

Federal Court



Cour fédérale

Date: 20230202

Docket: T-138-20

Citation: 2023 FC 155

Ottawa, Ottawa, February 2, 2023

PRESENT: The Honourable Madam Justice Rochester

BETWEEN:

ANDRIE LLC

Plaintiff

and

**BLUEWATER FERRY LIMITED, HIS MAJESTY THE KING IN RIGHT OF
CANADA, SIGNE GOTFREDSEN, THE INTERLAKE STEAMSHIP
COMPANY,
BETTER WAY LOGISTICS LLC, AND VAN ENKEVORT TUG AND BARGE,
INC.**

Defendants

AND BETWEEN:

BETTER WAY LOGISTICS LLC

Plaintiff

and

**BLUEWATER FERRY LIMITED, HIS MAJESTY THE KING IN RIGHT OF
CANADA, SIGNE GOTFREDSEN, THE INTERLAKE STEAMSHIP
COMPANY, ANDRIE LLC, and VAN ENKEVORT TUG AND BARGE, INC.**

Defendants

AND BETWEEN:

BLUEWATER FERRY LIMITED

Plaintiff by Counterclaim

and

**HIS MAJESTY THE KING IN RIGHT OF CANADA, SIGNE GOTFREDSEN,
THE INTERLAKE STEAMSHIP COMPANY, ANDRIE LLC,
BETTER WAY LOGISTICS LLC and
VAN ENKEVORT TUG AND BARGE, INC.**

Defendants by Counterclaim

JUDGMENT AND REASONS

[1] On the morning of January 11, 2018, facilities belonging to a ferry company were damaged by ice flowing down the St. Clair River. On the very same morning, a convoy of five vessels, led by an icebreaker, steamed down the St. Clair River and passed by the ferry company's facilities.

[2] The present matter raises two issues. First, whether there is sufficient evidence to conclude that the transit of the convoy down the St. Clair River caused ice to flow downstream and damage the infrastructure of a ferry terminal, owned and operated by Bluewater Ferry Limited [Bluewater]. Second, if one or more of the vessels in the convoy caused the damage to Bluewater's facilities, whether one or more of the vessels are liable to Bluewater.

[3] The owners of the five vessels [Shipowners] move for summary judgment on the basis that there is no genuine issue for trial. The Shipowners submit that Bluewater is unable to demonstrate that one or more of the vessels caused the damage to Bluewater's facilities or that they breached their standard of care.

[4] Bluewater also moves for summary judgment on the question of liability on the basis that there is no genuine issue for trial. Bluewater submits that the Court has the evidence required to reach a fair and just determination on the merits, namely to find that (i) the probable cause of the damage was the transit of the convoy, and (ii) the Shipowners are liable for the damage caused by their vessels.

I. Background

[5] The St. Clair River connects the southern end of Lake Huron with the northern end of Lake St. Clair. The river flows in a southerly direction. It forms part of the international boundary between the United States and Canada, with the boundary being roughly midway across the river. The state of Michigan is on the west side of the river and the province of Ontario is on the east side.

[6] The St. Clair River is a major artery for commercial vessels. During the winter months, the river is prone to freezing, and thus the Canadian Coast Guard [CCG] and the United States Coast Guard [USCG] coordinate and conduct icebreaking services in the region. As per the expert evidence, such icebreaking services permit commercial traffic to maintain their use of the river, prevent the buildup of ice, mitigate flood conditions, manage the ice cover and maintain a

groomed track through the ice. CCG and USCG icebreakers assist convoys of commercial vessels to allow them to transit the river. In the days leading up to the incident, there was frequent convoy activity on the St. Clair River.

[7] On the morning of January 11, 2018, the CCG icebreaker, Samuel Risley [CCG Risley] led a convoy of five vessels from Lake Huron, southbound down the St. Clair River, and into Lake St. Clair. The navigable track is located on the American side of the St. Clair River.

[8] The order of the convoy was as follows. First, the CCG Risley, owned by the Crown [Canada]. Second, an articulated combination of a tug named Joseph H. Thompson J.R. and an unpowered pushed vessel named Joseph H. Thompson [collectively, Joseph H. Thompson] owned by VanEnkevort Tug and Barge Inc. Third, the tug Michigan, owned by Better Way Logistics LLC [Better Way]. Fourth, the tug Barbara Andrie, owned by Andrie LLC [Andrie]. The Barbara Andrie was assisting the Michigan. Fifth, the Herbert C. Jackson, a bulk carrier, owned by the Interlake Steamship Company. Save for the CCG Risley, the vessels in the convoy were American-flagged vessels.

[9] During the transit down the St. Clair River, the vessels remained in a convoy formation with CCG Risley in the lead. The ice conditions in the established track varied during the transit. In certain portions of the river, the vessels sailed through open water. In others, brash ice was present. Brash ice is effectively the wreckage of other forms of ice. Brash ice is an accumulation of floating ice that is comprised of fragments of not more than 2 metres across [Brash Ice].

Pancake ice was also present, which refers to predominantly circular pieces of ice of up to 3 metres in diameter and up to 10 centimetres in thickness [Pancake Ice].

[10] In addition, fast ice was present in the river. Fast ice refers to ice which remains attached to the coast (i.e., either to the shore, a shoal, an ice wall, an ice front, or a grounded iceberg) [Fast Ice]. Fast Ice may form when water next to the shore freezes or when floating ice freezes to the shore. In the present case, the American side of the river was predominantly open water and light Brash Ice. On the Canadian side of the river, there was Fast Ice, that in certain locations went all the way to, and past, the international boundary. In certain locations, the Fast Ice east of the navigable track extended approximately 2,500 to 3,000 feet.

