34 Phil. 597

[G.R. No. 10283. July 25, 1916]

LIMPANGCO SONS, PLAINTIFF AND APPELLANT, VS. YANGCO STEAMSHIP CO., DEFENDANT AND APPELLEE.

D E C I S I O N

PER CURIAM:

The following grounds moved the court to a reversal in this case: On the 3d day of August, 1913, plaintiff employed defendant to tow from Guagua to Manila two cascos loaded with 2,041.80 piculs of sugar, property of the plaintiff, of the value of ₱11,229.90. On that date the cascos left Guagua towed by the launches *Tahimic* and *Matulin*, belonging to the defendant When the launches, together with their tows, arrived off the Malabon River, the *patron* of the launch *Matulin*, whether of his own motion, as contended by the casco men, or whether at the instance of the patrones of the cascos, as he testified, decided to leave the cascos in the Malabon River. The launch *Tahimic* towed the cascos into the Malabon River and the launch *Matulin* continued the trip to Manila. The reason why this was done, according to the testimony of the *patron* of the *Matulin*, was that, at that time, the weather was threatening, and that there was such a sea on as to make it dangerous for the cascos, heavily loaded as they were, to continue the voyage to Manila.

On Friday following, August 8, 1913, the launch *Matulin* was in the Malabon River and the *patron* talked to the men in charge of the two cascos, which were at that time tied up at Tansa, and told them that on the following day, the 9th of August, at daybreak, he would await them off the mouth of the Malabon River, outside the bar, and that, if the weather was then favorable, he would tow them to Manila. It was agreed between the *patron* of the *Matulin* and the *patrones* of the cascos that the latter should move out of the river by means of their *tikines* or bamboo poles and, thus propelled, proceed to the place where the launch *Matulin* was to be waiting for them. On the following day, 9th of August, 1913, at 6 a. m., the *patron* of the *Matulin* arrived with his launch off the mouth of the Malabon River and anchored outside of the shallows, something like 1,500 meters from the mouth of the river.

In accordance with the agreement with the *patron* of the *Matulin* and under his instructions, the crews poled their cascos out of the river following the channel. When they passed the shallow water they were met with high seas and strong winds. The bamboo poles were unavailing, and, finding themselves in danger of being washed ashore and destroyed, they claim they called to the *Matulin*, which was in plain sight, for help. The *patron* of the *Matulin*, they allege, made no effort to assist them and, by reason of the high seas and strong winds, they were driven ashore or on the shoals and their cargoes lost. The *patron* of the *Matulin* testified that he was unable to render assistance to the cascos by reason of the shallow water in which they were at the time they were caught by the winds and waves and washed ashore.

We are of the opinion that the judgment must be reversed on defendant's own statement of facts. Defendant, in its brief, states the facts substantially as above, except that it denies that the crews of the cascos, in their distress, called to the *patron* of the *Matulin* for assistance, or that the cascos were in deep water at the time the wind and waves began to drive them toward the shore. We have no doubt, however, from the facts and circumstances related that the crews of the cascos did call for help when they saw the dangerous position in which they had been placed by the orders of the captain of the launch. It would be a natural thing for them to do under the circumstances, and we have no doubt that they did. But whether they really did or not we regard as of very little importance; and the same may be said with respect to the position of the cascos when they first received the winds and waves. It was evident to the captain of the *Matulin* that the cascos were in distress, in the open bay with winds and waves driving them ashore; and if he had had anything like a proper conception of his duty he would have gone to their assistance. Nor does the argument avail that he could not do so because his launch was of such draft that it would have been impossible to navigate the shallow water in which the cascos were at the time the elements began to drive them toward the shoals. That fact does not furnish a legal excuse. He came for the purpose of towing the cascos to Manila; he knew that it was the season when the southwest monsoon or other winds could be expected to blow at any moment; he knew that two heavily loaded cascos with nothing to propel them but bamboo poles in the hands of their crews and nothing to maintain their position in the water except anchors so small as to be of little avail even in a moderate sea, would be at the mercy of wind and wave, if there should be any, the moment they emerged from the mouth of the river. He must have known, if he had any reasonable conception of his duty, that the cascos, propelled simply by bamboo poles, could make no headway against wind and sea, and that it would be well nigh impossible, in view of the weather which at any moment might prevail, to traverse

