Admiralty Practicum

Volume 1989
Issue 1 *Spring 1989*

Article 5

Sony Magnetic Products Inc. v. Merivienti O/Y United States Court of Appeals, Eleventh Circuit, 23 January 1989 863 F.2d 1537

UNITED STATES OF AMERICA v. JOHN DOE, A/K/A RAFAEL SEGUNDO CRESPO-HERRERA, ET. AL.

United States Court of Appeals, First Circuit, 27 October 1988
860 F.2d 488, cert. denied, 57 USLW 3722 (1989)

Government may prove constructive "customs waters" jurisdiction by using hearsay exceptions to show such a foreign government's acquiescence in the Coast Guard's boarding of one of that country's ships on the high seas.

FACTS: The defendants contend "that they were boarded by pirates, forced to take on pehaps eight million dollars worth of contraband [an estimated 250 bales of marijuana] and then abandoned by those scoundrels who yet, even in their absence, somehow compelled their victims to proceed on a forced journey." At least that's the way the First Circuit described the defense strategy. Predictably the jury rejected this version of the incident. More believably, the United States Coast Guard Cutter USS King intercepted and boarded the Honduran registered ship Captain Robert in international waters off the coast of Venezuela. On board the vessel the Coast Guardsmen found about 250 bales of marijuana and promptly arrested the eight crewmen on the vessel. Unable to tow the vessel back to port the Coast Guard preserved some of the evidence for trial and sank the Captain Robert at sea.

The eight prisoners were charged under 21 U.S.C. §955(c) (now part of 46 U.S.C. App. §1903) which makes it unlawful for anyone to be in the "customs waters" of the United States and "knowingly . . . possess with intent to distribute . . . a controlled substance."

"Customs waters" may be constructively extended to include international waters where the country of registry gives the United States permission to board its ships on a regular basis 19 U.S.C. §1401(j); *United States v. Molinares Charris*, 822 F.2d 1213, 1216-17 (1st Cir. 1987) or ad hoc *United States v. Robinson*, 843 F.2d 1, 2 (1st Cir. 1988); *United States v. Bent-Santana*, 774 F.2d 1545, 1549-50 (11th Cir. 1985).

All defendants were convicted at trial. Seven of the eight have appealed the conviction based on the theory that certain evidence allowed at trial violated hearsay rules. They contended that without this evidence the government would not have been able to prove that the constructive "customs waters" had been extended to include the Captain Robert.

ISSUE: Can the government prove by exceptions to the hearsay rule that it was given permission to board a foreign vessel thereby bringing that vessel constructively within the United States "customs waters" even though the exceptions are not enumerated in the federal rules of civil procedure?

ANALYSIS: The government relied on three pieces of evidence to prove the authorization by Honduras and subsequently its jurisdiction over the boarding of the Captain Robert.

I. The officer in charge of the USS King, officer Gibbons testified that he received oral permission through channels, government and diplomatic, from Honduras before he boarded the vessel. This was not contested or objected to at trial or on this appeal.

II. Two telexes from the Coast Guard Station in Miami saying that the station had received permission by telephone from the Hondurans were admitted into evidence at the trial. This admission into evidence was attacked for two reasons. The defense claimed that the trial court erred because the government did not satisfy the pretrial notice requirement under the Federal Rules of Evidence. Rule 803(24), and it was also inadmissible hearsay. The appeals court cites its flexible position under Rule 803(24) in *Furtado v. Bishop*, 604 F.2d 80, 91-93 (1st Cir. 1979), *cert denied* 444 U.S. 1035 (1980) and decided that the trial court did not abuse its discretion. The court said the telexes only came to light because of the defense' cross-examination and the trial judge allowed defense counsel time to inspect the telexes, an opportunity to discuss problems with their introduction, or a continuance if needed. The defense did not note any problems or request a continuance.

The court also ruled that various enumerated exceptions to the hearsay rule would allow the telexes to be admitted into evidence under the federal rules and since one of the rules that the trial judge used to admit them was Rule 803(24) it affirmed on that ground. Rule 803(24) allows the trial judge to decide on a very trial-specific basis that a statement not enumerated in the rules may nevertheless still be admitted if the trial judge determines that several criteria are met. Provided that there are circumstantial guarantees of trustworthiness equivalent to those of the enumerated exceptions, the court may allow into evidence hearsay that (A) is a statement of a material fact, (B) is more probative than reasonable procurable alternatives and (C) serves the purpose of federal rules and the interests of justice. Of course, the proponent of the evidence is required to provide notice to his adversary, in certain detail, of his intention to offer the statment.