[11] During the transit, the CCG Risley led the vessels through open water and lighter concentrations of Brash Ice and Pancake Ice, which was flowing down the river and in the direction of the American side. At one point during the transit, the CCG Risley encountered what has been described as a tongue of ice, which protruded from the Fast Ice. The tongue of ice was comprised of Brash Ice and refrozen medium and thin Pancake Ice with no visible track or movement. It was estimated to be approximately 100 - 200 metres in size and was located approximately 1 to 1.5 nautical miles north of Bluewater's facilities. The CCG Risley broke through the tongue of ice in order to avoid diverting the vessels around it and to maintain the navigable track. The master of the CCG Risley describes that the tongue of ice was not difficult to punch into and push through. Since there was open water on the American side of the river, the resulting broken ice flowed towards the American side.

[12] For the remainder of the material time, following the encounter with the tongue of ice, the CCG Risley continued to clear a path through light Brash Ice and in certain places sailed through open water. The convoy remained on the American side of the river.

[13] Bluewater owned and operated passenger ferries that transited the St. Clair River between Marine City, Michigan, and Sombra, Ontario. Two ferries operated on the route, save for the icebreaking season during which only one ferry operated. Bluewater owned two facilities, one on the Canadian side of the St. Clair River and one on the American side.

[14] Bluewater's Canadian facility was located at Sombra, Ontario. It consisted of a ferry terminal located on an island. The island had a two-lane access road which connected it to the river bank at Sombra. The access road was approximately 260 feet in length and was reinforced by steel pipes and I-beams. The access road also had a series of pilings placed upstream to protect it from ice damage. This access road was known as the "causeway" [Causeway].

[15] On the morning of January 11, 2018, fragments of ice flowed downstream along the Canadian shoreline, impacting and damaging the Causeway. The surge of ice against the Causeway damaged the access road, the supporting structure, the metal pilings, the guardrails and the electricity poles attached to the Causeway. Slabs of ice passed under and over the Causeway. While there is some dispute over the exact timing of the surge of ice against the Causeway, it is understood to have taken place around 8:00 a.m. or not long thereafter. Eyewitness accounts place the period of time during which the slabs of ice surged against the Causeway as between 10 to 20 minutes.

[16] As a result of the incident, a portion of the Causeway collapsed, rendering it unusable. Bluewater claims that the physical damage and the associated losses total \$6,000,000.

[17] The passage of the convoy down the St. Clair River, and in particular past Marine City and Sombra, coincided generally with the incident at Bluewater's facility. Based on automatic identification system data, the CCG Risley sailed past Bluewater's facilities at approximately 8:18 a.m. The other four vessels followed the CCG Risley at varying distances, with the convoy stretching over a number of nautical miles. The distances between the vessels generally ranged from 1.5 to 2 nautical miles, although at a certain point in the vicinity of Marine City Lighthouse the Joseph H. Thompson was approximately 1 nautical mile upriver of the CCG Risley. The Herbert C. Jackson, the last vessel in the convoy, sailed past Bluewater's facilities more than half an hour after the CCG Risley, at approximately 8:52 a.m.

[18] At the location in the St. Clair River where the convoy passed by Bluewater's facility, the vessels were following the navigable track on the American side of the river. The distance between the shoreline at Sombra and the international border in the river is approximately 1,700 feet. There was an expanse of Fast Ice (i.e., an ice field) in between the navigable track and Bluewater's facility, which protruded beyond the international border into the American side of the river.

[19] Bluewater alleges that the passage of the CCG Risley and the accompanying vessels caused thick slabs of ice to float downstream along the Canadian shoreline thereby causing damage to the Causeway.

II. The Proceedings

[20] As a result of the incident, Bluewater commenced proceedings in the Ontario Superior Court of Justice against, among others, the Shipowners. Following the commencement of the proceedings in Ontario, Better Way commenced limitation proceedings in this Court under Court File No. T-1713-19. Several months later, Andrie commenced the present limitation proceedings in this Court under Court File No. T-138-20. Both Better Way and Andrie respectively claim that they are entitled to limit their liability to \$500,000.

[21] By way of Order dated January 29, 2021, Associate Justice Alto ordered that the limitation proceedings brought by Better Way (T-1713-19) be consolidated with the present proceedings in order to be determined jointly.

[22] In the context of the limitation proceedings, Bluewater brought a counterclaim for damages in the amount of \$6,000,000 and alleged that the Shipowners are jointly and severally liable. Bluewater alleged that the Shipowners owed Bluewater a duty of care to navigate the waterway safely, carefully, prudently, and in such a manner as to avoid causing damage that was reasonably foreseeable to shoreline installations given the ice conditions on January 11, 2018. With respect to the icebreaking services, Bluewater alleged that Canada owed Bluewater a duty of care to perform such services in a safe, careful, and prudent manner. Bluewater alleged, among other things, that the vessels were operated at speeds which were excessive for the ice conditions on the St. Clair River at the material time.

[23] The Shipowners filed defences against Bluewater's counterclaim, along with cross claims against each other for contribution and indemnity in the event they were found liable to Bluewater. After the close of pleadings, affidavits of documents were exchanged and examinations on discovery were conducted.

[24] Following the service of Bluewater's expert report, the Shipowners signalled their intent to move for summary judgment. A schedule was agreed, pursuant to which the Shipowners served a joint expert report on the issue of liability. The parties also served supporting affidavits and conducted cross-examinations on a number of those affidavits.

[25] On December 2, 2022, all the parties served and filed their motion records. The Shipowners filed a joint motion Record.

