Federal Court Cour fédérale

Date: 20141020

Docket: T-298-12

Citation: 2014 FC 974

St. John's, Newfoundland and Labrador, October 20, 2014

PRESENT: The Honourable Madam Justice Heneghan

BETWEEN:

MAXWELL FORSEY

Plaintiff

and

BURIN PENINSULA MARINE SERVICE CENTRE

Defendant

JUDGMENT AND REASONS

I. OVERVIEW

[1] Mr. Maxwell Forsey (the "Plaintiff") seeks recovery of damages from the Burin Peninsula Marine Service Centre (the "Defendant") following the fall of the fishing vessel "Eastern Gambler" (the "Vessel") while located on the Defendant's premises at Fortune, Newfoundland and Labrador on July 10, 2011.

[2] The Defendant operates a Marine Service Centre in Fortune where vessels are lifted from the water for the purposes of storage and repairs.

[3] The fall damaged the fibreglass hull of the Vessel, leading to the spill of fuel oil. The Vessel was declared to be a constructive total loss and the Plaintiff's insurers paid out the sum of $200,000.00 in respect of that loss.

[4] Costs were incurred to contain and recover the fuel oil. Costs were also incurred in connection with the attendance of a marine surveyor to inspect the Vessel after the fall.

[5] The Plaintiff seeks the following relief:

a) General damages for the damage and loss of the Vessel in the amount of CAD $200,000.00;

b) General damages for the cost of fuel containment and clean-up in the amount of CAD $63,186.86;

c) General damages for the cost of surveyors to assess the damage and repair costs of CAD $6,020.00;

d) Pre-and post judgment interest until the date of full payment at the commercial rate; and

e) Costs.

II. THE WITNESSES

[6] The following individuals testified on behalf of the Plaintiff:

i. The Plaintiff;

ii. Mr. Simeon Forsey, a brother of the Plaintiff;

iii. Mr. Travis Forsey, a son of the Plaintiff; and

iv. Mr. Patrick Byrne, a marine surveyor.

[7] The Defendant called the following witnesses:

i. Mr. Heber Lethbridge, a retired truck driver;

ii. Mr. Anthony Kearley, a son of Mr. Robert Ayres and an employee of the Defendant as a general labourer;

iii. Mr. Dwayne Kearley, an employee of the Defendant; and

iv. Mr. Robert Ayres, manager of the Defendant.

[8] The parties also provided an Agreed Statement of Facts.

[9] The cross-examination of Mr. Ayres included reference to parts of his Discovery Examination pursuant to the *Federal Courts Rules*, SOR/98-106 (the "Rules").

[10] Certain documents and photographs were also submitted as evidence in a Joint Book of Documents. Those documents included invoices, the work order from June – July 2011, a "Statement of Acceptance of Responsibility" (the "Statement"), which is the written contract at issue in this proceeding, a demand letter from the Plaintiff to the Defendant, and a copy of the damage survey prepared by Mr. Byrne.

[11] Paragraph 3 of the Statement reads as follows:

> I understand and agree that the securing and locking of my boat is my responsibility, and not that of the said Marine Service Centre, or of its agents, servants, employees, or otherwise. Furthermore I agree to indemnify and save harmless the said Marine Service Centre and its officers, agents, employees, servants or otherwise from, any claims on my part with respect to the same.

[12] The Plaintiff, owner of the Vessel, testified about his experiences in using the Defendant's facility in the past and why he was using it in the summer of 2011. The Vessel was brought in for routine maintenance. The Vessel was removed from the water on June 27, 2011 after the Plaintiff signed the Statement. A work order, dated June 27, 2011, was written, outlining the services to be provided to the Plaintiff. Subsequently an invoice was prepared, dated September 21, 2011, setting out the charges for the work and services actually provided.

[13] Mr. Simeon Forsey is the "working" Master of the Vessel. He had contacted the Defendant on or about June 24 or 25 to arrange for the Vessel to be brought in and lifted from the water.

[14] Mr. Travis Forsey is the "Shore Captain" of the Vessel, that is, he looks after the administrative matters related to her operation. Due to physical limitations, he did not assist in securing the Vessel or in pushing in any of the cradles.

[15] Mr. Byrne is a marine surveyor and an employee of TriNav. He testified about his attendance at the Defendant's premises on July 12, 2011 for the purpose of surveying the damage and preparing a report on that damage, including an opinion as to its cause. Mr. Byrne was not

qualified as an expert witness and his evidence addressed the facts relating to the events of July 12, 2011.

[16] Mr. Lethbridge is a retired truck driver. He testified about his presence inside the cab of his truck parked outside the Defendant's premises on the night of July 9 and early morning of July 10, 2011 when he heard a loud bang. Upon looking outside, he saw that the Vessel was on her side. He also described the weather conditions as very windy.

[17] Mr. Anthony Kearley testified about his role in the securing of the Vessel on the Defendant's premises in June 2011. He was involved in picking up the cribbing from the stock pile near the shed. He carried it down by forklift. He testified that he selected the cribbing.

[18] Mr. Dwayne Kearley testified about the general procedure followed in securing a vessel on land, beginning with its placement on keel blocks followed by the construction of a "cradle" on the sides of the Vessel which is further secured by cross-braces which are passed beneath the hull and secured by screws or nails. The side pieces are variously known as "cradles" or "cribbing", and the cradle is custom built to fit the shape of a particular vessel.

[19] He also testified specifically about the procedure that was followed in relation to the Plaintiff's Vessel upon arrival at the Marine Centre in June 2011.

