

5, 1930

No. 84 of 1929.

In the Privy Council.

ON APPEAL.

FROM THE SUPREME COURT OF CANADA.

BETWEEN JAMES RICHARDSON & SONS LIMITED (Plaintiff)
(APPELLANT)

AND

THE SHIP "ROBERT J. PAISLEY" (Defendant) RESPONDENT

AND

BETWEEN CANADA STEAMSHIP LINES LIMITED (Plaintiff)
(APPELLANT)

AND

THE SHIP "ROBERT J. PAISLEY" (Defendant) RESPONDENT

10

Case on behalf of the Respondent.

1. These are two appeals from the Judgment of the Supreme Court of Canada dated the 5th February 1929, reversing the Judgments of the Honourable Mr. Justice Hodgins, Local Judge in Admiralty of the Exchequer Court of Canada, dated the 20th March 1928, who had decided in favour of the Plaintiff (Appellant) in each action.

RECORD.
p. 335.
p. 328.

20 2. The actions arose out of a collision between the steamship "Saskatchewan," and the steamship "Robert J. Paisley" (hereinafter referred to as the "Paisley"). In consequence of the collision the "Saskatchewan" and her cargo of wheat, were damaged.

RESPONDENT'S
CASE

3. On the 16th December 1927, the Appellant James Richardson & Sons Limited as owner of the cargo on board the "Saskatchewan" issued a writ in rem against the "Paisley" in the Exchequer Court of Canada. On the 28th December 1927 the Appellant Canada Steamship Lines Limited as owner of the "Saskatchewan" also issued a writ in rem against the "Paisley" in the Exchequer Court of Canada. Preliminary Acts were filed and Pleadings were delivered and on 8th February 1928 the actions were tried together before Mr. Justice Hodgins.

4. The following facts relating to the collision were proved at the trial:— 10

The collision occurred shortly after 10 a.m. on the 18th January 1927, in clear weather in Owen Sound Harbour. There was no material wind or current. A plan of the Harbour ^{will be available at the Harbour's} ~~is in the pocket at the end of the Record.~~ The "Saskatchewan" was moored in the harbour heading to the westward and was approximately 350 feet to the southward and westward of the elevator on the west side of the harbour.

The "Saskatchewan" is a steel steamship of 1860 tons gross register, and 266 feet long. The "Paisley" is a steel steamship of 3762 tons gross register and 360 feet long. Each steamship at the time of the collision was laden with grain. 20

The "Paisley" and the "Saskatchewan" were lying in winter quarters in Owen Sound Harbour. The whole harbour and the eleven ships loaded with wheat therein were under winter conditions, and the only motive or moving power in the harbour was the tug "Harrison," which had charge, under contract, of moving all of the vessels, including the "Saskatchewan" and the "Paisley" from their berths to the elevator, for the purpose of discharging as and when required the cargoes of winter storage wheat or grain with which they were loaded.

The "Harrison" was a powerful tug, manned by a crew who were accustomed to carry out this particular kind of towage operation. 30

At the time of the collision the "Paisley" was in process of being moved from the East side of the harbour, where she had been lying moored, to a berth alongside the elevator for the purpose of discharging her cargo. The "Paisley" which had no steam and was entirely without any motive power of her own, was being towed to the elevator by the steam tug "Harrison," owned by John Harrison & Sons Ltd., who were not parties to the action.

When the "Paisley" was about parallel to the elevator dock on which the elevator was, and was heading to the westward with the tug towing ahead of her, the tug master tried to stop the headway of the "Paisley" by getting

a back strain on the tow rope. In order to effect this object the engines of the tug were put astern, and the tug fell back along the port side of the "Paisley." The mate of the tug moved the tow rope from its point of attachment aft on the tug to a post forward on the tug, and tried to make the rope fast by taking a turn or turns round the post. The tow rope slipped or rendered round the post until it had all run out except about 4 feet. The engines of the tug were then stopped, the eye at the end of the rope was put over the post by the mate of the tug, and the engines of the tug were put full speed astern. Shortly afterwards the tow rope parted. The tow rope belonged to and was supplied by the tug owners and was a 7 inch line and about 130 feet long from end to end. At the time when the tow rope parted the "Saskatchewan" was ahead of the "Paisley," and after the rope parted the "Paisley" continued on heading to the westward and with her port bow struck the starboard side of the "Saskatchewan."

The port anchor of the "Paisley" was hanging down from the hawse pipe and was partly submerged, and the crown of the anchor came in contact with the "Saskatchewan" below the water line, and subsequently the "Saskatchewan" filled with water and her cargo was damaged.

5. During the operation of moving the "Paisley," the "Paisley" had on board a ship keeper called Penrice and three other men employed by him. The officers and crew of the "Paisley" had been paid off.

