Judgement of the Lords of the Judicial Committee of the Privy Council on the Appeal of the Queen v. Williams from the Court of Appeal of New Zealand, delivered 9th April 1884.

Present :

LORD BLACKBURN.
SIR BARNES PEACOCK.
SIR RICHARD COUCH.
SIR ARTHUR HOBHOUSE.

The Respondent in this appeal presented in the Supreme Court of New Zealand, under the provisions of an Act in force in that colony, called "The Crown Suits Act, 1881," a petition of right, in which it was stated that the suppliant was the owner of the steamship "Westport," and on the 16th of February 1882 the steamship entered Her Majesty's port or harbour of Westport, in the county of Buller, in the colony of New Zealand, and, by and under the direction of Her Majesty's harbour master, was moored at the staiths or wharf in the harbour erected by Her Majesty's Executive Government in the said colony for the use and accommodation of vessels frequenting the port; that the harbour at Westport is a tidal harbour, at or near the mouth of the Buller river, and is under the control and management of Her Majesty's Executive Government in the colony, which appoints the harbour master and all other officials exercising control over the same, and the staiths and wharves, and over the movements of all vessels therein, and receives the dues payable in respect

of vessels frequenting the port and using the accommodation therein provided; that all wharfage and tonnage rates, and all other rates and dues in respect of the harbour and of the staiths or wharves therein, are payable to and received by the authorities appointed to receive the same by and on behalf of Her Majesty's Executive Government, and on the 4th of March 1882 1*l*. 1*s*. 11*d*., by way of dues in respect of the use by the "Westport" of the staiths or wharf and harbour, was paid on behalf of the suppliant, and a receipt given for the same; that prior to the 16th of February 1882 the "Westport" had frequently visited the harbour, and been laden with coal and general merchandise in the usual and customary manner at the port; that the rise and fall of the tide was at the time of the happening of the events after mentioned 11 feet or thereabouts; that on the 17th of February 1882, while alongside the wharf or staiths, and being laden with coal and cargo in the usual and customary manner at the port, the "Westport" settled with the fall of the tide upon a snag lying at or near the bottom of the water of the harbour, and was so greatly damaged thereby that the steamer became filled with water, and sank to the bottom of the harbour alongside the wharf or staiths; that Her Majesty's Executive Government in the colony, and the harbour master and other officials exercising authority at the port, were at that time, and for a long time previously had been, well aware of the existence of this snag, and of the danger and risk incurred by vessels moored at and using the staiths or wharf or frequenting and navigating the harbour in consequence thereof, but had negligently and improperly suffered the same to remain there, and no steps whatever had been taken by the Executive Government or the harbour master or other officials to indicate to

masters of vessels frequenting the port the existence of the hidden danger occasioned by the position of the snag, or to warn the master of the "Westport" thereof, and the master was at the time of the accident wholly ignorant of the existence of such danger; that, in consequence of the injuries to the steamer, the suppliant had suffered loss and damage to the amount of 1,500*l.* and upwards.

The solicitor of the Supreme Court of New Zealand, duly authorized, and acting for and on behalf of Her Majesty, by his 1st plea denied all the material allegations in the petition of right, and in his 2nd and 3rd pleas he alleged that there was water to the height of 11 feet, covering the snag at low tide, and the "Westport," when fully laden, might and could easily and without damage have been hauled over and above the snag in any state of the tide in the harbour whilst loaded, so as to float in the same depth of water fore and aft, but the master improperly loaded the forehold of the steamer so as to cause the bow of it to sink to a depth of 13 ft. 6 in. or thereabouts, and the stern to sink only to a depth of 8 ft. 6 in. or thereabouts, and then and whilst the steamer was so loaded, negligently, carelessly, and improperly hauled the steamer from the berth where she was lying (2nd plea), and on his own responsibility, and without communication with the harbour master, carelessly, negligently, and improperly moved the steamer from the berth where she was lying (3rd plea), and whilst the steamer was being so hauled and moved she struck upon the snag and was injured. The replication to the 2nd and 3rd pleas denied the allegations in them in the terms of the allegations.