[20] Mr. Ayres, the Manager of the Defendant, testified about the general operation of this facility, as well as about his specific involvement with the Plaintiff and the Vessel in June and

July 2011. He described himself as "the boss" with overall responsibility for the operations in the Marine Service Centre, including responsibility for safety in the lifting and securing of vessels.

[21] Mr. Ayres described the physical layout of the Service Centre. The property is fenced with two gates, that is, a main gate allowing for the entry of vehicles and a smaller gate, called the "man gate", allowing the entry of pedestrians.

[22] He testified about the presence of two notices (the "Notices"), one on the main gate and the other on the dock. Copies of the two Notices are in included in the Joint Book of Documents. The Notice on the main gate advised that "all boats shall be acceptable only upon the receipt of the Marine Service Centre of a signed 'Statement of Acceptance of Responsibility' by the Owner/Operator". The second Notice, that is the one posted on the dock, provided, in part, that "Boats stored at Owner's Risk".

[23] The evidence of the witnesses, with the exception of Mr. Lethbridge and Mr. Byrne, focussed on the lifting and securing of the Vessel at the Defendant's premises on June 27, 2011. While the parties agreed to certain facts about those operations, other facts were contested.

[24] The important facts upon which the parties agree are that the cribbing material was transported from its storage area to the vicinity of the Vessel after the Vessel was removed from the water, and the fact that employees of the Defendant supplied and installed the keel blocks that were used to keep the Vessel upright.

[25] The parties also agree that that after the Vessel fell, the Defendant up-righted and re-cradled the Vessel using its own materials to build the cradle. The new cradle used three sets of cribbing on each side to secure the Vessel.

[26] The parties do not agree on who constructed the cribbing and what caused the Vessel to fall. Findings on these contested facts are required before considering the legal consequences.

III. EVIDENCE AND FACTUAL FINDINGS

[27] This action raises issues of bailment, contract, negligence and exclusion of liability. The following factual issues are in contention:

i. The construction of the cradle;

ii. The fitness of the material used to construct the cradle; and

iii. The disposition of the cribbing after the fall.

[28] On June 25, 2011, the Vessel arrived at the Defendant's premises for the purpose of undergoing repairs and maintenance. The shaft, rudder and blade were removed by an employee of the Defendant. The Vessel was under the control of Mr. Simeon Forsey when she arrived at the Marine Service Centre on or about June 25, 2011.

[29] According to the Plaintiff, the Vessel remained in the water until he signed the Statement that was presented to him by Mr. Ayres on behalf of the Defendant. The Plaintiff signed this document on June 27, 2011. Mr. Ayres also signed this document. The signatures were witnessed by Mr. Dwayne Kearley.

[30] Subsequently, the Vessel was removed from the water by means of straps and a hydraulic lift, known as a "travel lift". The travel lift was operated by Mr. Ayres and Mr. Dwayne Kearley was involved with the placement of the straps, upon the instructions of Mr. Ayres. The straps passed below the hull of the Vessel. Keel blocks were placed on the pavement in the yard and the Vessel, still in the straps or "slings", was placed on the keel blocks.

[31] All witnesses, with the exception of Mr. Lethbridge and Mr. Byrne, testified about the removal of the Vessel from the water and her placement in the cradle.

[32] According to Mr. Ayres and Mr. Dwayne Kearley, the cradle is custom-built, that is, to conform to the shape of a specific vessel. Mr. Maxwell Forsey testified to the effect that the process involves placing the hull on keel blocks, then placing "cribbing" made of wood along the sides followed by cross-bracing to secure the ship in an upright, stable position.

[33] Two sets of cribbing, that is, four supports were used on this occasion. The cross-bracing, made of plywood, was passed below the hull and secured either by nails or screws, to connect the cribbing on the starboard side with the cribbing on the port side. Two cross-braces were used. For present purposes, the whole ensemble of cribbing, cross-bracing and wedges will be called the "cradle". The Vessel remained in the straps until Mr. Ayres was satisfied that she was secure. Only then was the direction given to Mr. Dwayne Kearley to release the pins that were holding the straps together.

[34] Although there was agreement between the parties about some aspects of the presence of the Vessel at the Marine Centre in June 2011, there is dispute on other aspects, specifically about who chose the cribbing and who built the cradle.

[35] The Plaintiff, Mr. Simeon Forsey, and Mr. Travis Forsey testified that the cribbing was chosen by Mr. Anthony Kearley who carried the pieces down by forklift from the pile of cribbing stored by a shed. He carried one piece at a time and he testified that the first piece of cribbing was rejected by Mr. Ayres as being "no good".

[36] On the other hand, Mr. Dwayne Kearley and Mr. Ayres testified that the cribbing was chosen by the Plaintiff's employees.

[37] There is a conflict in the evidence on this point.

[38] The evidentiary burden that applies in this case is the ordinary civil burden, that is proof on a balance of probabilities; see the decision in *F. H. v. McDougall*, [2008] 3 S.C.R. 41 at paragraph 46 where the Court said the following:

> Similarly, evidence must always be sufficiently clear, convincing and cogent to satisfy the balance of probabilities test. But again, there is no objective standard to measure sufficiency. In serious cases, like the present, judges may be faced with evidence of events that are alleged to have occurred many years before, where there is little other evidence than that of the plaintiff and defendant. As difficult as the task may be, the judge must make a decision. If a responsible judge finds for the plaintiff, it must be accepted that the evidence was sufficiently clear, convincing and cogent to that judge that the plaintiff satisfied the balance of probabilities test.

