5, 1930

IN THE SUPREME COURT OF CANADA

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA

TORONTO ADMIRALTY DISTRICT

BETWEEN:

THE SHIP "ROBERT J. PAISLEY",
(Defendant) *Appellant,*

—AND—

JAMES RICHARDSON & SONS, LIMITED,
(Plaintiff) *Respondent,*

AND BETWEEN:

THE SHIP "ROBERT J. PAISLEY,"
(Defendant) *Appellant,*

—AND—

CANADA STEAMSHIP LINES, LIMITED,
(Plaintiff) *Respondent.*

FACTUM OF THE RESPONDENT, CANADA STEAMSHIP LINES, LIMITED.

GALT, GOODERHAM & TOWERS, *Solicitors for the Appellant.*
McGIVERIN, HAYDON & EBBS, *Ottawa Agents for Appellant.*
CASEY WOOD & CO., *Solicitors for the Respondent,* James Richardson & Sons, Limited.
ROWELL, REID, WRIGHT & McMILLAN, *Solicitors for the Respondent,* Canada Steamship Lines, Limited.
LARMONTH & OLMSTED, *Ottawa Agents for both Respondents.*

IN THE SUPREME COURT OF CANADA

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA

TORONTO ADMIRALTY DISTRICT

BETWEEN:

THE SHIP "ROBERT J. PAISLEY",
(Defendant) *Appellant,*

—AND—

JAMES RICHARDSON & SONS, LIMITED,
(Plaintiff) *Respondent,*

AND BETWEEN:

THE SHIP "ROBERT J. PAISLEY,"
(Defendant) *Appellant,*

—AND—

CANADA STEAMSHIP LINES, LIMITED,
(Plaintiff) *Respondent.*

FACTUM OF THE RESPONDENT, CANADA STEAMSHIP LINES, LIMITED.

PART I

STATEMENT OF FACTS

This is an appeal by the Defendant from the decree of the Honourable Mr. Justice Hodgins, Local Judge in Admiralty, for the Toronto Admiralty District of the Exchequer Court of Canada, delivered March 20th, 1928, (case p. 317) in these actions, as tried together and on the same evidence for the purpose of trial, in favour of the Plaintiffs and directing a reference to assess the damages.

The S.S. "Saskatchewan" (belonging to the Respondent, the Canada Steamship Lines Limited), while lying at her winter berth was struck and injured by the Appellant S.S. "Robert J. Paisley" on 18th January, 1927, and sank as a result. The S.S. "Saskatchewan" was laden with a winter storage cargo of about 86,000 bushels of grain owned by the Respondent, James Richardson & Sons, Limited.

These actions were brought by the owners of the "Saskatchewan" and the owners of her cargo to recover the damage sustained as a result of the collision and consequent sinking.

PART II

THE JUDGMENT APPEALED FROM

The judgment at trial should be sustained upon the following grounds:—

1. The trial judgment has dealt with a question of fact and should not be disturbed by the higher courts who have not seen and heard the witnesses.
2. The S.S. "Saskatchewan" and her cargo are innocent parties and the "Paisley" having come into collision with a moored ship the burden of proof was upon her and this has not been discharged.
3. The "Robert J. Paisley" and her owners caused the collision by their fault and negligence.
4. The findings and conclusion of the trial judge are right.

PART III

ARGUMENT.

The Respondent, "Canada Steamship Lines, Limited", respectfully submits that inasmuch as at the time of the collision, its vessel, "Saskatchewan", was properly moored in a proper place (Case p. 28, l. 9) and was struck and injured by the Steamship "Robert J. Paisley", (Case p. 319, l. 29) its right to recover is clear and the law in this regard is well settled. The "Devonshire" (1912) A.C. 634, Hatfield v Wandrian 38 S.C.R. 431.

The "Saskatchewan" was struck by the "Robert J. Paisley" and it is submitted that the burden lies on the latter ship of proving that the collision as far as she is concerned was absolutely unavoidable.

The Respondents submit in any event that the collision was due to the fault and negligence of the Appellant, for example:—

1. The "Paisley" did not arrange beforehand or at any time with the tug or those on shore as to the combined manoeuvres and as to making fast at the elevator dock.

2. The "Paisley" did not have her mooring lines ready.

3. The "Paisley" did not get a line ashore before coming abreast of the elevator, as she could and should have done.

4. The "Paisley" did not let go an anchor when the towing cable broke, as she could and should have done.

5. The "Paisley" did not get a line ashore from her starboard quarter or stern after her bow had passed her berth, as she could and should have done.