At the trial of the issues of fact by a special jury at Nelson, New Zealand, on the 21st and 22nd December 1882, the allegations

in the petition preceding the allegation of what happened on the 17th of February were either admitted or found to be true, except the allegation that the harbour was under the control and management of the Executive Government, the issue as to this being struck out, and except also the allegation of the receipt of rates and dues, as to which it was found that there are no harbour dues, and the 1*l.* 1*s.* 11*d.* was received for wharfage and tonnage dues.

The other issues, with the findings of the jury thereon, were as follow :—

"9. Did the said steamship 'Westport,' on the 17th day of February 1882, while alongside the said wharf or staiths, settle with the fall of the tide upon a snag lying near or at the bottom of the water of the said harbour?

"Yes, on the obstruction called the vertical snag.

"10. Was the said steamship so greatly damaged thereby that she became filled with water and sank to the bottom of the said harbour alongside the said wharf or staiths?

"Yes.

"11. Was Her Majesty's said Executive Government, at the time of the happening of the events in the said petition mentioned, and for a long time previously, well aware of the existence of the snag which caused the damage, and of the danger and risk incurred by vessels moored at and using the said staiths or wharf, or frequenting and navigating the said harbour, in consequence thereof?

"No; but after the communication from the harbour master, if proper steps had been taken promptly, they would have been aware.

"12. Did Her Majesty's said Executive Government negligently and improperly suffer the last-mentioned snag to remain alongside the said staiths or wharf, to the great danger of vessels moored at the said staiths or wharf?

"Yes.

"13. Did Her Majesty's said Executive Government take any steps, or did the harbour master or other officials take any steps to indicate to masters of vessels frequenting the said port the existence of the hidden danger occasioned by the position of the said last-mentioned snag, or warn the master of the said steamship 'Westport'?

"No.

"14. Was the master of the said steamer 'Westport,' at the time of the happening of the events in the petition mentioned, wholly ignorant of such danger?

"Yes.

"15. Could the said steamer 'Westport,' when fully laden, have easily and without danger been hauled over and above the said snag in any state of the tide in the said harbour, whilst loaded, so as to float in the same depth fore and aft?

"No.

"16. Did the master of the said steamship 'Westport' load the forehold of the said steamer so as to cause the bow of the said steamer to sink to a depth of 13 ft. 6 in. or thereabouts, and the stern of the said steamer to sink only to a depth of 8 ft. 6 in. or thereabouts?

"Admitted. Yes.

"17. Did the master of the said steamer negligently, carelessly, and improperly haul the said steamer from the berth where she had been placed by the harbour master; and did the said steamer then, and whilst being so hauled, strike upon the said snag and suffer the injury in the petition mentioned?

"No.

"18. Did the master of the said steamer move the said vessel carelessly, negligently, and improperly?

"No.

"19. Did the master of the said steamer move her on his own responsibility, and without communication with the said harbour master, and unknown to the said harbour master?

"Yes; but there was an implied permission, according to the usage of the port.

"20. Has the suppliant, in consequence of the injuries mentioned in the said petition, suffered damage and loss; and, if so, to what amount?

"1,500*l*."

On the 19th January 1883 the Supreme Court of New Zealand granted a rule to show cause why the verdict should not be set aside, and a new trial had, upon the grounds :—

That the verdict is against the weight of evidence on Issue 9.

That the qualification of the answer to Issue 11 is against the weight of evidence, and that the answer to Issue 11 does not sufficiently distinguish the snag referred to.

That the verdict is against the weight of evidence on Issues 12, 17, 18, and 19.

That the learned Judge improperly rejected evidence of the harbour regulations.

That the learned Judge misdirected the jury upon the question of negligence.