[39] The assessment of credibility of evidence was addressed in *Faryna v. Chorny N. S.* (1951), 4 W.W.R. 171 (B.C.C.A.) at page 174 where the Court said:

> The credibility of interested witnesses, particularly in cases of conflict of evidence, cannot be gauged solely by the test of whether the personal demeanour of the particular witness carried conviction of the truth. The test must reasonable subject his story to an examination of its consistency with the probabilities that surround the currently existing conditions. In short, the real test of the truth of the story of a witness in such a case must be its harmony with the preponderance of the probabilities which a practical and informed person would readily recognize as reasonable in that place and in those conditions. Only thus can a Court satisfactorily appraise the testimony of quick-minded, experienced and confident witnesses, and of those shrewd persons adept in half-lie and of long and successful experience in combining skilful exaggeration with partial suppression of the truth…

[40] I am satisfied, on a balance of probabilities, that the wood used to build the cradles was the property of the Defendant. I am equally satisfied that the plywood used to construct the cross-bracing belonged to the Defendant. The wedges were also the property of the Defendant. The cribbing, the wedges, and the cross-bracing material were all within the physical and managerial control of the Defendant.

[41] Having considered the evidence of the witnesses who were present when the cribbing material was carried down to the Vessel, I also find that it is more likely that the Defendant's employees selected the material. The Defendant, principally through Mr. Ayres, was in charge of the process of lifting and securing the Vessel. I find on a balance of probabilities that the cribbing material was selected by the Defendant's employees.

[42] As well, there is conflict in the evidence about who built the cradle. The Plaintiff and those crew members who testified on his behalf consistently said that the cradling operation was under the control of the Defendant and that the Plaintiff's crew assisted when asked by the Defendant's employees. The Plaintiff's employees said they helped "push" in the blocks.

[43] Again, I refer to the evidence of the control exercised by the Defendant over the circumstances of the Vessel's presence in the Marine Center. Mr. Ayres was consistent in his testimony that he was ultimately responsible for the operations in the Marine Center. Mr. Dwayne Kearley and Mr. Anthony Kearley also testified to this effect.

[44] The witnesses for the Plaintiff were consistent in their evidence that they assisted only when asked to do so by the Defendant's employees.

[45] Considering the applicable burden of proof, that is the balance of probabilities, I find that the weight of the evidence lies in finding that the cradle was constructed by the Defendant's employees, and that the Plaintiff's employees were only involved in a peripheral manner in that job.

[46] None of the witnesses saw the Vessel fall. Mr. Ayres and Mr. Simeon Forsey, who were notified early on July 10, 2011 about the incident, went to the Service Centre early in the morning. Arrangements were made to contain and clean up the spilled fuel oil.

[47] The Vessel was up-righted on July 10, 2011 by employees of the Defendant, using its cradling materials, with three supports per side.

[48] There is a further issue disputed between the parties as to the fitness of the cribbing materials used to construct the cradle. This issue is also related to the issue of the disposition of the cribbing materials.

[49] There was evidence about a change in policy regarding the use of cribbing. According to Mr. Ayres, at some time prior to June 2011, the head office in St. John's introduced a change in policy regarding charges for cribbing. Whereas prior to June 2011, the cribbing was rented out, by June 2011, the Defendant was no longer renting out the cribbing but offering it for use by customers at no charge.

[50] In cross-examination, Mr. Ayres testified that the reason for the change in policy was because it was too expensive to continue to maintain the cribbing materials.

[51] Invoices dated March 30 and July 16, 2010 were entered for the purpose of showing charges for cribbing. In March 2010, the Plaintiff was invoiced for a set of cribbing used in connection with another vessel owned by him, the F.V. "Gulf Harvester". In July 2010, he was invoiced $150.00 for cribbing in connection with the Vessel.

[52] The work order dated June 27, 2011, found in the Joint Book of Documents, shows an entry for cribbing, at a charge of $100.00. However, this was scratched out and the invoice dated

September 21, 2011, found in the Joint Book of Documents, shows no charge for cribbing. Mr. Ayres explains the deletion of "cribbing" on the grounds that "it's his [Mr. Forsey's] cribbing and that was a mistake on my part".

[53] The main evidence about the change in policy came from Mr. Ayres. That evidence is not wholly persuasive since Mr. Ayres was unable to say definitely when the change in policy was made or how that change was communicated to the Plaintiff. The evidence is inconclusive and I assign it little weight.

[54] The change in policy about offering cribbing material without charge, in my opinion, does not relieve the Defendant from its responsibility to provide adequate materials. The Defendant was responsible for the security of the Vessel on its premises and whether it charged for the cribbing or not, it was to make sure that the cribbing material was sufficient for the purpose.

[55] Mr. Ayres testified that the cribbing was stored outside on the premises in a section of the yard. He said that the cribbing was separated into two piles: a "good" pile, which was kept upright and available for use, if necessary, and another pile that was not usable and which was discarded to the side.

[56] The Plaintiff testified that he had not been warned about the quality of the cribbing materials.

[57] There is also dispute about the location of the broken cribbing when Mr. Byrne arrived from St. John's to survey the damage to the Vessel. The disposition of that cribbing is relevant to the issue of the fitness of the material. After the Vessel fell, the starboard cribbing was not available for inspection. As such, an inference must be drawn regarding the fitness of the materials used in the construction of the cradle.

[58] The Vessel had been put in the cradle with two sets of cribbing. She fell on the starboard side and according to Mr. Dwayne Kearley, the cribbing on that side was crushed. The cribbing on the port side was not damaged and according to him, the port side cribbing was re-used when the Vessel was up-righted and secured, either on July 10 or July 11, 2011.