[26] As noted above, the Shipowners move for summary judgment on the basis that there is no genuine issue for trial. The Shipowners allege that Bluewater is unable to demonstrate that one or more vessels caused the damage to Bluewater's facilities or that the Shipowners breached their standard of care.

[27] The Shipowners submit that the experts agree that (i) there is no evidence on the record indicating the cause of the damage to the Causeway, and (ii) there were no actions that the Shipowners could have taken to prevent the damage from occurring. Furthermore, the Shipowners plead that the expert evidence demonstrates that there were no apparent acts of poor or imprudent seamanship during the transit of the convoy.

[28] Bluewater moves for summary judgment on the question of liability on the basis that there is no genuine issue for trial. Bluewater submits that the Court has the evidence required to reach a fair and just determination on the merits, namely to find that (i) the probable cause of the damage was the transit of the convoy, and (ii) the Shipowners are liable for the damage caused by their vessels.

[29] Bluewater alleges that the excessive speed of the vessels caused the movement of ice on the Canadian side of the river that damaged the Causeway. Bluewater submits that this excessive speed gives rise to liability (i) in negligence under common law, and (ii) for having breached the *Collision Regulations*, CRC, c 1416, with this breach being causative of the ice movement, and therefore, of the damage. Bluewater pleads that the Shipowners are jointly and severally liable for damages on the basis of: (i) section 17 of the *Marine Liability Act*, SC 2001, c 6; (ii) the convoy being a single unit; or (iii) the principles of joint and several liability at common law.

III. Issues

[30] The Shipowners' motion for summary judgment and Bluewater's cross-motion for summary judgment raise the following issues:

- A. Is it appropriate to deal with the present matter by way of summary judgment?
- B. Did the passage of one or more of the vessels in the convoy, on a balance of probabilities, cause the ice to flow downstream on the Canadian side of the St. Clair River and damage the Causeway?
- C. If so, are one or more of the Shipowners liable to Bluewater?

IV. Analysis

A. *Is it appropriate to deal with the present matter by way of summary judgment?*

[31] The purpose of summary judgment is to allow the Court to summarily dispense with cases that should not proceed to trial because there is no genuine issue for trial, thus conserving judicial resources and improving access to justice (*Milano Pizza Ltd v 6034799 Canada Inc*, 2018 FC 1112 at para 25 [*Milano Pizza*]; *Canmar Foods Ltd v TA Foods Ltd*, 2021 FCA 7 at para 23 [*Canmar Foods*]; *Manitoba v Canada*, 2015 FCA 57 at paras 15-17; *Hryniak v Mauldin*, 2014 SCC 7 at para 34 [*Hryniak*]; *Gemak Trust v Jempak Corporation*, 2022 FCA 141 at para 62 [*Gemak*]).

[32] The rules on summary judgment, according to the Supreme Court, are to be interpreted broadly so as to promote affordable, timely and just adjudication of civil claims (*Hryniak* at para 5; *Canmar Foods* at para 23).

[33] Rule 215(1) of the *Federal Courts Rules*, SOR/98-106 [Rules] provides that the Court shall grant summary judgment where the Court is satisfied that “there is no genuine issue for trial with respect to a claim or defence”.

[34] The Federal Court of Appeal has noted that while “[t]here does not appear to be any definitive or determinative formulation of the test” on a motion for summary judgment, it describes the test as being not whether a party cannot possibly succeed at trial, but rather whether

the case is so doubtful that it does not deserve consideration by the Court at a future trial (*Canmar Foods* at para 24; see also *Gemak* at para 66).

[35] Relying on the Supreme Court's decision in *Hryniak*, the Federal Court of Appeal has also noted there will be no genuine issue for trial if there is no legal basis to the claim or, as is relevant to the present matter, if the judge has the evidence required to fairly and justly adjudicate the dispute (*Gemak* at para 64).

[36] In *Hryniak*, the Supreme Court instructed that there is no genuine issue for trial where a summary judgment motion can achieve a fair and just determination on the merits by way of "a process that allows the judge to make the necessary findings of fact, apply the law to those facts, and is a proportionate, more expeditious and less expensive means to achieve a just result than going to trial." (at para 4; see also paras 49, 50, 66).

[37] It is acknowledged that summary judgment is not as exhaustive as a trial, however, the focus must be on whether the judge can make the necessary findings of fact and apply the relevant legal principles so as to resolve the dispute (*Hryniak* at para 50; *Yodjeu Ntemde v Canada*, 2018 FC 410 at para 57).

[38] The onus is on the party seeking summary judgment to establish the absence of a genuine issue for trial. Rule 214 of the Rules, however, requires the responding party to set out specific facts and adduce evidence showing that there is a genuine issue for trial. While the burden is on the moving party, both parties must put their best foot forward (*Canmar Foods* at para 27;

Milano Pizza at para 34). In other words, the parties on a motion for summary judgment are required to put their best foot forward, regardless of where the onus lies.

[39] Given the obligation to put one's best foot forward, the Court is entitled to assume that if the case were to go to trial, no additional evidence would be presented (*Rude Native Inc v Tyrone T Resto Lounge*, 2010 FC 1278 at para 16; *Kaska Dena Council v Canada*, 2018 FC 218 at para 23).

[40] There are, however, limits on the type of matters that may be dealt with by way of summary judgment. There may be cases where, given the nature of the issues and the evidence required, the judge is unable to make the necessary findings of fact in the context of a motion for summary judgment (*Hryniak* at para 51).