The Master of the "Harrison" was in charge of the operation of moving the "Paisley" and no orders were given to him during the towage by those on board the "Paisley," and no arrangements were made with Penrice as to when and where the "Paisley" would get her lines ashore when near the elevator.

The Master of the "Harrison" who was called as a witness on behalf of the Plaintiffs (Appellants) admitted in his evidence that if the tow rope had not parted, the tug could have stopped the "Paisley" from colliding with the "Saskatchewan."

6. The towage was performed under a contract made between the Cleveland Cliffs Iron Company, the operating managers of the "Paisley" and the owners of the "Harrison." The contract is set out in correspondence which is printed at pp. 303—310 of the Record.

7. At the trial there was considerable discrepancy in the evidence as to the distance between the "Paisley" and the elevator dock shortly before the tow rope parted. The question also arose as to whether those on board the "Paisley" could and should have thrown a heaving line ashore to the elevator dock, and if so whether a rope or ropes could have been made fast between the "Paisley" and the elevator dock and whether the "Paisley" could have

brought up by means of these ropes, and whether the collision in question could have been thereby prevented. On these issues the trial judge decided in favour of the Plaintiffs (Appellants) and the Supreme Court decided in favour of the Defendants (Respondents.)

8. The Respondents contended, unsuccessfully at the hearing and with success on Appeal, that the damage sued for was solely caused by the negligence of the Master and crew of the tug "Harrison" who were not their servants or agents, and that neither they, the Respondents, nor their agents, were guilty of any negligence.

317. 9. Mr. Justice Hodgins in his judgment found that the Respondents 10 were to blame on two grounds:—

318, l. 18. (a) That Penrice and Waugh, the master of the tug "Harrison" were 18
324, l. 12. equally responsible for the position of the port anchor of the "Paisley" at the time of the collision.

324, l. 12. Mr. Justice Hodgins on this point said "*As it was intended to move the 12
"vessel with the anchor so placed, it added an element of danger to the move-
"ment contemplated, in that it became a menace to other ships laid up in a
"narrow harbour, and possibly hampered the movement or position of the
324, l. 25. "tug when at the bow of the 'Paisley'. . . . Waugh, captain of the tug, was 20
"to tow the 'Paisley,' which when afloat would be under his charge, and he
"was to cause her to move across the harbour and place her close enough to
"the dock to enable her to be moored in safety. In that manoeuvre she would
"have to be moved both backward and forward under the steam power of the
"tug, and I think the duty of seeing that everything was ship-shape on the
324, l. 41. "vessel that he was to tow rested primarily upon the tug master . . . But so
"far as Penrice's responsibility is concerned what he did in his position as
"ship keeper was to urge and persuade Waugh to allow the anchor to occupy
"a dangerous position and to take part in leaving it so.*"

"*The safe stowing of this anchor was, if not specifically covered by the
"contract, within its scope and purpose. As I understood him at the trial 30
"the stowing of this anchor was part of his duties in assisting in safely moving
"the 'Paisley' across the harbour, and in the events that happened his neglect
"and that of Waugh jointly became the cause of the damage.*"

(b) That Penrice did not make any arrangement with his men or with the men at the elevator to pass the lines from the "Paisley" to the elevator "dock when passing by the dock.

325, l. 14. Mr. Justice Hodgins on this point said that the bow of the "Paisley" 14
325, l. 16. got within 30 feet of the dock when it was passing the centre of the elevator and continued "*I have no doubt that had those on board the 'Paisley' been 16
"ready and proper arrangements made to have men at the dock to receive them, 40
"they could have got their lines out in time to have helped to check the steamer
"and with the shoving of the tug to safely dock her.*"

"The real fault to my mind was that when the 'Paisley' was cast off by the tug as she shifted from the port side to nose her in, there was no one to heave lines ashore from any part of the ship and no one to receive them . . . I blame both the tug master and Penrice for the absence of any pre-arrangement regarding the presence of the men on the dock at the critical time and also as to the proper stationing of the men on the 'Paisley' and their duties at the same moment."

p. 326, l. 42.

p. 327, l. 21.

10 Mr. Justice Hodgins in conclusion said that the onus was cast upon the "Paisley" to justify or excuse her actions in running into a vessel at anchor, and continued *"I have come to the conclusion though I must admit with some doubt that in the respects I have mentioned that onus has not been discharged."*

p. 328, l. 20.

p. 328, l. 25.

10. There was no evidence given at the trial to support the suggestion made by the trial judge that the position of the anchor was a menace to other ships or that it hampered the movement or position of the tug when at the bow of the "Paisley." On the contrary before the towage started the anchor was hove up close to the hawse pipe and all clear of the water and was moved from that position on the instructions of the Master of the tug.

p. 44, l. 5.

p. 52, l. 16.

p. 52, l. 33.