[59] There is mixed evidence as to what happened with the cribbing from the starboard side.

[60] On the one hand, Travis Forsey, a witness for the Plaintiff, said this starboard cribbing was crushed, but did not know if it was of further use.

[61] On the other hand, Mr. Ayres testified in direct examination that one piece of the starboard cribbing "went back in under the boat" and the rest of the cribbing upon which the Vessel fell "stayed there". It is not clear what is meant by "there".

[62] Mr. Dwayne Kearley said that the crushed cribbing was put back in the pile of cribbing outside the shed.

[63] Mr. Byrne testified that he did not see the damaged cribbing when he attended at the Defendant's premises on July 12, 2011. He said that he spoke to the Plaintiff, Mr. Simeon Forsey and Mr. Travis Forsey about the damaged cribbing and together with them, went up to the shed. He was told by the Plaintiff that the cribbing had already been disposed of.

[64] Mr. Byrne did not remember specifically asking Mr. Ayres about the damaged cribbing but said that in the normal course of investigating a loss, he would have asked.

[65] Mr. Ayres also testified about the location and the disposition of the damaged cribbing. He said that the damaged cribbing was kept "a nice while" before it was disposed of and that it was not disposed of until after the survey was done by TriNav, that is, Mr. Byrne. Mr. Ayres testified that damaged cribbing was kept for a "couple, three weeks probably" until the discovery of a leak of fuel oil coming from those pieces of wood.

[66] Further, Mr. Ayres testified that he asked Mr. Byrne directly if he, Mr. Byrne, needed to see the damaged cribbing. According to Mr. Ayres, Mr. Byrne answered in the negative. Indeed, Mr. Ayres testified that the "exact words" from Mr. Byrne were "No, I don't need to see that, Bob".

[67] Mr. Maxwell Forsey also was questioned about the damaged cribbing. The missing cribbing was referenced in the demand letter that Mr. Forsey sent to the Defendant dated August 24, 2011. He testified that he was aware that it was missing prior to the arrival of Mr. Byrne.

Mr. Maxwell Forsey further testified that he was with Mr. Byrne when Mr. Byrne was looking for the damaged cribbing. Only one piece of cribbing was found.

[68] On the issue of the location of the cribbing after the fall of the Vessel, I prefer the evidence of the Plaintiff and of Mr. Byrne to that of Mr. Ayres.

[69] The testimony of Mr. Ayres at trial about the location of the cribbing after the fall of the Vessel was inconsistent with statements he made during his Discovery Examination. In his Discovery Examination, Mr. Ayres testified that the cribbing remained beside the Vessel for approximately one week. At trial, however, Mr. Ayres testified that the cribbing was taken to the other side of the yard "the next day or on the 11th or the 12th".

[70] Discovery examination evidence may be used at trial to impeach the credibility of a witness; see Rule 291 of the Rules.

[71] Having regard to the inconsistencies in Mr. Ayres evidence, I find that the evidence of the Plaintiff and Mr. Byrne to be more credible. On the balance of probabilities, I find that the cribbing was not available at the time of Mr. Byrne's inspection.

[72] Mr. Bryne had gone to the shed with the Plaintiff. The damaged cribbing would have been visible if located at that site. Mr. Byrne arrived at the Marine Centre on July 12, shortly after the incident. Regardless of the contamination of the cribbing material by oil, if available, that material could have been inspected.

[73] The unavailability of that cribbing material is relevant to the issue of its fitness for the purpose of constructing the cradle that secured the Vessel.

[74] I conclude that the damaged cribbing was removed prior to the arrival of Mr. Byrne, and further that it was removed with an intention that it not be available for inspection.

[75] As well, there is a question about the maintenance of the cribbing materials, that is, whether they were being maintained by the Defendant. This issue arises in light of the evidence of Mr. Ayres that the policy of charging rent for these materials had been changed due to the costs of maintaining them. This evidence suggests that the cribbing materials were no longer being maintained. There is clear evidence that the cribbing materials were stored outside, consequently they were exposed to the elements of wind, rain, snow and sun.

IV. DISCUSSION AND DISPOSITION

[76] The key question arising in the action is what caused the fall of the Vessel and who is responsible for the loss. The following legal issues arise from the pleadings, the evidence and the submissions of Counsel:

i. Was there a bailment between the parties?

ii. If so, has the Defendant disproved negligence as the cause of the loss?

iii. Does the exclusion clause in the contract, as represented by the Statement, relieve the Defendant of liability for negligence?

iv. What is the relevance of the Notices posted on the main gate and on the dock in terms of relieving the Defendant from liability?

[77] The Plaintiff frames his case in terms of breach of contract, bailment and negligence. To some extent, all three grounds are related in this case.

[78] The contract addresses the lifting and storage of the Vessel. It does not address the work to be done on the Vessel and in any event, there is no issue about the removal of the shaft, rudder and blade.

[79] The Plaintiff argues that the cradle was unfit for the purposes of holding the Vessel, that inadequate supports were used as "cribbing", that the supports used to make the cradle were rotten, and that there was no change in policy about no longer charging rent, but that the Defendant waived the charges after the accident. In this regard, the Plaintiff relies on the "scratched out" charges on the invoice dated September 21, 2011.

[80] He also argues that the contradictory evidence about the disposal of the damaged cribbing gives rise to an inference that the cribbing was disposed of immediately or soon after the accident in order to prevent the opportunity for examination.