[41] Moreover, the jurisprudence is clear that issues of credibility should not be decided on motions for summary judgment (*Gemak* at para 68). Where there are important factual disputes that cannot be resolved without determining questions of credibility and inferences to be drawn from conflicting evidence, a trial is the preferable means to resolve the dispute (*TPG Technology Consulting Ltd v Canada*, 2013 FCA 183 at para 3 [*TPG Technology*]). In general, a judge who hears and observes witnesses giving oral evidence in chief and under cross-examination is better placed to assess their credibility and to draw the necessary inferences than a judge who must depend solely on affidavits and documentary evidence (*TPG Technology* at para 3; *Gemak* at para 68).

[42] A credibility issue arises when, for example, the evidence of a lay or expert witness is not believed or given no credit when coming to the opposite conclusion, or when the judge must choose one witness's evidence over that of another (*Suntec Environmental Inc v Trojan Technologies Inc*, 2004 FCA 140 at paras 23 - 28; *Canada v Bezan Cattle Corporation*, 2021 FC 397 at para 47).

[43] The Federal Court of Appeal has been very clear: cases should go to trial where there are serious issues with respect to the credibility of witnesses (*Gemak* at para 71). That being said, not all conflicting evidence will raise credibility issues and preclude addressing a matter by way of summary judgment (*Rallysport Direct LLC v 2424508 Ontario Ltd*, 2019 FC 1524 at para 42; *Gemak* at para 72). It is incumbent on the Court to "take a 'hard look' at the merits of the case" in order to determine if there are credibility issues that need to be resolved (*Milano Pizza* at para 39; *Gemak* at 72).

[44] I note that the Shipowners rely on Rule 216(6) and related jurisprudence for a number of propositions. It bears mention that Rule 216 governs motions for summary trial as opposed to motions for summary judgment. Summary trial under Rule 216 and summary judgment under Rules 214 and 215 are not the same. Where there is in fact a genuine issue of fact or law for trial, a summary trial may be held in accordance with Rule 216, and in such cases judges have greater powers to decide disputed questions of fact (*Gemak* at para 65).

[45] The considerations with respect to whether a summary trial is appropriate differ from those for summary judgment. Such considerations for summary trials include the amount

involved; the complexity of the matter; its urgency; any prejudice likely to arise by reason of delay; the cost of taking the case forward to a conventional trial in relation to the amount involved; whether credibility is a crucial factor; and the course of the proceedings (*Premium Sports Broadcasting Inc v 9005-5906 Québec Inc (Resto-bar Mirabel)*, 2017 FC 590 at para 54). As such, while there are a number of the general principles that apply to both a motion for summary judgment and a motion for summary trial, one must exercise caution when seeking to rely on summary trial jurisprudence in the context of a motion for summary judgment.

[46] In the present case, both Bluewater and the Shipowners move for summary judgment and submit that the matter is an appropriate one for summary judgment.

[47] The Shipowners plead that the parties have put their best foot forward in terms of their evidence and agree on the critical issues in dispute, namely fault and causation. The Shipowners plead that the Court has sufficient evidence to fairly adjudicate the dispute.

[48] Bluewater submits that all the facts necessary to determine liability in the present matter are before the Court and are essentially unchallenged. Bluewater pleads that a full trial, with testimony, is unnecessary.

[49] I am mindful of the instructions of the Federal Court of Appeal that issues of credibility should not be determined on motions for summary judgment (*Gemak* at para 68). Bluewater and the Shipowners differ in their characterization of certain portions of the expert evidence. In particular, Bluewater has criticized certain statements made by the expert instructed by the

Shipowners on the topic of the speed of the vessels. During the hearing, I questioned the parties on the issue of the credibility of the two experts. Both parties asserted that credibility is not at issue in the present proceeding.

[50] Nevertheless, it is for this Court to take a “hard look” at the merits and decide whether there are issues of credibility to be resolved (*Gemak* at para 72). Having considered the affidavits of the two experts, the affidavits of the lay witnesses, and the transcripts of the cross-examinations that were conducted, I find that credibility is not a determinative issue. As will be discussed in further detail below, I am not called upon to render a finding on the credibility of one witness over another, upon which I would rely in order to decide the case. While the issue of one expert’s consideration of the speed of the vessels did arise, I agree with counsel for Bluewater that ultimately, the expert’s statements do not preclude this Court from proceeding by way of summary judgment. In addition, this matter does not turn on whether I disbelieve any of the witnesses. As such, the dispute can be resolved without determining questions of credibility and drawing the necessary inferences (*Gemak* at para 68; *TPG Technology* at para 3).

[51] I now return to the broader issue of a genuine issue for trial. The parties have pleaded, and I agree, that issues of credibility do not need to be determined. The parties are *ad item* that there is no genuine issue that would require a trial. Considering the record before the Court and the parties’ submissions, I find that it would be an unnecessary use of the parties’ time and resources, as well as the Court’s, to send this matter to trial. Given the obligation on Bluewater and the Shipowners to put their best foot forward and the contents of their respective motion records, the Court, in my view, has the evidence required to adjudicate this dispute fairly and

justly. The evidence in the record permits me to make the necessary findings of fact and apply the law to those facts. Accordingly, I find that this matter is one that is appropriate for summary judgment.

B. *Did the passage of one or more of the vessels in the convoy, on a balance of probabilities, cause the ice to flow downstream and damage the Causeway?*

[52] The Shipowners plead that Bluewater's case suffers from a false cause fallacy by presuming that the only reasonable explanation for the dislodgment of the ice along the Canadian shoreline of the river was the convoy. The Shipowners submit that there is no certainty as to the exact time of the damage to the Causeway and no indication as to where the dislodgment of ice took place.