III. A certificate dated February 3, 1987 from the commander-in-chief of the Honduran navy, verifying that the Honduran government had given its permission to the United States Coast Guard to board the Captain Robert, was allowed into evidence. The appeals court noted, but did not comment on, the fact that the certificate said permission was granted the day after the ship was actually boarded. The defense argued that this certificate too was inadmissable hearsay. The court agreed with the trial judge that Rule 803(24) would allow the certificate into evidence because it was most unlikely the government could have procured the attendance of such a high ranking Honduran official at the trial and this was the best way possible to prove the consent of the Honduran government. In any event, said the court, the defense never really claimed that the Honduran government did not approve the boarding.

Since the appeals court found all of the evidence challenged to be admissible, the jurisdiction based on the "customs waters" extension was proper.

George Plevretes '90

SONY MAGNETIC PRODUCTS INC. v. MERIVIENTI O/Y

United States Court of Appeals, Eleventh Circuit, 23 January 1989
863 F.2d 1537

The ambiguous meaning of "package" under COGSA §1304(5), which limits liability to $500 per package, will be construed to be equal to the number of actual cartons, not pallets, and not pieces, contained in a shipping container, as long as consistent with the act's purpose.

FACTS: Plaintiff, Sony Magnetic Products, Inc. of America (Sony) contracted with Page and Jones (P & J), a freight forwarder, to have a container of video cassettes sent from Sony's plant in Dothman, Alabama, to England. P & J, through Gas and Equipment Transport Inc., reserved space for Sony's cargo with Atlantic Cargo Services on board the M/V Finnhawk. Merivienti, owner of M/V Finnhawk and Atlantic Cargo Services are the defendants-appellants.

The cassettes were packaged within a standard shipping container measuring forty feet long, eight feet wide and eight feet high. There were 1,320 cartons which were strapped onto fifty-two pallets within the container. As the container was being loaded the motor on the Finnhawk's deck crane catastrophically failed and the crane dropped the cassettes over sixty feet to the cement loading dock below, damaging the tapes.

(Continued ...)

Sony v. Merivienti *(Cont.)*

Sony brought suit in 1983 based on breach of contract and negligence theories, while defendants asserted defenses under the Carriage of Goods by Sea Act (COGSA). Sony, prior to the trial, agreed that COGSA governed the action although it was not a basis in the original complaint. Under COGSA, Sony established a prima facia case merely by proving that the goods were received in good condition but unloaded damaged. *Terman Foods Inc. v. Omega Lines*, 707 F.2d 1225 (11th Cir. 1983).

The defendants argued that a latent defect caused the accident. This is listed in COGSA as an excepted cause which is sufficient if established to rebut a prima facia case, 46 U.S.C. App. §1304(2). Alternatively, defendants argued that if there was liability, it should be limited according to COGSA at $500 per package, 46 U.S.C. App. §1304(5), and that the number of packages should be one or fifty-two, but not 1,320. The district court disagreed, however, and awarded Sony damages for the full loss. This appeal followed.

ISSUE: **(1)** Whether the deck crane's motor failure was the result of an excepted cause, i.e., a latent defect.

(2) Whether the definition of "package", within COGSA, should be interpreted to equal fifty-two or 1,320.

ANALYSIS: The Eleventh Circuit resolved the first issue regarding liability by holding that the district court's findings were not clearly erroneous and therefore should not be overturned on appeal. Fed.R.Civ.P. 52(a); *McAllister v. United States*, 348 U.S. 19, 20 (1954). At the trial both parties introduced expert testimony relating to the cause of the motor failure. The defense witness claimed there were tiny cracks in the motor's piston, a latent defect, while the plaintiff offered expert testimony that the cause was a malfunctioning stop switch, which the carrier either knew of or should have known existed. The inconsistencies were resolved as a matter of law in favor of Sony because its theory explained areas that the defense could not. The court of appeals agreed that the defense failed to rebut plaintiff's prima facia case by establishing that the cause was a latent defect and affirmed the ruling.

The second issue deals with the ambiguous wording of §1304(5) of COGSA which provides that the carrier will not be liable for more than $500 per package unless the value is inserted in the bill of lading. Sony did not put the value on the bill of lading but the district court determined that each of the 1,320 cartons was a "package" and limited liability at $660,000, which covered the cassettes actual cost of $424,765.44, which Sony was awarded.