[81] Further, the Plaintiff submits that the Defendant failed to warn him about the sufficiency of the cribbing and that the Statement does not relieve the Defendant of responsibility for any negligence in the construction of the cradle.

[82] For its part, the Defendant denies any negligence, pointing to the fact that the Vessel remained fast from June 27 until July 9, 2011, that is, 13 days without incident.

[83] In reply, the Defendant argues that the cribbing was satisfactory and sufficient. All pieces had been inspected prior to being chosen. Only one piece of cribbing was unacceptable, on the basis of size and shape.

[84] The Defendant submits the Plaintiff's employees participated in the construction of the cradle. It further argues that the change in policy about renting the cribbing is not significant, and suggests that the use of its cribbing by the Plaintiff was merely a matter of convenience.

[85] The Defendant also argues that no adverse inference should be drawn from the circumstances of disposal of the cribbing. It submits that cribbing was available for inspection when Mr. Byrne attended at the premises and was not disposed of until later. It argues that the fall was an accident.

[86] The Defendant also submits that the issue of bailment is irrelevant, that it acted with due care and has rebutted any presumption of negligence, and that it did not improperly remove evidence.

[87] The Defendant further argues that if it was negligent, it is exempt from liability pursuant to the terms of the contract set out in the Statement. It submits that by this document, it is not liable for any damage to the Plaintiff's property even if caused by its negligence.

[88] In any event, the Defendant relies upon the exemption clause found in the Statement, in particular, paragraph 3, which states that the Plaintiff is responsible for securing and locking the Vessel.

[89] The Defendant submits that the words "securing" in paragraph 3 of the Statement means that the Plaintiff is responsible for the safety of the Vessel while upon the cradle.

[90] The Defendant also refers to the warnings set out in the two Notices on the premises, that is, the Notice by the main gate and the Notice on the wharf, both of which provide that property stored on its premises remain at owner's risk. The Statement also refers to the Notices and the Defendant argues that the Notices, together with the terms of the Statement, relieve it of liability for negligence.

[91] As noted above, a marine surveyor, Mr. Patrick Byrne, attended on the premises on July 12, 2011 for the purpose of surveying the damage and preparing a report. That report, included in the Joint Book of Documents at Tab 15, included photographs of the Vessel and also contained Mr. Byrne's opinion as to the cause of the fall.

[92] Mr. Byrne testified as a fact witness, not as an expert witness. His report was entered into evidence as proof of the fact that he prepared such a report following his attendance at the Marine Service Centre.

[93] There was evidence about wind from Mr. Lethbridge, a witness called on behalf of the Defendant. Mr. Lethbridge described the wind on the early morning of July 10, 2011 as high, approximating it to be between 70 and 80 km per hour. He said that on the road in such a wind, he would pull over.

[94] Mr. Ayres too testified about the wind, describing it as "whistling" early in the morning, that is, between 5:30 and 6:30 a.m.

[95] Mr. Maxwell Forsey also testified about the high wind.

[96] Although Mr. Byrne referred to windy or gusty conditions in his report, the weather printouts from Environment Canada were not entered into evidence on the grounds that Mr. Byrne has not downloaded these documents himself. Nonetheless, there was evidence from Mr. Lethbridge and Mr. Ayres that the wind was high on the morning of July 10, 2011. Further, Mr. Ayres testified that high winds were not unusual for Fortune.

[97] I will first address the issue of bailment.

[98] Bailment is the legal relationship that arises when the property of one person is in the possession of another. In *Howell v. Newfoundland (Attorney General)*, [1987] 65 Nfld. & P.E.I.R. 139 (S.C. Nfld. T.D.) at paragraph 28, the Court said the following, relative to a claim for damage to a vessel that was stored upon the Defendant's property:

> The duty of a bailee to provide suitable premises in which to store the bailors goods was in issue before the Court of Appeal of the

Province of Nova Scotia in the case of Furness-Whitey & Co. Ltd. v. Ahlin (1917), 35 D.L.R. 150 (N.S.C.A). There the collapse of a wharf due to the defective condition of the supporting piles resulted in damage to a cargo stored thereon. The trial judge found that the defects could have been discovered by the exercise of reasonable diligence by the defendant/owner even though the superstructure was intact, and it held that the owner was liable for damages sustained. In dismissing the defendant's appeal, Graham, C.J., of the Court of Appeal stated at page 156 as follows:

> "Passing to the law applicable to the facts in such a case I only propose to cite one or two authorities. In respect to the degree of care to be required from warehousemen, Blackburn, J., as he then was, in the case of Searle v. Laverick, L.R. 9 Q.B. 122, at 126, says:
>
> 'The obligation to take reasonable care of the thing entrusted to a bailee of this class (warehousemen, etc.) involves in it an obligation to take reasonable care that any building in which it is deposited is a proper state so that the thing therein deposited may be reasonably safe in it.'
>
> "I also refer to The Moorcock, 14 P.D. 64; Brabant v. King, [1895] A.C. 632 at 641. I also wish to quote from an American case, Garfield v. Rockland, 184 Mass., 62. There the Court says:
>
> 'The general rules of law which are applicable in cases of this character are the same in England, and in this country, and are the same at common law and in Admiralty. They are as well stated in the case of Nickerson v. Tirrell, 127 Mass. 236, 239, as perhaps in any case: The owner or occupant of a dock is liable in damages to a person who by his invitation, expressed or implied, makes use of it, for an injury caused by any defect or unsafe condition of the dock which the occupant negligently causes or permits to exist, if such person, was himself in the exercise of due care. Such occupant is not an insurer of the safety of his dock, but he is required to use reasonable care to keep his dock in such la state as to be reasonably safe for use by vessels which he invites to enter it, or for which he holds it out as fit and ready. If he fails to use such due care, if here is a defect which is known to him, or which

> by the use of ordinary care and diligence should be known to him, he is guilty of negligence and liable to the person who, using due care, is injured thereby.'"