[53] While the Shipowners acknowledge that the damage to the Causeway took place on the same morning that the convoy passed, they plead that both experts agreed that they could not identify the probable cause of the dislodgment of the ice and the resulting damage. The Shipowners submit that the expert instructed by Bluewater, Captain John McCann [Captain McCann], was able to identify a number of factors that could possibly have moved or dislodged the Fast Ice on the Canadian shoreline, but that Captain McCann's conclusions are that these factors are simply possibilities.

[54] The Shipowners plead that Captain McCann's opinions are phrased in a manner that are hypothetical, conditional and avoid any definitive conclusions. The Shipowners highlight a number of passages from Captain McCann's report, including his opinion that "it's possible with

the frequent convoy activity over several days that there could be some weakening of the fast ice coupled with some higher water levels, warmer temperatures and melting ice.” Captain McCann states that “if indeed ice was dislodged or weakened along the shoreline that the combined mass and hydrodynamics of a five-vessel convoy along with other environmental factors could have influenced the movement of the ice along the shoreline in my professional opinion.” Captain McCann confirms that “in my opinion, given the facts that there was ice movement in Sombra on January 11, 2018, that you cannot rule out that the ice breaker escort may have contributed to this incident.” Captain McCann identifies that the convoy “could have been [a] contributing factor” to the movement of the ice, and “other factors may have been environmental”, namely higher temperatures causing surface melting and higher water levels.

[55] The Shipowners further highlight that during cross-examination, Captain McCann could not confirm whether the actions of one or more of the vessels caused or contributed to the displacement of the ice field which damaged the Causeway. Captain McCann stated that without the data on the hydrodynamic influence of the vessels, he could not answer yes to the question of whether the convoy had an impact on the movement of the ice.

[56] The Shipowners rely on the expert they instructed, Captain Christopher Hearn [Captain Hearn], who concluded that the evidence available “does not allow for clear determination of the cause of the flow of ice that damaged the Bluewater causeway”. Captain Hearn stated that he agreed with Captain McCann with respect to “the possibility that frequent convoy traffic combined with warmer temperatures and high water levels could have weakened some areas of the fast ice on [*sic*] extending from the Canadian shore line.” Captain Hearn cautioned though

that “there was no clear evidence that the passage of the ice breaker and convoy vessels caused the flow of ice to damage the Bluewater causeway”.

[57] The Shipowners further rely on affidavits from the captains and crewmembers of the vessels at issue, attesting that there was nothing unusual or out of the ordinary that took place during the transit of the convoy. The Shipowners note that Bluewater relies on the affidavits of two residents of Sombra who heard loud cracks in the ice and scraping noises, and witnessed ice hitting the Causeway. The Shipowners highlight, however, that Captain McCann, during his examination, confirmed that when the vessels passed the house of one of the witnesses and the Causeway, there was no further ice to be broken in the track on the American side of the river. Consequently, Captain McCann confirmed that the unusual noise heard by the two witnesses from Sombra was not the breaking of ice by the convoy on the American side of the river but rather the sound of the ice impacting the Causeway on the Canadian side.

[58] The Shipowners therefore submit that because the experts agree that there is no evidence as to the cause of the damage and neither is able to identify a likely cause, Bluewater’s claim must fail on this basis. The Shipowners further submit that the eyewitness evidence from both parties does not assist in determining the cause of the flow of ice that damaged the Causeway.

[59] Turning now to the submissions of Bluewater, who plead that Captain McCann identified four possible causes of the flow of ice into the Causeway: (i) higher ambient temperatures; (ii) higher water levels; (iii) loss or weakening of the attachment of the Fast Ice at the Canadian

shoreline of the river; and (iv) speed of the vessels, and in particular the resulting surface wake and hydrodynamic disturbance beneath the Fast Ice.

[60] Bluewater submits that at no point does Captain Hearn challenge the material opinions of Captain McCann as to what the potential causes of the movement of ice on the Canadian side could have been, nor does he provide any additional or alternative potential causes. Bluewater pleads that identifying possible causes and providing opinions on facts which influence the relative possibility of those causes are the task of an expert witness. Bluewater submits that Captain Hearn has failed to perform that task. Consequently, there is no relevant dispute between the expert witnesses as to the opinion of Captain McCann on the issue of causation.

[61] Bluewater argues that Captain Hearn has set the bar too high in terms of possible causes. A “clear determination of the cause of the flow of the ice” is not required, rather one must consider what could have been the cause or causes and which of these were “more probable than not”. Bluewater submits that Captain McCann provided all the possibilities as to the cause of the movement of the ice, and it is the Court's role to choose from the possibilities provided.

[62] Bluewater relies on the following passage from *Fontaine v British Columbia (Official Administrator)*, [1998] 1 SCR 424 at paragraph 27, in which the Supreme Court indicated how the trier of fact should deal with circumstantial evidence:

[Circumstantial] evidence is more sensibly dealt with by the trier of fact, who should weigh the circumstantial evidence with the direct evidence, if any, to determine whether the plaintiff has established on a balance of probabilities a *prima facie* case of negligence against the defendant. Once the plaintiff has done so,

the defendant must present evidence negating that of the plaintiff or necessarily the plaintiff will succeed.

[63] Bluewater submits that in the present case, the circumstantial evidence is that the convoy caused the flow of the ice. The damage to the Causeway occurred at the time as when the convoy was in the area and the speeds at which the convoy navigated are a possible cause of the dislodgment of ice. Bluewater highlights that two residents of Sombra witnessed the Causeway being damaged by pans of ice floating downstream. Bluewater pleads that the evidence establishes that the damage was *prima facie* caused by the passage of the convoy and that it rests with the Shipowners to present evidence negating that.