a distance of 1,500 meters in an open sea. Fifteen hundred meters is almost a mile; and that the captain of the *Matulin* should have expected that the two cascos could successfully face the weather which would naturally be expected at that time while the crews "poled" their heavily laden craft in the open bay for almost a mile demonstrates that he had no proper conception of his obligation. It must be remembered that the Malabon River opens into Manila Bay toward the southwest, almost directly in the teeth of the winds prevailing at the time. Every wind across Manila Bay from the southwest blows almost squarely into the mouth of the Malabon River; and every craft passing from the river into the bay in the monsoon season must be prepared to meet that obstacle to its progress. In view of this and the further fact that strong southwest winds were the rule rather than the exception at that season of the year, was the captain of the *Matulin* exercising reasonable care when he asked the crews of two heavily loaded cascos carrying more than 2,000 piculs of sugar of the value of more than ₱ 11,000 to attempt to cross a stretch of open water, nearly a mile in width, with nothing to propel them but bamboo poles? And under the circumstances described, did the captain of the *Matulin* perform his full duty when he ordered or even permitted the cascos to attempt such a journey when he himself was without power or means to help them in case of need?

A vessel which undertakes a towage service is liable for reasonable care of the tow, and that reasonable care is measured by the dangers and hazards to which the tow is or may be exposed, which it is the duty of the master of the tug to know and to guard against not only by giving proper instructions for the management of the tow, but by watching her when in a dangerous locality, to see that his directions are obeyed. The duty of the tug to a tow is a continuous one from the time service commences until it is completed. Its responsibility includes not only the proper and safe navigation of the tug on the journey, but to furnish safe, sound and reasonable appliances and instrumentalities for the service to be performed, as well as the giving of proper instructions as to the management of the tow; and if the locality in which the tow finds itself at any given time is more than ordinarily dangerous, the tug is held to a proportionately higher degree of care and skill. It is well recognized that in towing a boat built only for the shallow water of an inland stream, as the cascos mentioned in this case are, greater care must necessarily be used when venturing upon an ocean voyage than with a vessel fitted for deep water; and this applies not only in the choice of route, to select the one having the smoothest water and affording shelter in stormy weather, but in the handling of the tow. (The *Jane McCrea*, 121 Fed., 932; The *Printer*, 164 Fed., 314; The *Somers N. Smith*, 120 Fed., 569; Ross *vs.* Erie R. Co., 120 Fed., 703; 38 Cyc, 564.)

In the case at bar the defendant failed to meet any of these requirements; it neglected to

furnish suitable appliances and instrumentalities; for the tug itself, as is demonstrated by the facts in this case, was unsuitable for the purpose in hand. As we have said, it is negligence to leave two heavily loaded cascos in Manila Bay at the mercy of weather likely to exist in the month of August for a distance of 1,500 meters with no other motive power than bamboo poles. Also the captain of the *Matulin* failed to give proper instructions to the tow. If it was negligence not to provide himself with appliances by which the cascos could be protected while passing from the mouth of the river to the launch, it was negligence for him to ask the cascos to move out into the open sea under such circumstances. It is clear, therefore, that the defendant directly or through the captain failed in every duty laid upon it by the law, even though the law applicable under the facts and circumstances of this case require the use of only ordinary diligence and care; but, as a matter of fact, the law required the exercise of more than ordinary care under the circumstances existing at the time the cascos were lost. The fact of time and season and of the probability that in coming out of the river they would be met with wind and wave and, in their helpless condition, would in all probability, if so met, be driven on the shoals, made the situation of the cascos one of more than ordinary danger; and the tug should be held to a proportionately higher degree of care and skill.