[99] The Vessel was removed from the water and "cradled" in the wooden structure that was built under the instructions of the Defendant. The cradle was inspected by Mr. Ayres and only when he was satisfied did he instruct Mr. Dwayne Kearley to release the pins that were holding the Vessel in the straps or "slings" of the Marine Travelift.

[100] On the basis of the evidence here, I am satisfied that the Plaintiff has shown, on a balance of probabilities, that the Vessel was placed in the possession of the Defendant at the Defendant's premises in Fortune. The Vessel was brought to the Main Service Centre, by water, for the purpose of being removed from the water and stored on land, to undergo repairs and maintenance that had been discussed beforehand with Mr. Ayres. I find that a bailment existed between the parties.

[101] There is a contract for the lifting and storage of the Vessel. This contract is represented by the Statement signed on June 27, 2011.

[102] With or without this contract, there is a bailment of the Vessel wherein the Plaintiff, as bailor, entrusted her possession to the Defendant, as bailee. The fact that the employees of the Plaintiff painted the Vessel while she was located on the Defendant's premises does not revert possession to the Plaintiff. The principles discussed and applied in *The "Ruapehu"* (1925), 21 LI.L Rep. 310 (Eng. C.A.) apply here.

[103] That case involved a bailment relationship and a subsequent a claim in negligence after the outbreak of a fire on a ship that was being repaired. The Court found that the presence of certain crew members on board the ship during the bailment did not alter the essential quality of the legal relationship as one of bailment and said the following at page 315:

> If then the present case were not complicated by the presence on the ship of some of the owners' servants there would seem to be a simple case of bailment and an onus on the defendants to show that the fire was not caused by negligence on their part.
>
> How far is the position altered by the presence of the owners' servants? I do not think that the rights reserved to the owners to retain the use of the vessel for certain purposes prevents the transaction from being one of bailment.

[104] Since I have found that a bailment existed, the civil burden shifts to the Defendant to show that it was not negligent in the manner in which it dealt with the Plaintiff's property; see the decisions in *The "Ruapehu", supra* at page 315 and *Howell, supra* at paragraph 27.

[105] Has the Defendant met its burden to show that it was not negligent?

[106] In the circumstances of this case, the question of negligence relates to both the fitness of the materials and the manner in which the cradle was constructed.

[107] As I have concluded above, the crushed cribbing materials were disposed of and were consequently not available for inspection by Mr. Byrne. As such, the fitness of wood used to construct the cradle could not be assessed.

[108] The disposition of the cribbing raises an issue of spoliation, that is the intentional destruction of evidence relevant to ongoing or contemplated litigation, where a reasonable inference can be drawn that the evidence was destroyed to affect the litigation; see the decision in *McDougall v. Black & Decker Canada Inc.*, [2009] 1 W.W.R. 257 at paragraph 18.

[109] Spoliation gives rise to a rebuttable presumption that the evidence would be unfavourable to the party who destroyed the evidence; see the decision in *McDougall supra* at paragraph 16, citing *St. Louis v. The Queen*, [1896] 25 S.C.R. 649. The presumption can be rebutted by proving that the spoliator did not intend to destroy evidence relevant to existing or contemplated litigation; see the decision in *McDougall, supra* at paragraphs 17 - 18.

[110] In *Nova Growth Corp. v. Kepinski*, 2014 ONSC 2763 at paragraph 296, the Ontario Superior Court recently interpreted the decision in *McDougall, supra* to mean that spoliation requires the following four elements to be established on a balance of probabilities:

1) the missing evidence is relevant;
2) the missing evidence must have been destroyed intentionally;
3) at the time of destruction, litigation must have been ongoing or contemplated; and
4) it must be reasonable to infer that the evidence was destroyed in order to affect the out come of the litigation.

[111] On a balance of probabilities I find that the cribbing materials that were disposed of are relevant physical evidence that relate directly to the issue of proving negligence, that is, whether

the cradle was negligently constructed because the cribbing materials that were used to build the cradle were unfit for that purpose.

[112] In the present action, I have found that the cribbing was disposed of and was not available for inspection by Mr. Bryne. Considering that the incident occurred on July 10 and Mr Byrne arrived on July 12, it follows that the damaged cribbing materials must have been disposed of in that 48 hour period.

[113] In my opinion, the Defendant ought to have known, when it disposed of the cribbing, that litigation would be contemplated by the Plaintiff to recover for the damage that was done to the Vessel while she was in the possession and control of the Defendant, and further that disposition of the cribbing would affect any future claim made by the Plaintiff.

[114] The Vessel was a commercial fishing vessel and the Plaintiff's source of livelihood, as well as the source of income for his crew. As such, it was a valuable asset to the Plaintiff. As a direct result of the fall and subsequent up-righting, the Vessel suffered serious structural damage, and she was declared a constructive total loss.

[115] Notwithstanding the fact that the Plaintiff's hold liable letter was not sent until August 24, 2011, the Defendant ought reasonably to have considered both that the Plaintiff would seek compensation for the damage done to his property, and that the broken cribbing would be important evidence in any future claim that might be made against it.