[64] Bluewater argues that because the crewmembers of the vessels did not notice anything unusual, does not mean it did not take place. By way of example, Bluewater notes that the First Mate of the Herbert C. Jackson stated that he did not notice anything unusual or alarming and the vessel's wake was not unusual or excessive. The Herbert C. Jackson was the last vessel in the convoy and passed Bluewater's facilities at 8:52 a.m., approximately 30 minutes after the ice damage occurred. Bluewater notes that the First Mate did not notice the extensive damage to the Causeway as it is not where his attention was directed. Bluewater therefore submits that the convoy's attention was not on the movement of the ice along the Canadian shoreline.

[65] Bluewater pleads that the fact that there is no direct evidence available does not mean that Bluewater does not have a claim. Rather, the indirect evidence, in Bluewater's view, is sufficient to establish the cause of the ice movement on a balance of probabilities.

[66] Building from Captain McCann's report, Bluewater pleads that of the four possible causes of the movement of Fast Ice along the Canadian shoreline identified, the speed of the vessels was the only probable cause of the movement of ice which damaged the Causeway. Bluewater submits that the other three possible causes identified by Captain McCann can be eliminated.

[67] With respect to higher water levels, Captain McCann identified that there had been higher water levels recorded, which may have been a contributing factor coupled with other factors. Bluewater pleads that Captain Gotfredsen, the master of the CCG Risley, stated during her examination on discovery that the water levels were "workable" on the day of the incident and were at their lowest point in two weeks. They shot back up the day after the incident. Bluewater submits therefore that there is no evidence upon which the Court could conclude that a higher water level was a probable contributor to the ice movement on the day of the incident.

[68] With respect to warmer temperatures, Captain McCann identified the higher temperatures and melting ice as possible factors for the ice being weakened along the shoreline. The weather and ice reports from the CCG Risley indicate that the temperature was 5 Celsius at 8 p.m. on January 10 and 8.5 Celsius at 8 a.m. on January 11. Bluewater submits that the higher temperatures were not ultimately a contributing factor because the master of the CCG Risley described the Fast Ice as having meltwater on the surface but being voluminous and heavy. Furthermore, Bluewater pleads that freezing must have taken place overnight in order for the tongue of ice to have formed. Consequently, it is Bluewater's position that the above freezing temperatures were insufficient to weaken the Fast Ice on the Canadian side of the river.

[69] With respect to the weakening of the Fast Ice, Captain McCann stated that it was possible that with the frequent convoy activity over several days, there could be some weakening of the Fast ice. Bluewater highlights that the master of the CCG Risley stated that she did not observe weakening of the Fast Ice but also acknowledges that she could not see the details of the Fast Ice on the Canadian side. Bluewater states that there was no reason for anyone from Bluewater to inspect the Canadian shoreline prior to the incident. Consequently, Bluewater submits that there is no evidence before the Court that there had been weakening of the Fast Ice that caused it to dislodge.

[70] Accordingly, Bluewater pleads that the speed of the vessels, with the resulting wake and hydrodynamic disturbance beneath the Fast Ice, is the only probable cause of the breakage of the Fast Ice near the Canadian shoreline. Bluewater highlights that when transiting the river, the CCG Risley sailed at a speed upwards of 12 knots for approximately 17 minutes between 7:47 a.m. and 8:04 a.m. on the morning of the incident. The CCG Risley slowed her speed thereafter, shortly after clearing a path through the tongue of ice and approximately 1 nautical mile upriver from Bluewater's facilities. Bluewater also highlights that the speed of the Joseph H. Thompson was 10.9 knots in the region of the tongue of ice.

[71] Bluewater notes that Captain McCann stated that the CCG Risley, when operating at higher speeds of 10 to 12 knots, can crack ice outboard of the vessel through its wake, although the outboard wake can be dampened somewhat by impeding ice but not necessarily eliminated.

[72] Bluewater relies on a Special Report from the United States Army Corps of Engineers dated May 1983 entitled “Effect of vessel size on shoreline and shore structure damage along the Great Lakes connecting channels” [1983 Special Report]. Bluewater notes that the 1983 Special Report concludes that the most significant factor in ship-related damage potential is vessel speed. Bluewater highlights the finding of the 1983 Special Report that as a vessel’s speed increases, vessel-induced surface waves are created. The report further notes that during winter ice conditions, the passage of vessels can cause nearshore cracks in the ice. Bluewater submits that the 1983 Special Report supports Captain McCann’s statement that hydrodynamics can have an influence on the movement of ice.

[73] Consequently, Bluewater pleads that it is more likely than not that the speeds of the CCG Risley and the Joseph H. Thompson, about 1 to 1.5 nautical miles upstream of the Causeway, initiated the dislodgment of the Fast Ice that resulted in the flow of pieces of ice downstream on the Canadian side of the river, which ultimately caused the damage to the Causeway.

[74] In response to Bluewater’s submissions, the Shipowners plead that Bluewater is stepping far outside the four corners of Captain McCann’s report and making statements that Captain McCann was not willing to say himself. The Shipowners note that while Captain McCann did state that at higher speeds, the CCG Risley can crack ice quite far outboard of the vessel, he did not go beyond that or categorically state that speed was in fact a cause. Rather, he referred to possible weakening of the ice by reason of a number of factors, and never stated that the CCG Risley’s speed was unsafe or too high for the conditions. Nor did Captain McCann state that he would not have proceeded at the same speed the master of the CCG Risley did on that day.