While the captain of the *Matulin* would not have been responsible for an act of God by which the cascos were lost, it was his duty to foresee what the weather was likely to be, and to take such precautions as were necessary to protect his tow. It was not an act of God by which the cascos were lost; it was the direct result of the failure of the captain of the *Matulin* to meet the responsibilities which the occasion placed on him. To be exempt from liability because of an act of God the tug must be free from any previous negligence or misconduct by which that loss or damage may have been occasioned. For, although the immediate or proximate cause of the loss in any given instance may have been what is termed an act of God, yet, if the tug unnecessarily exposed the two to such accident by any culpable act or omission of its own, it is not excused. (Manresa, vol. 8, pages 91 *et seq.;* art. 1105, Civil Code.)

These are the grounds upon which the decision in this case was rested. So ordered.

Torres, Moreland, and *Araullo, JJ*.
Johnson, J., concurs in the result.
Trent, J., dissents.

November 2, 1916

DECISION ON MOTION FOR REHEARING

MORELAND, J.:

This is a motion for a rehearing in a case decided by this court in which we held that the plaintiff was entitled to a judgment against the defendant. The action was one for negligence in towing two cascos from Guagua to Manila whereby they and their cargoes were lost. Reference is made to the decision in the main case for a statement of the facts.

> On this motion the defendant contends that "the decision of this honorable court in the above entitled cause is based upon the ground that it was negligence for the *patron* of the defendant's launch to permit the *patrones* of the cascos to attempt to move their vessels from their mooring place in the Malabon River to the place where the launch was waiting for them outside the bar."
>
> While, says the defendant, "the case was tried below solely upon the theory that the negligence imputed to defendant consisted in the failure of the launch to go to the assistance of the cascos when the roughness of the sea made them unmanageable."

With this allegation as a basis the defendant says in its motion:

> "The decision of this honorable court is based upon the theory of the case which was not advanced by plaintiff at the trial and is wholly at variance with the issues of law tendered at the trial. The case was tried on the assumption that if it was in fact impossible for the launch to go to the aid of the cascos, no liability for the loss would rest upon the defendant. It was never once contended in the course of the trial that it was negligence *per se* for the defendant to permit the cascos to make their way from the mouth of the river to the bar."

We are of the opinion that the defendant limits too severely the theory on which the case was tried below. The complaint alleges facts sufficient to state a cause of action against the defendant from several points of view. As shown by the statement of facts in the decision in the main case, which was but a restatement of the facts alleged in the complaint, the defendant was charged with negligence for everything done by him subsequent to the time when he placed the cascos in the Malabon River instead of continuing with them to Manila. Indeed, the complaint even alleges that the placing of the cascos in the mouth of the Malabon River was in itself an act of negligence. To say the least, the theory of the plaintiff was that the negligence of the defendant began from the placing of the cascos in the river, While the fact that the defendant's launch did not go to the assistance of the cascos when they found themselves unable to navigate the waters of the bay was, perhaps, dwelt upon with more emphasis than the other features of the case, there does not appear any intention on the part of the plaintiff of relying solely on that theory and to renounce his rights against the defendant arising from other acts of negligence and to stand alone upon the act on which particular emphasis was placed.

Moreover, the act of the *patron* of defendant's launch of calling the cascos out of the shelter of the Malabon River into the dangers of the bay, while an act of negligence on the part of the defendant's *patron* under the circumstances, is so closely connected both in point of time and in nature with the inability of the *patron* to go to their assistance after they were called out as to make the two inseparable to the extent that logically they cannot be divided for the purpose of claiming that one of the acts or omissions was accepted as the theory of the case to the exclusion of the other. We held in the main case that it was not only negligence for the *patron* of the defendant's launch to order the cascos out of the shelter of the river into the dangers of the bay; but we also held that the failure of the defendant to provide suitable means by which it could extend assistance to the cascos after they had reached the waters of the bay was also negligence under all the circumstances. Indeed, one of the principal grounds of our decision was that the defendant, after putting the property of the plaintiff in a dangerous position, found itself without means of averting the catastrophe which its own acts invited.