[116] It is not necessary that the party have received actual notice of litigation; see the decision in *Leon v. Toronto Transit Commission*, 2014 ONSC 1600 at paragraph 40. Rather it may be the case that litigation is contemplated or reasonably foreseeable; see the decision in *Blais v. The Toronto Area Transit Operating Authority* (2011), 105 O.R. (3d) 575 at paragraph 72.

[117] As such, it is reasonable to conclude that litigation was reasonably foreseeable at the time when the evidence was destroyed. I draw the adverse inference that the evidence was intentionally destroyed to affect the litigation.

[118] My conclusion in this regard raises a rebuttable presumption that the evidence was unfavourable to the Defendant, that is, that the cribbing materials used to construct the cradle were unsound and unfit. The burden is on the Defendant to rebut this presumption by showing that it did not intend to destroy evidence relevant to existing or contemplated litigation.

[119] In my opinion, the Defendant has not provided sufficient evidence to rebut this presumption.

[120] As I have discussed above, there are credibility issues raised by Mr. Ayres' evidence about the disposition of the cribbing after the fall of the Vessel, namely, that his testimony at trial was inconsistent with his evidence in the Discovery Examination, and that his testimony conflicts with the evidence of the witnesses of the Plaintiff. Where there was conflict in the evidence, I preferred the evidence of the Plaintiff, as found above. As such, Mr. Ayres' oral testimony fails to rebut the presumption of spoliation. No other evidence was submitted by the

Defendant that would prove that the materials were not disposed of with the intention of affecting the litigation.

[121] The present case is distinguishable from *Blais, supra* and *Leon, supra* where the evidence was destroyed in the ordinary course of business, pursuant to company policy. Furthermore, in *Blais*, there was sufficient additional evidence retained and presented by the Defendant.

[122] Further, I have found that the fitness of the material could not be inspected due to its intentional removal. The fitness of the cribbing impacts on the fitness of the cradle.

[123] Although the Defendant argues that the Vessel stayed in place for several days without incident, I note that there were high winds in the early morning of July 10, 2011, and the Plaintiff's Vessel was the only one that fell over. The fact that nothing happened to the Vessel in the preceding days does not rebut the presumption that the cradle was unfit, in light of the disposition of the cribbing material.

[124] As such, I draw the inference that the materials were unfit for use in constructing the cradle, and find that the Defendant has not rebutted the presumption that the cribbing was intentionally disposed of without giving the Plaintiff and his agents the opportunity to inspect it.

[125] In my opinion, having considered all the evidence, I find that there was negligence in the selection and use of unfit cribbing materials by the Defendant in the construction of the cradle. I

further conclude that the Defendant has failed to discharge the onus of proving that it was not negligent.

[126] The Defendant was in charge of the operation. The Defendant owned the cribbing. Mr. Ayres, an employee of the Defendant, inspected the cribbing. Employees of the Defendant built the cradle and the fact that employees of the Plaintiff assisted in pushing in cross-bracing and wedges does not shift control of the "cradling" operation from the Defendant.

[127] Having concluded that the Defendant was negligent in the construction of the cradle, the final issue that remains to be determined is whether the Defendant can rely on the Statement and the two Notices, which are incorporated into the Statement by reference, to exclude its liability for its negligence.

[128] In *Coles v. Clarenville Drydock Ltd.*, [1998] 170 Nfld. & P.E.I.R. 17 at paragraph 14, the Court discussed the analytical approach adopted by Canadian courts in relation to the enforcement of exemption of liability clauses. The Court summarized the principles, which are taken from pages 561-600 of Fridman's *The Law of Contract in Canada*, (3rd ed. 1994), as follows:

> (a) An exempting clause will not be enforced if an innocent misrepresentation by one party has misled the other to enter into the contract with such as clause (p. 571).
>
> (b) An exempting clause will not be enforced if the party seeking protection did not bring its existence and inclusion in the contract sufficiently to the notice of the other party at the time of, or prior to the making of the contract (p. 573). Normally notice will be inferred where the clause is in a written agreement, the party signing can red, and that party has not been rushed into signing (pp. 573-8).

> (c) Once the courts accept that an exempting clause is included in a contract, the courts still regard it with a critical or jaundiced eye, approaching the interpretation of such a clause strictly, applying the ordinary rules of construction, including the *contra proferentum* rule, which says the clause, particularly in a standard form contract, is to be strictly construed, against the party who drafted it (p. 578). A clause will not exclude liability for the drafter's own negligence unless it does so expressly or by necessary implication. The latter case arises only where the words could not reasonably apply to some other ground other than the drafter's negligence (p. 580).
>
> (d) Where the exempting clause purports to exempt from a fundamental breach of the contract, that is, where "the performance of the contract becomes something totally different from that which the contract contemplates", or the breach "goes to the root of the contract", or "undermines the whole contract", or involves "a totally different performance of the contract from that intended by the parties" (pp. 565-6), the law is somewhat confusing.

[129] Counsel for both parties spent some time discussing the principle of fundamental breach in relation to exclusion clauses in contracts; however, pursuant to the decision of the Supreme Court of Canada in *Tercon Contractors Ltd v. British Columbia (Minister of Transportation & Highways*), [2010] 1 S.C.R. 69 at paragraph 62, the doctrine of fundamental breach has been laid to rest. As such, the Defendant's ability to rely on the Statement and the Notices to exclude liability for negligence will depend solely on the construction of the contract.

[130] In the present case, neither the Notices, nor the Statement, which is a standard form contract, expressly, or by necessary implication, exclude negligence by the Defendant.