That the question of negligence ought not to have been left to the jury.

That the learned Judge ought to have directed the jury that no duty was cast upon the Government of the colony to keep

the harbour of Westport clear of snags, of which the Government and its officers were ignorant.

Or, in the alternative, why the verdict should not be entered for the Respondent, upon Issues 11 and 12, upon the above grounds."

This rule was discharged by the Supreme Court on the 18th May 1883, and the present appeal is from that order. The reasons for the appeal, as stated in the Appellant's case, are :—

" 1. Because, under the circumstances alleged in the petition, or proved at the trial, it was not the duty of the Executive Government to ascertain whether or not snags might be lying in the river.

" 2. Because there was no evidence in support of the allegation imputing to Her Majesty's Executive Government any negligence which occasioned the damage, nor of any wrong or damage done by the Executive Government in, upon, or in connection with a public work, within the meaning of the Crown Suits Act, 1861.

" 3. Because the said harbour regulations show that the master, in moving his steamer without the consent or instructions of the harbour master, ought to be considered as having done so at his own risk.

" 4. Because the case proved and relied on was inconsistent with that made by the petition."

Before proceeding to discuss what their Lordships consider the real question on the merits, they think it best to dispose of some other questions which have been raised. The harbour regulations for the ports of New Zealand, made by Order in Council, provide that the master of every vessel shall anchor or moor where the harbour master or person deputed by him may direct, and he shall not unmoor or quit the anchorage, nor shall he haul his vessel alongside any public pier, wharf, or jetty without having previously obtained permission from the harbour master or his deputy to do so, and any master offending against this regulation shall be liable to a penalty not exceeding five pounds. The evidence of the mate of the "Westport" was that she crossed the bar of the harbour on the morning of the 16th of February 1882, and

made fast to the coal staiths under the direction of the harbour master, with the forehatch under No. 1 shoot, head up the river; that the following day, having finished loading the forehold, about 1 or 2 p.m., they slacked astern about 25 feet, to take in a few packages of cargo from the gangway, which they generally do whilst they are loading coal; when they went about 25 feet astern the vessel struck on a snag, which, as the tide fell, made a hole in her bottom. The "Westport" measures about 116 feet from the forehatch to the stern, counting to about the centre of the hatch, and her beam is 23 feet. The snag struck her about 5 feet abaft the midship section on the starboard side of the keel, which was outside as she lay, and at the garboard streak, where she would be drawing about 10 ft. 9 in. of water. As the head ropes were slacked, the current necessarily set the bow out, there being a slight curve in the river at that point. The bow was about 8 feet off the staiths when she struck, and the stern about 15 feet. Opposite the point where she struck, she was about 13 feet from the staiths, and the edge of the hole in her bottom being about 1 foot from her keel, the snag must have been about 25 feet from the staiths.

It may be convenient to notice here the variance between this evidence and the allegation in the petition that the steamer was alongside the wharf or staiths when she settled with the fall of the tide, upon which the 9th issue was framed. As to this the Supreme Court in its judgement says, "There was therefore a variance " from the case stated in the petition, inasmuch " as the steamer was damaged whilst shifting " her berth. But there was no application for a " nonsuit upon this or any other ground. Had " the objection been made it would have been " properly met by the allowance of an amend-

"ment in the petition. The question whether "the vessel had been moved was not really but "only formally in issue between the parties. "As regards the suppliant's conduct, the only "questions raised were, whether the vessel had "been moved negligently so as to cause or con- "tribute to the damage, or illegally. These "were the questions which the parties went "down to try." And as to the 9th issue, the Court says, "The objection here seems to be that "the jury have found that the 'Westport' was "damaged" while alongside the wharf, "the "damage having in fact occurred whilst her posi- "tion was being slightly altered. But as the "vessel was only allowed to move a few feet "along the wharf, remaining always connected "with it by her head and stern lines and "springs, it appears to us that she may properly "be said to be injured while alongside." Their Lordships think that the finding of the jury may be so understood, and then it is in accordance with the evidence.