The circuit court analogized the instant case to *Vegas v. Compania Anonima Venezolana de Navegacion*, 720 F.2d 629 (11th Cir. 1983), where the cargo was 109 cartons consolidated onto two pallets. Under "No. of Pkgs." on the bill of lading the carrier wrote "2" and later tried to limit liability to $1,000 based on §1304(5) when the shipment was damaged. The *Vegas* court realized that both the individual cartons and the master cartons (pallets) could have fit the definition of package. To resolve this ambiguity they looked to the purpose of COGSA which "was to set a reasonable limitation on liability which carriers by law could not reduce by contract." *Id.* at 630 (citing *Allstate Ins. Co. v. Inversiones Navieras Imparca, C.A.*, 646 F.2d 169, 171 (5th Cir. Unit B 1981)). In effect, Congress wanted to protect the shipper where the carrier who issued the bill of lading later claimed unrealistically low damages based on the bill of lading, when the goods were later lost or damaged. Consistent with this purpose the court could not find justification for limiting liability because the cartons were consolidated.

Here, the case was clearer because the bill of lading said 1,320 cartons and not fifty-two. Defendants, however, used *Hayes-Leger Associates, Inc. v. M/V Oriental Knight*, 765 F.2d 1076, 1082 (11th Cir. 1985) as precedent that "where the shipper overstates the number of packages in a container, the COGSA liability limitation should be applied to the actual number of packages in a container." In that case the bill of lading stated "2,641 pcs" under packages when there were actually five containers which held these pieces. Taken to its logical extreme such an interpretation of *Hayes-Leger* would mean that the container itself should be considered one COGSA package for all shipments. This approach was rejected by the court because in *Hayes-Leger* the description "was insufficient to indicate to the carrier that the goods were packaged." *Id.* at 1089 n.9. In the present case it is not necessary to look beyond the bill of lading because the description there is enough to indicate that Sony's goods were packaged. The Eleventh Circuit therefore rejected the defendants arguments and affirmed the district court's damages.

David A. Pellegrino '90

NUNLEY v. M/V DAUNTLESS COLOCOTRONIS

United States Court of Appeals, Fifth Circuit, 23 January 1989
863 F.2d 1190

A barge owner who abandoned recovery efforts for a barge that had broken away and was sunk as a result of an inevitable accident is not liable for a subsequent collision with the sunken barge. The cost for buoy markings of a sunken barge are to be borne by the owner if at that time there is no evidence of abandonment. One who has contracted to conduct dewatering at the site of a sunken barge can not bring a claim for recovery as a voluntary salvor.

FACTS: It began January 16, 1974, with what is now referred to as the "Great Barge Breakaway." As a result of inclement conditions on the Mississippi River during the winter of 1973-1974, large grain shipments, a longshoreman's strike, and an inaccessibility to upstream ports, thousands of barges were docked in the Port of New Orleans. On the evening in question, many vessels broke from their moorings and struck Combi Line's (Combi) barges causing them to tear away from their moorings. One of the barges struck was the Lash. It was the only one that was not recovered.

Diligent efforts by Combi were expended to recover Lash. Sitings in Algiers Lock Forebay (Algiers) and an area near the Tenneco Oil docks produced two barges below the surface that could have been Lash. The Algiers' siting was 67 feet below the water and the Tenneco's was 37 feet below, with the latter "constituting a hazard to navigation." Based upon the readings from a magnetometer and fathometer, Combi concluded that the barge near Algiers was in all probability Lash. This vessel did not pose a threat to navigation and Combi did not bother to mark it or raise it.

The United States Coast Guard found the other vessel and marked it on two occasions in early 1974.

In July, 1977 a fire broke out on the M/V Dauntless Colocotronis (Dauntless) as it approached the Tenneco refinery. A search of the river produced a sunken barge that was identified as the missing Lash. The Dauntless had struck this barge causing the pump room of her ship to be filled with crude oil and a fire ensued.

ChemLink had contracted with the Coast Guard to provide the equipment to remove water and oil from the Dauntless. The vice president of ChemLink, Captain Walter Nunley, aided in dewatering the Dauntless.

Dauntless brought an action against Combi alleging negligence in leaving its barge in a vulnerable location and in failing to mark or remove it from the river. The district court found Combi to be free from negligence because it had reasonably concluded that the vessel near Tenneco was not its barge.

The Coast Guard brought suit against Combi for its expenses in marking the barge and the district court granted the award.

Captain Nunley brought a salvage claim against the Dauntless

(Continued...)