20 11. Apart from the question as to the position of the port anchor of the "Paisley" those on board the "Paisley" were therefore only found to blame by the trial judge because they had not thrown a line to the shore when the ship was passing along the side of the elevator dock at a distance stated by the learned judge to be about 30 feet.

12. The Defendants appealed from the said judgments to the Supreme Court of Canada. The appeals were heard on the 5th and 6th December 1928, before the Right Honourable F. A. Anglin, Chief Justice; the Honourable Mr. Justice Mignault, the Honourable Mr. Justice Newcombe, the Honourable Mr. Justice Lamont, and the Honourable Mr. Justice Smith. The Court reserved judgment and on the 5th February 1929 the unanimous judgment of the Court was delivered by Mr. Justice Newcombe allowing the appeals and dismissing the actions.

p. 335.

p. 336.

30 13. The judgment of the Supreme Court was based on their finding that those on board the "Paisley" were not guilty of any negligence during the towage, and that the collision was solely caused by the negligent navigation of those in charge of the tug, who were conducting the towage operation, and were not under the control of the owners of the Respondents and were not their servants or agents. On this finding the case falls within the principle laid down in the House of Lords in the "Devonshire" (1912) A.C. 634 and the "W.H. No. 1" (1911) A.C. 30 and in the Privy Council in the American & Syria (1874) L.R. 6 P.C. 226.

p. 344, l. 32.

Mr. Justice Newcombe when dealing with the failure of the tug to stop the way of the "Paisley" before she reached the "Saskatchewan," said "*It seems therefore to be a necessary inference, that from the beginning, the project must have been to stop the progress of the tow by reversing the tug, and that this manoeuvre was adopted, not by reason of any emergency, nor because of any failure of anticipated action by the tow to put her mooring lines ashore, but because it was a part of the towing operation, as deliberately designed and attempted by the tug, that the towing should be reversed when the tow had reached the point beyond the elevator where the tug master had directed his mate to shift the tow line. Admittedly neither he nor his mate* 10
knew, nor had tried to ascertain, whether or not any line had been put ashore by the tow, nor had either of them made the ship keeper aware of any intention or desire on the part of the tug that the ship should, in the circumstances, endeavour to heave a line."

Mr. Justice Newcombe, after reviewing the evidence as to the possibility of throwing a heaving line from the "Paisley" to the elevator dock, said—

350, l. 33.

"As to the rate of speed at which the tug and tow passed up on their south westerly course opposite to the elevator dock, there are various estimates by the observers, running from half a mile an hour to two or three miles, and there seems to be no doubt that it was involved in the operation, 20
as designed by Captain Waugh, that at some point beyond the elevator, he would cast off the tow line from the tug's stern, carry it forward and make it fast at her bow, and by reversing the tug and backing up on that line, check the speed of the tow, so as to enable him to push her into place by bringing the tug into contact with the side or bow of the ship; or, as described in the evidence, by 'nosing' the ship into place, a manoeuvre which did not in any wise depend upon any action on the part of Penrice, or any of his men, in the way of landing a cable, to be made fast on the dock for the purpose of checking the 'Paisley's' speed."

351, l. 1.

Mr. Justice Newcombe referred to the findings of the trial judge that the tug got the bow of the "Paisley" within 30 feet of the dock, and that those on board the "Paisley" if they had been ready and proper arrangements made, could have got their lines out in time to have helped to check the steamer, and said— 30

351, l. 7.

"Now, with all due respect for the learned judge's finding, and with full realization of the difficulties, if any, involved in the case, I am persuaded, upon the whole testimony, and the attendant circumstances, that the judge is mistaken, both in his finding and in permitting that finding to influence his determination of the case. . . ."

351, l. 29.

Mr. Justice Newcombe then pointed out that Captain Waugh, with the interest which his owners had in the elevator and his experience in towing vessels there, knew perfectly well what should be done, and that Captain Waugh admitted that the tug was supposed to put the ship right at the elevator.