For these reasons we are of the opinion that the theory on which the case was tried below was not so narrow as the defendant assumes. Nor was the decision of this court so circumscribed as counsel maintains. All of the facts upon which our decision was based were proved in the trial and were discussed by the trial court. While he may not have drawn conclusions from some of the facts, that was due more to the circumstance that he found for the defendant than that he was simply following a particular theory in the trial of

the cause.

Finally, the brief filed in the trial court by the plaintiff puts these questions:

> "First, Was there reasonable ground for the defendant leaving the cascos in the Malabon River? Second, *Was not the loss of the cascos and their cargoes due to the negligence of the patron of the launch 'Matulin'?"*

In arguing these questions counsel said: "The contract of towage is by its nature indivisible." Continuing the argument he called attention to the fact that the *patron* of the *Matulin* summoned the cascos from the Malabon River into the bay in the early morning and then left them to the mercy of the wind and waves. Counsel then argued the legal responsibility of the defendant. He asserted that the *patron* of defendant's launch should have known the hours of the ebb and flow of the tide and the condition of the bay and that he should not have called the cascos from the mouth of the river until the conditions were such that they could navigate without assistance or until, if they needed assistance, he was able to offer it.

It is undoubtedly the law that, where a cause has been tried upon the theory that the pleadings are at issue, or that a particular issue is made by the pleadings, or where an issue is tacitly accepted by all parties as properly presented for trial and as the only issue, the appellate court will proceed upon the same theory. (Lizarraga Hermanos *vs.* Yap Tico, 24 Phil. Rep., 504; Molina *vs.* Somes, 24 Phil. Rep., 49.) It would be unjust and oppressive for the appellate court to adopt a theory at variance with that on which the case was presented to and tried by the lower court. It would surprise the parties, take them unawares and off their guard, and would, in effect, deprive them of their day in court. There is a difference, however, between a change in the theory of the case and a shifting of the incidence of the emphasis placed during the trial or in the briefs. The theory of the case is primarily determined by the pleadings. But the parties may, by express or implied agreement during the trial, adopt and follow some other theory, in which case the theory so adopted will control the case. Where, however, the theory of the case as set out in the pleadings remains the theory throughout the progress of the cause, the change of emphasis from one phase of the case as presented by one set of facts to another phase made prominent by another set of facts, all of which facts were received in evidence without objection as clearly pertinent to the issues framed by the parties in their pleadings, does not result in a change of theory, and particularly not where the two sets of facts are so closely related both as to time and

nature that they are to all intents and purposes inseparable. In the case under discussion the action was based on the negligence of defendant which resulted in the loss of plaintiff's cascos and their cargoes of sugar. The complaint contains a complete history of the case and a statement of all of the defendant's acts from the time it received the cascos in tow until they were lost. Those acts were proved in the trial. Plaintiff emphasized in particular those facts which showed that defendant's *patron* refused or neglected to go to the assistance of the cascos after he had summoned them from the safety of the river into the hazards of the bay and when he saw them drifting helplessly on the shoals. But there was in the case the fact that the *patron did* call the cascos out of the river into the bay *knowing* that he could not assist them should they need assistance before they reached the deeper water where the launch could navigate, and *knowing* the state of the tide and that bad weather might supervene at any moment at that season of the year. The court on appeal emphasized, perhaps, but not intentionally, as it was unnecessary, the latter facts, holding that it was negligence, under all the conditions, for the defendant to summon the cascos from the river into the bay while the defendant had so circumstanced itself as to be unable to render assistance to the cascos if they should need it. These two sets of facts are so closely related and inseparably connected in the theory of plaintiff's case as stated in the pleadings and as tried that we do not believe it can reasonably be urged that there was a change of theory in the appellate court. This court simply developed plaintiff's theory and its facts; it did not change them. The motion is denied. So ordered.

Torres, Johnson, Carson, and *Araullo, JJ.,* concur.

Date created: May 29, 2014