause in question which reads as follows:

> WARRANTED that a watchman is stationed on board the BAMCELL II each night from 2200 hours to 0600 hours with instructions for shutting down all equipment in an emergency.

It is significant that, although there was no watchman stationed on board Bamcell II during the hours prescribed in that clause, this had absolutely no bearing whatever on the loss of the vessel which occurred in mid-afternoon. The clause would only have been effective if the loss had occurred between 2200 hours and 0600 hours, and it was proved that there was no watchman stationed aboard during those hours. To this extent the condition contained in the clause constituted a limitation of the risk insured against but it was not a warranty.

Finally, the appellants contend that the insured failed to disclose to them circumstances which were material to the risk as required by ss. 19 and 20 of the Insurance (Marine) Act (supra). In the circumstances of this case regard must be had to the custom of the marine insurance business which

is in my view accurately described by Lambert J.A. in the following paragraph of his reasons for judgment:

> In accordance with custom, the ship owner asked an agent to obtain the insurance and, again in accordance with custom, the agent retained a marine surveyor whose report was provided to the insurance underwriter. In this case the particular marine surveyor was proposed by the underwriter and there is no doubt that the owners of the Bamcell II made complete disclosure of all material circumstances to him.

The surveyor's report on the hull is fully set forth in those reasons and the disclosures therein contained are epitomized by Mr. Justice Lambert in the following passage:

> The disclosure that was made plainly states that there were six compartments; that the two midships compartments and the two aft compartments were not water-tight, indeed, that the two aft compartments had no bottoms at all; and that the two forward compartments contained a lot of cement. The report does not plainly state that if the four aft compartments were flooded the vessel would sink. But surely, unless the vessel was equiped with flotation devices, the conclusion that it would sink was inevitable. The report says nothing about flotation devices.
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> The assured is obliged to disclose every material circumstance. In my opinion, by describing the vessel accurately in the report of the marine surveyor, the assured discharged that obligation. In a report on a conventional vessel it is not a failure of disclosure if the report does not say that if the sea cocks are opened and enough water enters the interior of the vessel, it will sink. I think that the same is true in this case. Every material circumstance was disclosed. It was not the obligation of the assured to speculate about the various possibilities for improper operation of the vessel which would cause it to sink, including leaving the deck valves open, thereby permitting too much sea water to enter the hull.

It will be seen that I am in general agreement with the reasons for judgment of Mr. Justice Lambert and I would accordingly dismiss this appeal with costs.

> Appeal dismissed with costs.