6. The "Paisley" did not get another line from the tug promptly when the towing cable broke, as she could and should have done.

7. The "Paisley" did not use her steering gear or even have it ready for use.

8. The "Paisley" should not have left her port anchor hanging out as it was.

9. The "Paisley" did not arrange with elevator men to be ready on the dock north of the elevator to take her lines.

10. The "Paisley" had not proper or sufficient crew on board for shifting.

11. In any event the "Paisley's" keeper, Penrice, should not have wasted time over the heaving lines and changing his mind in that connection as he did.

The Appellant ship improperly and under objection (Case p. 103, l. 7 to p. 105, l. 39) endeavoured to escape liability on the grounds of a contract by correspondence (exhibits P-6, p. 303 and S-9 p. 309) between the owners of the "Robert J. Paisley" and Tug "Harrison" relative to the shifting of the "Paisley", although a representative of the owners of the Plaintiffs was on board her at all material times together with three men whom he had hired to assist him in his duties on board the ship. It is submitted that this alleged contract and any other arrangements entered into by the owners of the "Paisley" cannot affect its liability to the "Saskatchewan" and the Respondents are not concerned in any domestic arrangements by the owners of the "Paisley".

The Appellants were negligent in not making proper arrangements with the Captain of the Tug as to what the manoeuvre would be, in not making proper arrangements to have men on the dock ready to receive lines, in manoeuvring in a crowded harbour with an anchor hanging partly below the water line, in failing to properly man the ship and have a sufficient crew on board, and in failing to keep a proper lookout on the ship and to warn the tug of any unusual circumstances.

When the Tug's line broke, an anchor should have been let go by those on board the "Paisley" in order to check her way.

The representative of the owners of the "Paisley" failed to properly instruct his helpers what to do and what stations to occupy and he failed to have proper mooring lines ready to connect with the dock at the proper place and he failed to warn the Tug that the manoeuvre was being carried on in an improper and dangerous manner.

This Respondent further submits that the contract referred to is insufficient to establish the Tug owners as independent contractors so as to relieve the owners of the "Paisley", as the contract itself (Exhibit S-9, case p. 309) expressly stipulates that the shifting operation was to be carried out at "owners' risk", and our contention is that this reservation by the Tug owners, agreed to by the vessel owners, indicates clearly that the owners of the "Paisley" retained some responsibility for the manoeuvre and the most advantageous position in which they could be placed is that of joint control along with the Tug and as such it is submitted they are liable for any damage caused which was not the result of inevitable accident. Canadian Dredging Co., v Northern Navigation Co. (1923) Ex. C.R. 189.

Control of the shifting manoeuvre was in fact in the "Paisley." The Tug was employed by the owners of the "Paisley" to supply the motive power to a ship which at that time had no steam, and in the employment agreement it is expressly stipulated and agreed to that any risk will be that of the owners of the "Paisley." In any event, it is extremely improbable that the owners of a valuable ship having aboard 190,000 bushels of grain (Case p. 13, l.24) would entirely entrust its control and safekeeping to a tug without retaining some measure of control of the operation. In addition, the owners of the "Paisley" had in Owen Sound their representative whose responsibility was to look after their vessels, (Case p. 109, l.36-47). He was an officer licensed as a First Mate (Case p. 172, l. 1-16) and he was in fact on board her and in charge of her at the time of the accident (Case p. 172, l.28-1.43). He admitted that he had duties to perform on the vessel in connection with the shifting (Case p. 172, l.41 to p. 173, l.14). He admitted he had hired three men to assist him and that he was in charge of them (Case p. 172, l.32-33) and should direct them in their duties. He admitted that during the early part of the manoeuvre he remained on the stern of the vessel so that if danger were apparent he could warn the Tug (Case p. 181, l.13-23) and it is submitted that as it was an obvious impossibility for the crew of the small Tug to keep a sharp lookout on all sides of the freighter, it was the duty of someone to maintain a lookout on the "Paisley" and warn the Tug of unusual circumstances, and as Penrice admits that earlier in the manoeuvre he was keeping a lookout on the stern (Case p. 181, l.38) it is an irresistible conclusion that he should have been a lookout for all purposes, and if the occasion arose, should have warned the Tug of any danger. It is therefore respectfully submitted that Penrice's evidence in this regard leads to the conclusion that he, as representative of the owners and as ship-keeper on the vessel, retained a measure of control in the adventure, and that the Respondent's right to recovery is clear. The "Devonshire" (1912) A.C. 634.