The question whether the steamer was negligently and improperly moved was raised by the 17th and 18th issues. These were answered by the jury in the negative. The evidence of the mate was that the harbour master directs the movements of the vessel if he happens to be there, but he had never objected to their dropping astern to the gangway; that they moved the vessel without his directions and he never complained, it is the custom of the port, of all ports; when the harbour master knew of the accident he did not object that the ship had been moved without his permission; and the harbour master himself, in answer to the question by the Court, "Was it imprudent to move her," replied only that it was unusual. The only ground upon which it can be contended that these issues ought not to have been answered in the negative is that

there was a breach of the harbour regulations. The jury found upon the 19th issue that the master of the steamer moved her without communication with and unknown to the harbour master, "but there was an implied permission "according to the usage of the port." There was evidence upon which the jury might reasonably find this, and that under the circumstances the master did not negligently and improperly move the vessel. The Supreme Court thought that the defence that the master was doing an illegal act prohibited under a penalty, and that no action could lie for damage to the vessel consequent upon the illegal act, was not raised by the pleas. Their Lordships see no reason to differ from this.

The main question is, whether there was a breach on the part of the Executive Government of that duty which the law would have cast upon private persons maintaining the staiths or wharf and inviting ships to visit them in the same manner in which the Executive Government are shown to have done.

In the Lancaster Canal Company *v.* Parnaby (11 A. & E., 230), where a Company had, under powers given by an Act of Parliament, made a canal for their profit, and opened it to the public upon payment of tolls to the Company, it was held by the Court of Exchequer Chamber that the common law imposed a duty upon the proprietors to take reasonable care, so long as they kept it open for the public use of all who might choose to navigate it, that they might navigate without danger to their lives or property. This decision was approved of in the Mersey Docks Trustees *v.* Gibbs (Law R., 1 E. & I. App. Cas., 93), in which it was held that, if the cause of the injury was a bank of mud in the dock, and if the Defendants, the trustees, by their servants had the means of knowing that the dock was in an

unfit state, and were negligently ignorant of it, they neglected their duty, and did not take reasonable care that it was fit.

The present case differs from the Lancaster Canal Company *v.* Parnaby, and the Mersey Docks Trustees *v.* Gibbs, in that there are no harbour dues, and the public have a right to navigate subject to the harbour regulations, but the harbour is under the control and management of the Executive Government, which has authority to remove obstructions in it. The staiths and wharves belong to the Executive Government, which receives wharfage and tonnage dues in respect of vessels using them. These are collected by the railway authorities appointed by the Government, and the manager of the Railway Department directs where the vessels which are to load with coals shall be placed. It appears to their Lordships that this case is within the principle upon which the above cases were decided, and upon the facts proved, they are of opinion that the law imposes a duty upon the Executive Government to take reasonable care that vessels using the staiths in the ordinary manner may do so without danger to the vessel.

The principal evidence on this question is the harbour master's, and his letters to the Marine Department of the Government of New Zealand. He first became aware of the existence of a snag near the place where the "Westport" struck at the end of January 1882 by a vessel called "The Ladybird" touching on it. He sent down a man who was not a professional diver to examine it, and reported to the Secretary of the Marine Department. This report is as follows :—

"Harbour Office, Westport,
27th January 1882,

"Sir,

"I have the honour to inform you that a snag has been recently found at the coal staiths, and lies in the way of ships loading. At low-water spring tides it has about 11 feet on it.

Formerly it was not much in the way, but larger and deeper vessels come now for coal, hence the difficulty. Several vessels have been on it lately, but sustained no damage. It lies between the two upper shoots (Nos. 1 and 2), which are most used.

