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 Respondent

James Richardson & Sons 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.

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ON APPEAL FROM THE EXCHEQUER COURT OF CANADA, TORONTO ADMIRALTY DISTRICT

Between:

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(Defendant) Appellant,

—and—

JAMES RICHARDSON & SONS, LIMITED

(Plaintiff) Respondent.

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PART I.

STATEMENT OF FACTS.

This is an action in rem arising out of a collision between the Steamship PAISLEY, the present Appellant, and the Steamship SASKATCHEWAN, owned by the Respondent, Canada Steamship Lines, Limited, which occurred in Owen Sound Harbour at about 10:15 A.M. on the 18th of January, 1927, while the PAISLEY was moving to the elevator for unloading. The SASKATCHEWAN was laden with wheat owned by the Respondent, James Richardson & Sons, Limited.

At the time of the collision the SASKATCHEWAN was moored in her winter quarters in the slip south of the elevator (see Exhibit S-1), heading about west by north. It has not been suggested that she was

moored in other than a proper place, or that anything could or should have been done by her to avert the collision.

The PAISLEY, also laden with wheat, had been moored to the east side of the harbour heading south (see Exhibit S-1). Her starboard anchor was on the bottom and her port anchor, the chain of which had been unshackled and carried ashore as a mooring line, was "hung off" on several turns of wire cable from bitts on the forward deck. Pipes had been fitted to her windlass so that it could be worked by steam supplied by a tug, and the shackle of the port anchor had been left ready to re-
10 shackle the chain to the port anchor.

The PAISLEY had on board as shipkeeper, one Penrice, who was employed and paid by her owners through their operating managers, The Cleveland Cliffs Iron Company. Penrice had a pilot's license which entitled him to act as Mate of a steamship, and while other vessels of the same fleet wintering in Owen Sound Harbour had their own shipkeepers, Penrice took charge on board these other vessels when they were being moved. (Case p. 111, ll. 1-3.)

Arrangements had been made by letter and telegram between the PAISLEY'S managers and John Harrison & Sons Co. Limited, tug owners at Owen Sound, to keep the harbour clear of ice and move their ships to
20 the elevator for unloading at owner's risk (Ex. S-9. Case p. 309).

On the 15th of January, 1927, three days before the actual moving, the tug HARRISON, owned by John Harrison & Sons Co. Limited, went to the PAISLEY to assist in getting her ready to move to the elevator. Steam was supplied by the tug to the PAISLEY'S windlass, and with the assistance of men from the tug Penrice hove the starboard anchor home into its hawse pipe. The chain of the port anchor was shackled to the port anchor and the port anchor partly hove in, but the cable on which it had been "hung off" was not removed and this cable prevented the
30 anchor from being hove home. When hove in as far as the cable would permit, the port anchor projected a considerable distance out from the PAISLEY'S side. There is conflict between Penrice and Waugh as to what occurred thereafter, but the learned Trial Judge accepts Waugh's statement (case, p. 318, ll. 3-19). Waugh's evidence is that when the anchor jammed on the cable and was projecting as aforesaid, he told Penrice that the port anchor would be dangerous to the tug, in that projecting position, and Penrice by releasing the compressor of the windlass dropped it down to where it had been before with the crown and part of the stock submerged. Penrice then asked Waugh if the anchor would be in the
40 tug's way, and Waugh said that it would not bother the tug. Waugh then offered to help take the cable off so that the port anchor could be hove home. Penrice asked again if it was in the tug's way, and on Waugh repeating that it would not be in the tug's way, Penrice said "To hell with it then, we will leave it till spring and let them take it in in the spring", and the anchor thereupon was left hanging as aforesaid (Case, p. 52, ll. 1-46). Under these circumstances it was impossible to change its position during the operation of moving to the elevator.

On the 18th of January the tug HARRISON again went to the PAISLEY in order to tow her to the elevator. Penrice had three men, Sykes, Bechard and Holmes, to assist him on board the PAISLEY during the moving operation. They were hired by Penrice and paid by the owners of the PAISLEY. The mooring lines were cast off and the HARRISON towed the PAISLEY stern first down the harbour to a point north of the elevator, checked her there and went to the bow to pull her into the elevator dock. Penrice remained at the stern so that he might warn the tug if the PAISLEY'S stern got too near some obstruction in the harbour which he termed "riff raff".