The Respondent submits that Penrice, the man in charge of the "Paisley," who was her ship-keeper and the representative of her owners in Owen Sound, was negligent in not making arrangements for men to be on the elevator dock to take lines from the ship when she arrived close enough thereto, (Case p. 174, l.10-34; p. 275, l.5-13). There were in fact no men on the dock to recieve the lines although there were men within hailing distance, (Case p. 145, l.4-12) as Penrice would have known had he been alert.

Penrice was negligent in not ascertaining before the manoeuvre which hatch of his vessel would be placed under the elevator leg so that he would be in a position to know where he should tie up to the dock. (Case p. 173, l. 28-35).

Penrice was negligent in not having a sufficient crew on board his ship to handle her lines which were to be gotten ashore and generally to carry out the duties necessary to make sure that the vessel would be properly taken care of and properly moored. (Case p. 264, l.15-25; p. 271, l.30-45; p. 273, l. 9-16, l. 43-44; p. 289, l. 27-41).

Penrice was negligent in not ascertaining beforehand if his emergency steering gear could be operated and in not fitting it out so that it could be operated in case of emergency, (Case p. 176, l. 31-43).

Penrice was negligent in not having steam up on his vessel so that she could be handled properly in emergencies which might occur due to the manoeuvring of a heavily laden vessel in a congested harbour.

Penrice was negligent in not discussing with the crew of the Tug the particulars of the manoeuvre to be carried out, in not being aware as to how the vessel was to be taken to the elevator and in not deciding definitely on the details of such manoeuvre as would be required by the exercise of good seamanship, (Case p. 176, l. 15-30; p. 275, l. 14-21).

Penrice was negligent in allowing his ship to be shifted in a crowded harbour with her port anchor hanging slightly below the water line (Statement of Defence, Case p.15,l.21) in such a position that if the anchor came into contact with another vessel, serious damage must occur which would admit water into the hull of such other vessel. It is submitted that in allowing the anchor to remain in this position Penrice was careless and did not afford the proper consideration to the rights of other vessels and structures in the harbour, (Case, p. 318, l. 16-19; p. 324, l. 11 and p. 325, l. 2).

Penrice and his assistants on board the "Paisley" were negligent in not having heaving lines to hand and ready for use so that when the vessel was within heaving distance of the dock, lines could be gotten ashore, (Case p. 190, l.39 to p. 191, l. 37).

Penrice was negligent in not properly instructing his assistants or helpers as to their duties and as to what stations they should occupy. So gross was his disregard of this precaution that he was unable to tell the Court where his men were, (Case p, 326, l. 30-42).

Penrice admitted that he acted as lookout on the stern of his vessel and would have warned the Tug of any danger. It is respectfully submitted that even on his story that the tow was being made at a too great rate of speed, this was

danger, and ordinary care called for him to warn the Tug. Even on his story that the vessel was not closer to the dock than 75 feet, (Case p. 164, l. 1-7; p. 180, l. 26-37) this was danger and he should have warned the Tug. It is clear that to make a proper landing at the elevator the vessel's bow should have been brought close to the dock before the vessel reached the north end of the elevator, (Case p. 275, l. 30 to p. 276, l. 14) but even though the vessel passed the south side of the elevator Penrice made no effort to communicate with the Tug to ascertain if anything was wrong or to warn of danger, (Case, p. 165, l. 44 to p. 166, l. 10). Anything that he did was after the vessel had proceeded about seventy-five feet past the elevator, when she should have been nosed to the dock before she reached the elevator, and all that he did was to throw a heaving line ashore. The heaving line was useless as he had not taken the ordinary precaution of seeing that a mooring line was handy on which to fasten the heaving line so that the cable might be hauled ashore, (Case p. 192, l. 18 to p. 193, l. 15). That the heaving line was not completely extended is indicated by the evidence of Dault who says the slack was pulled in by the fellows on shore, (Case p. 127, l. 41-46; p. 147, l. 7). Had Penrice taken ordinary care and been ready, the heaving line could have been attached to the cable and the vessel made fast.