[75] As for the 1983 Special Report, the Shipowners submit that Captain McCann simply referred to it for the proposition that hydrodynamics can be influenced by shoreline conditions, and did not analyze it or consider it in detail in his report. As such, the Shipowners argue that it is not for the Court to go beyond Captain McCann's report and dive into the graphs and the science contained in the 1983 Special Report when the expert did not.

[76] The Shipowners plead that in fact there is no evidence whatsoever that it was more likely than not that speed was the cause of the damage to the Causeway. The Shipowners highlight that during cross-examination, Captain McCann confirmed that there was nothing in terms of "the movement of the vessels" that was unusual and that there was nothing with respect to the nature of the damage that indicated that the "movement of the vessels contributed to it". I note that the Shipowners interpret the term "movement" to include speed, while Bluewater submits that this term, in the context of the line of questioning, did not address speed.

[77] The Shipowners further highlight that the master of the CCG Risley stated that the wake was not excessive when the vessel was steaming at over 12 knots considering that the downstream current was between 1.5-1.7 knots. When breaking through the tongue of ice and the ice track at that speed, any wake was quickly absorbed by the ice in the track and the outer edge of the ice field on the Canadian side of the river. The master stated that by the time the vessel was 1 nautical mile north of Bluewater's facilities, she had slowed her speed to 0 – 10.2 knots and there was no wake at those speeds.

[78] The Shipowners plead that both experts confirmed that the vessels were operating in the spirit of good seamanship and neither expert stated that the speed was improper or unsafe given the conditions. If either of the experts thought the speed was excessive, they would have said so and not confirmed that the principles of good seamanship were followed. The Shipowners submit that the evidence from the crews of the vessels was that the wake was minimal and/or not out of the ordinary. As such, it is the Shipowners' position that there is no causal link between the passage of the convoy and the damage to the Causeway.

[79] Having considered the parties' written and oral submissions, and the motion records before me, I am unable to conclude, on a balance of probabilities, that one or more of the vessels caused pieces of ice to dislodge and flow downstream along the Canadian shoreline, thereby damaging the Causeway.

[80] It is common ground that the Causeway was damaged by pieces of ice floating downstream on the morning of January 11, 2018. The difficulty for Bluewater, in the present case, is while there is evidence that the passage of the convoy on the American side of the river coincided generally with the ice damage to the Causeway, there is insufficient evidence that one or more vessels caused ice, on the opposite side of the ice field from the convoy, to dislodge and float downstream along the Canadian shoreline.

[81] One can fully appreciate the reaction of Bluewater that the activity on the river, namely the passage of the vessels, must be linked to the dislodgment of the ice along the Canadian shoreline. Indeed, that was the impression of one of the two residents of Sombra who noted the

passage of the vessels on the American side of the river and witnessed the Causeway being impacted by pans of ice floating downstream.

[82] The difficulty for Bluewater, however, lies in the failure of either experts to identify a likely or probable cause of the dislodgment of the ice based on their expertise and the material provided to them. The expert reports in the present case are fatal to Bluewater's claim.

[83] Captain Hearn, the expert instructed by the Shipowners, concluded that the available evidence did not permit him to identify the cause of the flow of ice that damaged the Causeway. Captain Hearn agreed with Captain McCann that there was a possibility that frequent convoy activity over several days combined with warmer temperatures and higher water levels could have weakened some areas of the Fast Ice extending from the Canadian shoreline. Nevertheless, it was Captain Hearn's opinion that even if that was the case, there was no clear evidence that it was the passage of the CCG Risley and the convoy that caused the ice flow that damaged the Causeway.

[84] Captain Hearn further opined that, save for the tongue of ice upriver of the Causeway, the vessels were operating either in open water, light Brash Ice, or a groomed channel filled with Brash Ice. The vessels were operating within the speed limits of the St. Clair River when approaching and passing the Causeway. It is Captain Hearn's opinion that even if the Fast Ice was soft and fractured on the Canadian side of the river, given the distance of the vessels to the Canadian shoreline and the extent of the ice coverage, any course alterations or movements by

the vessels on the American side would have crushed or broken ice rather than “shifting enormous ice floes entirely to the extent that they moved against the causeway”.

[85] Captain McCann, the expert instructed by Bluewater, concluded that given there was in fact ice movement on January 11, 2018, “you cannot rule out that the ice breaker escort may have contributed to this incident”. Captain McCann did raise several possibilities, namely frequent convoy activity over several days and environmental factors, and opined that “[i]f indeed the ice was dislodged or weakened along the shoreline that the combined mass and hydrodynamics of a five-vessel convoy along with other environmental factors could have influenced the movement of the ice along the shoreline” [emphasis added].

[86] Taking both expert reports into account, along with the other evidence before me, I find that the evidence is insufficient to conclude, on a balance of probabilities, that the convoy caused pieces of ice to dislodge and float downriver damaging the Causeway and/or caused the movement of ice which damaged the Causeway. While there is a correlation generally between the timing of the passage of the convoy and the damage to the Causeway, correlation is not to be confused with causation.

[87] Despite the able submissions of counsel for Bluewater, the circumstantial evidence presented by Bluewater and Captain McCann’s opinion that one cannot rule out that the passage of the convoy may have contributed to the damage to the Causeway are simply insufficient to permit Bluewater to demonstrate a causal link between the convoy and the damage.

[88] While Captain McCann did raise several possible contributing factors (higher water levels, warmer temperatures, weakening of the Fast Ice, and the passage of the convoy), it was counsel for Bluewater who was ultimately left to argue why three of the four factors were not in fact possible in the present case. Bluewater had access to the same information and evidence that Captain McCann did, but while Bluewater undertook the exercise of seeking to eliminate the other possible factors, Captain McCann did not.