Mr. Justice Newcombe further said "*The suggestion that he (the master of the tug) anticipated that the ship keeper would put his lines ashore from the ship's bow to the northward of the elevator, even if he could, is impossible to accept especially when it is evident that Captain Waugh did not intend to cast off, reverse and nose the tug in, until he had reached the point beyond the elevator where that process was attempted and failed. Moreover, Captain Waugh never gave any order or instruction for the handling of the lines, thus showing, since he was in charge of the enterprise, that no action on the part of the tow was at the time expected or anticipated; and, indeed it would have been a very imprudent and perhaps hazardous step on the part of the ship keeper and those on the dock, without direction from the tug, to have attempted to check the speed of the tow while the tug was still deliberately moving her forward.*"

On the point whether those on board the "Paisley" were negligent in any respect during the towage, Mr. Justice Newcombe said—

"*I cannot discern that, during the progress of the towing, the ship keeper did or omitted to do anything which caused or contributed to the accident, and I see no reason to charge the owners of the 'Paisley' with any fault relating to the navigation, after the 'Paisley' was taken by the tug from her moorings.*"

"*Penrice, the ship keeper, had no authority either from his owners or from the tug to exercise independent judgment as to anything concerned with the navigation, or as to when, so long as the ship was in charge of the tug, good seamanship required that he should cast a line or perform any service connected with the movement of the ship.*"

15. With reference to the point that the owners of the "Paisley" were liable for the damage because Penrice was partly responsible for the position of the "Paisley's" port anchor, Mr. Justice Newcombe said—

"*With regard to the port anchor there is no doubt that Penrice on 15th January, when the tug master objected to the position to which he had raised the anchor in its hawse pipe, encouraged Captain Waugh to leave it in the position in which it was at the time of the accident, and perhaps the 'Saskatchewan' would not have sustained the damage which occurred, if the anchor had not been there, but the position of the anchor, if it were a fault, was not the fault of the owners of the 'Paisley'; they had put the tug in charge, and their ship keeper had no authority to direct the stowage of the anchors, for the purposes of the tug; and moreover, the anchor did not cause or contribute to the collision, and its position does not create liability on the part of the owners, upon well known principles, which were recently discussed in the case of Admiralty Commissioners v. s.s. 'Volute' (1922) A.C. 129."*

16. Mr. Justice Newcombe, after he had concluded the statement of his reasons for exonerating the owners of the "Paisley" from any personal liability, dealt with the question whether the "Paisley" herself was liable for the damage done by reason of the negligence of the tug. On this point Mr. Justice Newcombe said :

353, l. 22

"Now it is evident that, in the towing of the 'Paisley' the governing and navigating authority was solely with the tug, and that the ship in the condition in which she was, had no power to assist in the operation, either in the way of furnishing power or of directing her course. It was not contended at the hearing that the tug was in any wise the servant of the tow" 10
"The case therefore falls within the rule stated by Fletcher Moulton L.J. in the 'Devonshire' (1912) p. 49."

354, l. 41.

Mr. Justice Newcombe after referring to other authorities on this point said *"If as I conclude, the 'Paisley's' owners were not guilty of any fault, it follows that they have not incurred any personal obligation."*

354, l. 45.

Mr. Justice Newcombe in conclusion dealt with the suggestion that a maritime lien attached to the tow, although innocent of any fault in itself, seeing that it was the instrument which, by reason of the tug's negligence, caused the injury, and said that the question was in principle ruled against the Plaintiff by the decisions of the American and the Syria (1874) L.R. 6 P.C. 127 and the "Utopia" (1893) A.C. 492. 20

17. The Respondents submit that the judgment of the Supreme Court of Canada is right and should be affirmed for the following

REASONS.

- 1.—Because the evidence established that those on board the "Paisley" were not guilty of any negligence.
- 2.—Because it was not negligent to carry the port anchor in the position in which it was, and, even if it were negligent, those on board the "Paisley" were not responsible for its position and had no means of moving it or authority to move it.

- 3.—Because the collision and damage were solely caused by the negligence of those in charge of the tug “Harrison.”
- 4.—Because those in charge of the tug “Harrison” were not under the control of the Respondents and were not in their employment and the Respondents are not liable in Law for the negligence of those in charge of the “Harrison.”
- 5.—Because if there was any negligence on the part of those on board the “Paisley” which is denied, such negligence was not the cause of the collision.
- 6.—Because no liability attaches in law to the ship “Paisley” in respect of damage done by the ship for which her owners are not personally liable.
- 7.—Because the Judgment of the Supreme Court of Canada is right and should be affirmed.

GEORGE LANGTON.

ALFRED BUCKNILL.

No. 84 of 1929.

In the Privy Council.

ON APPEAL FROM
THE SUPREME COURT OF CANADA.

BETWEEN

JAMES RICHARDSON & SONS LTD.
(Plaintiff) APPELLANT

AND

THE SHIP "ROBERT J. PAISLEY"
(Defendant) RESPONDENT

AND BETWEEN

CANADA STEAMSHIP LINES LTD.
(Plaintiff) APPELLANT

AND

THE SHIP "ROBERT J. PAISLEY"
(Defendant) RESPONDENT

Case

ON BEHALF OF THE RESPONDENT.

THOMAS COOPER & CO.,
21, Leadenhall Street,
London, E.C.3,
Respondent's Solicitors.