Penrice was negligent in not getting a line ashore earlier. The evidence of the Tug crew is that the vessel was brought to within thirty feet of the dock at the north side of the elevator, (Case p. 49, l. 29-38; p. 73, l. 28-36 and p. 327, l. 1-5) and the learned Trial Judge so finds. The evidence is that a heaving line can be thrown for one hundred feet (Case p. 49, l. 43-44) and no reason exists that a line could not be gotten ashore at this point. Yeo called by the Defence changed his evidence when confronted by a statement signed by him, (Case p. 148, l. 40) and admitted that at the time the line was heaved to the dock, her stern was closer than her bow, and even at that stage Penrice could have gotten a line out from her stern.

Penrice was negligent in not keeping careful watch at to the manoeuvre and in not perceiving the danger until too late. At the time the Tug began to back up to take the way off the vessel and before the line parted, it should have been noticeable to Penrice that there was danger, but he through carelessness or indifference neglected to take the proper steps to avoid any damage.

Penrice was negligent in having the port anchor so slung that it could not be dropped (Case p. 157, l. 7-12). He was also careless and negligent in not letting go the starboard anchor at the time, if not before, the tow line parted. The Defence endeavoured to prove that an anchor would not have been of use. It is respectfully submitted that the evidence of the witnesses for the defence is not reconcilable with common sense when it indicates that good judgment would not have dictated the lowering of an anchor in an endeavour to resist the forward impetus of the vessel. It is submitted that the evidence of Gulbronson (Case p. 277, l. 41 to p. 278, l.3; p. 283, l. 23) and McPherson (Case p. 291, l. 8-23) should be accepted and that even were it true that the anchor would not take immediate hold of the ground on being dropped, from the moment it was lowered it would have offered resistance to the for-

ward movement and as the impact was slight, good seamanship on the part of Penrice would have commanded that the anchor be lowered at the first intimation of danger. The evidence of Penrice himself is that it could have been dropped in three seconds, (Case p. 176, l. 44 to p. 177, l. 31).

This Respondent respectfully refers the court to the following cases:

Cory v France Fenwick, (1911) l K.B. 114, at p. 130, Kennedy L. J.
The Niobe (1888), 13 P.D. 55.
The Devonion, (1901) P. 221.
The Duc d'Aumale (1904) P. 60.
The Jane Bacon, (1878), 27 W. B. 35 (C.A.).
The Ticonderoga (1857), Swabey, 215.
The Englishman and Australia, (1894) P. 239.
Bucknill, "Tug and Tow" (2nd Ed'n.) p. 49:

"The Liability of the Owners of the Tow to Third Parties."

"Those in charge of the tow have a general duty to take proper "steps to avoid doing damage. "The tow may be a steamship or a "sailing vessel, and she may, and sometimes does, use her own means "of propulsion to assist the tug in their joint voyage. The tow "can, by her helm, command, within limits, her direction of motion. "She does, in fact, owe the maritime duty towards other vessels "of using her helm, and under appropriate circumstances, her steam "or other means of propulsion or control, so as to avoid collision. "She is not, like cargo, a passive spectator of the manoeuvres. "She owes a duty to play a part in them, and is to blame if she plays "a wrong part. In this I am not speaking of the responsibility "of the tow for the conduct of the tug, but of her responsibility "for her own conduct" (Buckley, L. J., The Devonshire, (1912) "p. 21, at p. 61). The towage is a joint undertaking, and both tug "and tow are bound to take reasonable care, and use reasonable "skill, a duty which cannot be removed by the terms of the towage "contract. Such a duty is independent of contractual duties, "and is in accordance with the general duty which rests upon every- "body, whether using a river or a road, to take care not to omit "anything which is reasonably necessary for the protection of others, "and to do nothing which will by reason of want of care inflict "injury upon others. (Cory v France Fenwick, (1911) l. K. B. "114, at p. 130, Kennedy, L. J.). It is in each case a question of "fact and of good seamanship whether those in charge of the tow "have exercised due care and skill."

It is important to note that as pointed out by Bucknill "It is in each case a question of fact and of good seamanship" and the present Respondent

contends that this court should not disturb the decision of the trial Judge who heard and saw the witnesses give their evidence upon the important questions of fact and good seamanship that are involved.

The Respondent, Canada Steamship Lines, Limited, respectfully submits that the judgment appealed from should be sustained and that this appeal should be dismissed with costs.

Dated at Toronto, Ontario, Nov. 28th, 1928.

A. R. Holden.
F. Wilkinson.
10 of Counsel for the Respondent, Canada Steamship Lines, Limited.