"I had the snag examined yesterday by a diver, who reports it to be about 3 feet in diameter. The butt end is buried under the stones forming the protective wall; the balance, outside of pile, projects into the river about twenty feet (20), and immediately under ships' bottoms. Ten feet of this is the trunk or barrel of the tree, the rest a branch or limb. The trunk touches one of the piles of the staiths, and lies so close to the bottom as to be embedded half its diameter in the gravel, causing slinging to be difficult, if it were any use. But I think it would be unwise to attempt raising it by lifting upward, as the chances are that, if it did rise, a large number of the stones would be dislodged, with every chance of their rolling out, as the bottom is rather steep at the staiths. The diver reports two large stones nearly out to the end of tree already, and I have felt others when sounding at the staiths, thus showing that they roll out fast enough themselves, without being molested. In any case, I think the chances of lifting the snag in this way would be very doubtful, except it broke; it must be a long way under the stones now. Consequently, I should like the Marine Engineer's opinion as to its removal.

If the snag lay midway between the piles, which are some 14 feet apart, I think it could be cut or severed by small charges of dynamite, but I would not use it in this case without first getting Mr. Gorman's opinion. He is the person that travels for Nobel's Dynamite Company, and explains how to use it. I got much useful information from him (*re* dynamite) when snagging the river. I think he will recommend cutting the snag in question, about two feet or more outside the pile. I know how he does this.

"I think Mr. Gorman did a similar job at Hokitika, where the wharf had been built over a large snag, which gave the harbour authorities much trouble for many years.

"A diver, with his dress, could cut it off I dare say. My diver has no dress, neither does he understand its use, but simply undresses and goes down. I found him very useful when snagging the river.

"I have the honour to be, Sir,
"Your most obedient servant,
"S. A. LEECH, Harbour Master.

"The Secretary,
"Marine Department, Wellington."

To this there was the following reply:—

"Marine Department, Wellington,
9th February 1882.

"Sir,

"I have the honour to acknowledge the receipt of your letter of the 27th ultimo, with reference to a snag recently

found at the coal staiths ; and in reply, to inform you that this snag is not to be blasted, but that you are authorized to have the same cut off about two feet from the piles.

"I have the honour to be, Sir,

"Your obedient Servant,

"H. S. McKellar, for Secretary.

"The Harbour Master,
"Westport."

On the 14th February the harbour master again wrote as follows:—

"Harbour Office, Westport,
14th February 1882.

"Sir,

"I have the honour to acknowledge the receipt of your letter M. 82/264, No. $\frac{770}{31}$, acknowledging receipt of mine, *re* snag at the coal staiths, authorizing me to have it cut off about two feet from the piles, as blasting is not permitted. In reply, I beg to state that I know of no way to cut it except by a diver going down and doing it. The diving dress that was here was returned to Wellington, where it was urgently required.

I can see no other way of doing it except by putting the punts on it at low water. Should it rise with the tide, then, I fear, as already expressed in last letter, that the stones would get dislodged and roll out under ships' bottoms. This would be bad. Certainly it might break off short about the pile, or just where it goes under the stones. If so, all would be right, and the danger would be removed ; but my experience of snags is that they are very strong, and usually in a good state of preservation when under water. Consequently, I dread that heaving the punts down to this snag at low water is fraught with much danger, for reasons already given, and that I cannot recommend it in consequence. However, whether it is decided to send the diver, or use the punts, I shall be glad to see something done as soon as possible towards removing this danger.

"S. A. Leech, Harbour Master.

"The Secretary,
"Marine Department, Wellington."

No notice of danger was given until after the accident to the "Westport," when the harbour master put up a notice on the piles, "Snag here, "11 feet 6 inches low-water springs."

On the 8th of May 1882, a diver employed by the Public Works Department went down and found a horizontal snag, about 40 feet long, projecting from the staith, the butt of the tree being underneath it. From 25 to 30 feet from the staith he came across the stump of a tree that

had been felled, standing up vertically, and projecting about 18 inches above the horizontal snag, which was resting up against it. This was the snag which caused the damage to the "Westport." If she had gone on the horizontal one, she would have forced it down, as there was two feet of water under it.