[89] Rather, based on the material provided to him, Captain McCann identified those factors as being possible contributing factors and did not see fit to eliminate them. I note the material provided to Captain McCann was extensive and included the affidavits of documents of the parties, the transcripts of the examinations on discovery, the witness statements, videos, weather and ice condition reports, other vessel reports, along with additional material. Similarly extensive material was provided to Captain Hearn. In this sense, I agree with counsel for the Shipowners that Bluewater is stepping well beyond the bounds of the expert evidence and making pronouncements that the experts themselves were not willing to make based on the materials presented to them.

[90] In addition, during his cross-examination, Captain McCann confirmed that while he could not say that “there is no correlation” between the convoy and the damage to the Causeway, he also confirmed that at this point he could not actually show that there is a correlation. Captain McCann further confirmed that the answer to the question, “[d]id the actions of one or more of the five vessels either alone or in conjunction cause or contribute to movement or displacement of the ice which, in turn, cause the damage to [the Causeway]?” was that he does not know.

When questioned again on this point, Captain McCann confirmed that based on the information available to him, he could not “say ‘yes’ or ‘no’ that [the convoy] had an impact on the ice movement.” Effectively, Captain McCann did not have sufficient information to confirm whether the convoy caused or contributed to the movement of the ice.

[91] As mentioned previously, Bluewater pleads that it is more likely than not that the speed of the convoy, and in particular, the CCG Risley and the Joseph H. Thompson, approximately 1 to 1.5 nautical miles upriver of the Causeway, initiated the dislodgment of the ice. The issue of speed, in terms of causation and with respect to a failure to exercise due skill and care and/or a statutory violation, played a prominent role both in the written submissions and at the hearing.

[92] With respect to causation, I find that there is insufficient evidence that the speed of the convoy, upriver of the Causeway, caused or contributed to the displacement of the ice that ultimately damaged the Causeway. Captain McCann was fully informed of the speed of the convoy, and well versed on the impacts that higher speeds could have on the displacement of water and ice in the connecting channels of the Great Lakes. Captain McCann was the former Captain of the CCG Risley and the former Director Marine Programs for the CCG Central and Arctic Region. Nevertheless, Captain McCann could not confirm whether the convoy, including the speed of the vessels therein, had an impact on the movement of the ice. Furthermore, I agree with the Shipowners that, had Captain McCann considered the speed of the CCG Risley excessive, unsafe, or improper given the conditions and based on the information provided to him, he would have said so given his mandate to address, among other issues, whether there was a failure of good seamanship on the part of one or more of the five vessels.

[93] Consequently, in terms of a possible cause of the damage, at best the expert evidence demonstrates that there are a number of factors that may have contributed to the movement of the ice on the morning of January 11, 2018. While one cannot rule out that the passage of the convoy may have caused or contributed to the dislodgment and/or movement of the ice, one can equally not rule out that the environmental factors and prior convoys may have caused or contributed to it.

[94] As noted by my colleague Justice Denis Gascon, the law of evidence operates as a binary system in which only two possibilities exist – either a fact happened or it did not (*Lv v Canada (Citizenship and Immigration)*, 2018 FC 935 at para 41 [*Lv*]). The party that carries the burden of proof must ensure that there is sufficient evidence to satisfy the Court as to the existence of a fact on the balance of probabilities. In order to satisfy the Court of the existence of a fact, on the balance of probabilities, the “evidence must always be sufficiently clear, convincing and cogent” (*FH v McDougall*, 2008 SCC 53 at para 46; *Lv* at para 41).

[95] The evidence, when taken as a whole, is insufficient to enable me to conclude that the passage of one or more of the vessels caused the pieces of ice on the Canadian side of the river to dislodge and damage the Causeway. Bluewater is therefore unable to demonstrate, on a balance of probabilities, that the Shipowners caused the damage to the Causeway.

[96] Having ruled in favour of the Shipowners with regard to causation, there is no need to consider the issue of whether one or more of the Shipowners are liable to Bluewater.

V. Conclusion

[97] Based on the evidence before me, I am satisfied there is no genuine issue for trial as to the cause of the dislodgment of the ice that flowed downstream on the Canadian side of the St. Clair River. The evidence in the record leads me to conclude, on a balance of probabilities, that the passage of the convoy on January 11, 2018, did not cause the pieces of ice to dislodge and ultimately damage the Causeway. Having so concluded, the Shipowners' motion for summary judgment is granted, and Bluewater's cross-motion for summary judgment is dismissed.

[98] There is no reason in the present case to depart from the usual practice of awarding costs to the successful parties. If the parties are unable to agree on the costs of the present motions and the underlying proceedings, they may provide written submissions within 30 days of the release of these reasons. Such submissions are not to exceed five (5) pages, although they may attach a bill of costs as an appendix, and should enable the Court to fix costs under Rule 400(4) of the Rules.

JUDGMENT in T-138-20

THIS COURT’S JUDGMENT is that:

1. The motion for summary judgment of the Defendants by Counterclaim is hereby granted;
2. The motion for summary judgment of the Plaintiff by Counterclaim is hereby dismissed;
3. The limitation proceedings commenced under Court Files No. T-1713-19 and T-138-20 are hereby dismissed; and
4. If unable to agree on costs, the parties may make submissions thereon in accordance with the reasons given.

“Vanessa Rochester”

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: T-138-20

STYLE OF CAUSE: ANDRIE LLC v BLUEWATER FERRY LIMITED ET AL;

PLACE OF HEARING: TORONTO, ONTARIO

DATE OF HEARING: DECEMBER 19, 2022

JUDGMENT AND REASONS: ROCHESTER J.

DATED: FEBRUARY 2, 2023

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