[131] There is some ambiguity in respect of the word "securing" as it appears in paragraph 3 of the Statement, that is, whether the term "securing" meant that the Plaintiff was responsible for

lifting lines and securing buoys etc., as the Plaintiff proposes, or alternatively, whether the word meant that the Plaintiff was responsible for the safety of the Vessel while she was on the cradle, as the Defendant would have me interpret the term.

[132] Where there is ambiguity in a standard form contract, the ambiguity is resolved by reading the contract *contra proferentum* against the drafter, in this case the Defendant; see the decision in *Coles, supra* at paragraph 14.

[133] Applying the *contra proferentum* rule of construction, I reject the submissions of the Defendant that the Plaintiff's acceptance of responsibility for "securing and locking" the Vessel in paragraph 3 of the Statement means that the Plaintiff was responsible for the safety of the Vessel while she was on the cradle.

[134] Mr. Ayres was consistent in his testimony that he was ultimately responsible for the operations of the Marine Centre, and I have already concluded that Defendant was in control of the construction of the cradle. Given the control exercised by the Defendant throughout the process of lifting and securing the Vessel, it could not have been the intention of the parties that the word "securing" bear the meaning proposed by the Defendant, that is, that the Plaintiff was responsible for securing the vessel during the period of the repairs.

[135] Furthermore, having regard to the principle of contract construction that requires express exclusion of liability for negligence, I do not accept the Defendant's submission that the exclusion of negligence by the Defendant in paragraph 1 of the Statement, means, by necessary

implication, that in the remaining paragraphs of the Statement, the Defendant will not be responsible even if it is negligent.

[136] In my opinion, having regard to the principles of contract construction relative to exclusion clauses, the Statement and the Notices do not exclude liability for negligence, and the Defendant cannot rely on them to exclude its liability for negligence in connection with construction of the cradle.

[137] In the result, I am satisfied that the Defendant is liable for the Plaintiff's loss. One question remains and that is whether the Plaintiff is entitled to recover the costs of the survey, all other items of damages having been agreed between the parties.

[138] The Defendant argues that these costs, in the amount of $6,020.00 are not recoverable because the Plaintiff did not pay these costs. On the other hand, the Plaintiff submits that this expense would not have been incurred in the absence of the damage to the Vessel.

[139] The general rule about recovery of damages remains that set out in *Hadley v. Baxendale* (1854), 156 E.R. 145 that damages that flow directly from an injury are recoverable.

[140] In the present case, I find the decision in *Laichkwiltech Enterprise Ltd. v. "Pacific Faith" (The)*, [2009] 8 W.W.R. 681 to be persuasive. In that case, the British Columbia Court of Appeal upheld the award of additional investigatory costs as being "a natural and probable consequence of the tort"; see paragraphs 44 to 47 of the decision.

[141] Here, the parties agreed that the Vessel was declared to be a constructive total loss and the Plaintiff recovered from his insurers. In the circumstances, I am satisfied that the cost of the survey is a "natural and probable consequence" of the loss for which I have found the Defendant to be liable, and the Plaintiff is entitled to recover this amount.

[142] In conclusion, the Plaintiff has made out his case on the applicable burden of proof and judgment shall be entered in his favour as follows:

a) General damages for the damage and loss of the Vessel in the amount of CAD $200,000.00;

b) General damages for the cost of fuel containment and clean-up in the amount of CAD $63,186.85; and

c) General damages for the cost of surveyors to assess the damage and repair costs of CAD $6,020.00, all together with pre-judgment interest and post-judgment interest;

d) The Plaintiff shall have his costs to be taxed pursuant to column III, of Tariff B of the Rules.

[143] Pursuant to subsection 36(7) of the *Federal Courts Act*, R.S.C. 1985, c. F-7 (the "Act"), the Court enjoys discretion in the award of pre-judgement interest in maritime matters. The claim in this case clearly falls within the maritime jurisdiction of this Court; see paragraph 22(2)(e) of the Act.

[144] The Plaintiff has asked for interest at the commercial rate, and if Counsel cannot agree, the Parties may make submissions on the appropriate rate of interest. Counsel for the Plaintiff shall serve and file its submissions on the appropriate rate of commercial interest within five days after the issuance of this judgment. Counsel for the Defendant shall serve and file its reply on the appropriate rate of interest within five days after receipt of the Plaintiff's submission.

[145] Counsel may make submissions as to whether counsel fees shall be assessed for more than one lawyer, if otherwise unable to agree. The submissions on costs shall be made at the same time as the submissions on interest.

JUDGMENT

THIS COURT'S JUDGMENT is that the Plaintiff has made out his case on the applicable burden of proof and judgment shall be entered in his favour as follows:

a) General damages for the damage and loss of the Vessel in the amount of CAD $200,000.00;

b) General damages for the cost of fuel containment and clean-up in the amount of CAD $63,186.85; and

c) General damages for the cost of surveyors to assess the damage and repair costs of CAD $6,020.00, all together with pre-judgment interest and post-judgment interest;

d) The Plaintiff shall have his costs to be taxed pursuant to Column III, Tariff B of the Rules.

Pursuant to subsection 36(7) of the *Federal Courts Act*, R.S.C. 1985, c. F-7 (the "Act"), the Court enjoys discretion in the award of interest in maritime matters. The claim in this case clearly falls within the maritime jurisdiction of this Court; see paragraph 22(2)(e) of the Act.

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Counsel may make submissions as to whether counsel fees shall be assessed for more than one lawyer, if otherwise unable to agree. The submissions on costs shall be made at the same time as the submissions on interest.

"E. Heneghan"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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APPEARANCES:

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Jean-François Bilodeau	FOR THE DEFENDANT

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