There had been no discussion between Penrice and Waugh as to the manner of bringing the PAISLEY to a stop at the elevator dock. Waugh says that he expected Penrice to get lines out to the elevator dock as soon as possible and check the PAISLEY'S way with the lines. Penrice says that he expected Waugh to bring the PAISLEY to a standstill against the dock.

The HARRISON towed the PAISLEY west and south toward and along the elevator dock. Waugh and his mate, Matthewson, say that the PAISLEY was thirty feet off the dock when her bow was about abreast of the elevator, and that subsequently she headed a little further out. Penrice says that she was much further away from the dock. The learned Trial Judge accepts the testimony of Waugh and Matthewson (case, p. 319, ll. 1-6; p. 325, ll. 14-19).

Penrice made no attempt to get a line ashore, when the PAISLEY'S bow was north of or passing the elevator, nor until she was considerably south of the elevator. He had made no arrangements for men to be stationed on the dock to take lines from the PAISLEY. Two men had come onto the elevator dock before the PAISLEY had got near the elevator, but they retired around the corner of the elevator out of the wind and saw no more of the PAISLEY until her bow had come past the south wall of the elevator.

Waugh, after bringing the bow of the PAISLEY past the elevator, backed the tug out to the port side of the PAISLEY intending to nose the PAISLEY in to the dock. He then discovered what he had previously been prevented from seeing by the bow of the PAISLEY, that no line had been got out to the dock. He endeavoured to take the way off the PAISLEY by backing on the tow line, but it parted. Another line was passed from the tug to the PAISLEY, but the PAISLEY struck the SASKATCHEWAN before her way could be taken off by this line.

Penrice did throw a heaving line ashore to a clump of spiles south of the elevator, where the dock was unfinished, and the nearest mooring posts were a considerable distance back (see Exhibits S-7, and C-1), but he did not get out a mooring line or even get one attached to the heaving line so that the men on shore could endeavour to pull it out.

Penrice says that he thought of dropping the starboard anchor when

the PAISLEY was very close to the SASKATCHEWAN, but did not do so. It could have been dropped in a matter of seconds by releasing the compressor. The port anchor could not be dropped because the wire cable had not been removed.

The port bow of the PAISLEY struck the SASKATCHEWAN somewhat forward of amidships at an angle of about 45° leading forward, so that the partly submerged port anchor of the PAISLEY was between the bluff of her bow and the side of the SASKATCHEWAN. There was a boom log with a chain on one end floating in the water and this was between the two vessels. The impact was not heavy, and no damage was apparent, but it was later discovered that a hole had been punched in the shell plating of the SASKATCHEWAN and that a corner had been broken off the crown of the PAISLEY'S port anchor. It was suggested that the hole might have been caused by the three-eighths inch chain on the boom log, but the learned Trial Judge finds as a fact that it was caused by the PAISLEY'S port anchor (case, p. 319, ll. 29-31).

The Appellant pleaded that the tug was in sole control of the operation, and was an independent contractor entirely responsible for the position of the PAISLEY'S port anchor and for the conduct of the moving operation, and that there was no negligence on the part of those on board the PAISLEY.

The learned Trial Judge held that the relationship between the PAISLEY and the tug should be judged by the ordinary relationship of tug and tow; that Penrice was partly responsible for the position of the anchor which caused the damage, and also for the failure to have men moment; that there was not sufficient men on board the PAISLEY and ready on the dock and men and lines ready on the PAISLEY at the critical that the contract between the PAISLEY'S owners and the tug owners could not affect the rights of third parties, and he gave judgment condemning the Appellant in damages to be ascertained by a reference and in costs.

PART II.

Reasons Why the Judgment of the Learned Trial Judge Is Alleged to Be Right.

1. Because the PAISLEY was improperly moved without sufficient or competent men on board.

2. Because there was no proper arrangement made between those on board the PAISLEY and those on board the tug as to the manner of checking the PAISLEY at the elevator dock.