Their Lordships think that there was here evidence from which, if it was properly left to them, the jury might properly conclude that the Executive Government, by their servant the harbour master, had, before this accident, notice of a danger at this spot, such as to make it a want of reasonable care in them not, by their servants, to inquire what that danger was, and to warn a vessel in the position of the Plaintiff's vessel of the existence of danger there. If such a warning had been given it would have been the fault of the Plaintiff's servants if they let the vessel pass over that spot at low water. Their Lordships do not think it was necessary to go so far as to prove that the servants of the Government knew the precise nature of the danger, or whether the projecting snag was, as it turned out to be, an independent vertical snag, or, as the harbour master seems to have supposed, a branch or limb attached to the horizontal snag. The real question was, whether, if they had not neglected the duty which the law cast on them to take reasonable care, they would not have known of the existence of a danger against which they should give warning.

Their Lordships have felt much embarrassed from not being told what directions were given to the jury. It may be that there was some misdirection, or that the right point was not presented to the jury, but that is not shown, and it lay on the Appellants to show it.

The findings of the jury on the 11th and 12th issues amount to a finding that there was negli-

gent ignorance, and their Lordships are by no means prepared to say that there was not evidence upon which the jury might reasonably come to that conclusion. Even if such evidence had not existed, still there was evidence that the Executive Government had before the accident to the "Westport" sufficient notice of the danger to make it their duty to give warning of it, which was not done till after the accident. This was a breach of the duty to take reasonable care.

It remains to notice one other question which was raised by the Counsel for the Appellant, namely, whether the negligence which occasioned the injury was within the provisions of the "Crown Suits Act, 1881." Section 37 of that Act provides that,—

"No claim or demand shall be made upon or against Her Majesty, under this part of this Act, unless the same shall be founded upon or arise out of some one of the causes of action hereinafter mentioned, and for which cause of action a remedy would lie if the person against whom the same could be enforced were a subject of Her Majesty,—

"(1.) Breach of any contract entered into by or under the lawful authority of the Governor on behalf of Her Majesty, or of Her Majesty's Executive Government in the colony, whether such authority be express or implied.

"(2.) A wrong or damage independent of contract, done or suffered by or under any such authority as aforesaid in, upon, or in connection with a public work as hereinafter defined.

"(3.) For the purposes of this provision 'public work' means any railway, tramway, road, bridge, electric telegraph, or other work of a like nature used by the Government of the Colony,

or constructed by such Government out of moneys appropriated by the General Assembly, and the revenues derived from which form part of the general revenue of the colony."

In Jolliffe *v.* the Wallasey Local Board, Law R. 9, C. P. 62, it was held that an omission to do something which ought to be done in order to the complete performance of a duty imposed upon a public body under an Act of Parliament, or the continuing to leave any such duty unperformed, amounts to "an act done or "intended to be done" within the meaning of a clause requiring a notice of action, and their Lordships think that the negligence in this case to take reasonable care is a wrong done by or under the authority of the Executive Government. They also think that the staiths are "a "work of a like nature" within the meaning of Sub-section (3). Indeed, the staiths seem to be an adjunct to the railway which is used for carrying coals to be loaded on board the vessels in order to facilitate the loading, and, in the view their Lordships take of the case, the negligence is in connection with them. The Supreme Court say that their verdict might possibly not have been the same as that of the jury, but they could not say the finding was contrary to law. Their Lordships also might possibly not find the same verdict, but the question of negligence was one which the jury was to determine, and no sufficient ground has been shown for setting aside their verdict. Their Lordships will therefore humbly advise Her Majesty to affirm the decision of the Supreme Court, and to dismiss the appeal, and the costs thereof will be paid by the Appellant.