3. Because those on board the PAISLEY negligently failed to have men and lines ready on board the PAISLEY; to heave lines ashore at the proper time; to arrange to have men on the elevator dock to take lines, and to realize in time the danger of collision and drop the starboard anchor.

4. Because the port anchor of the PAISLEY was negligently carried in an improper and dangerous position.

5. Because those responsible for these acts of negligence which caused the collision and damage were agents or servants of the owners of the PAISLEY, or alternatively were persons in whose charge the PAISLEY had been voluntarily placed by her owners and for whose negligence the ship is liable in an action in rem.

PART III.

ARGUMENT

The learned Trial Judge has found that Penrice was the servant of the owners of the PAISLEY (case, p. 323, ll. 26-28). The said owners are responsible for the following negligence of the said Penrice:—

First: Penrice hired only three men to assist him on board the PAISLEY; the Trial Judge has found that four men on the PAISLEY was insufficient for what they had to do (case, p. 328, ll. 12-16), and this finding, it is submitted, is supported by the evidence. (Case, p. 177, ll. 32-44; p. 273, ll. 7-16).

Second: There was negligence on the part of Penrice in leaving the port anchor hanging partly submerged against the bow of the PAISLEY while she was moving in the narrow and congested harbour of Owen Sound;

The MARGARET (1880), 6 P.D. 76;
The SIX SISTERS (1900), P. 302;
The PALMETTO, 18 Fed. Cases, 10699;
The SONTAG, 40 Fed. Reporter, 174;
The LADY OF GASPE, 276 Fed. Reporter 900, at 902.

Third: Penrice on his own admission did nothing whatever with regard to arranging that there should be men on the elevator dock to assist the PAISLEY in checking or mooring, or to ensure that they should have any intelligent idea as to their duties (case, p. 174, ll. 9-14).

Fourth: It was clearly negligence for Penrice to enter upon the moving operation without having a clear and definite understanding with the tug master as to the conduct of each phase of the operation, and particularly as to the manner in which the PAISLEY should be brought to a standstill at the elevator dock.

It is submitted that this duty rested on Penrice rather than on the tug master, because Penrice might and should have stationed himself in such a position on the PAISLEY that he could see everything that was being done and could have given directions to the tug. In fact, the reasonable inference for the tug master to draw from the fact that Penrice did not have such a discussion with him would be that Penrice intended in this way to direct the operation. The lack of collaboration is obvious in the result. Penrice on the PAISLEY, and Waugh on the tug, each expected that the other would act in checking the way of the PAISLEY (case, p. 50, ll. 13-44; p. 165, ll. 22-28). The case in this respect is similar to that of Canadian Dredging Company vs. Northern Navigation Company (1923) E.C.R. 189.

Fifth: Penrice seems to have been utterly oblivious to the fact that he had duties to perform when the PAISLEY approached the elevator

dock. The evidence of Waugh is that lines could and should have been got out from the PAISLEY to the elevator dock when the PAISLEY was still north of the elevator (case, p. 49, l. 29-p. 50, l. 1). Penrice, who had been at the stern watching the "riff raff", or perhaps attending to the fire which he had built under the stern winch, did not even go to the forward part of the PAISLEY until her bow was past the south wall of the elevator (case, p. 179, ll. 38-42). He remained forward and threw a heaving line to a clump of spiles at a point where there was no mooring post within sixty-five or seventy feet (case, p. 165, ll. 14-18), and where there was really no dock at all, and no provision for mooring. At this point, according to the contemporaneous statement of Yeo, the stern of the PAISLEY was nearer the dock than her bow, and a line could have been got out from her stern to the elevator dock proper (case, p. 148, l. 39-p. 149, l. 35); but there appears to have been no one at the stern of the PAISLEY, nor was any effort made by Penrice to get a man to the stern of the PAISLEY or to have a man on the dock to take a line from the PAISLEY'S stern. Penrice says that manilla lines were ready at the bow and stern, but it does not appear that they were in any place where they could be used, or that anyone was stationed at either of the manilla lines. The wire cables, except for about thirty-five feet, which would not be much more than enough to carry them from the winches amidships through the fairleads and back over the rail so that they could be handled, were coiled on the drums of the winches, and the evidence shows that without steam, the cable could not have been got off the drums rapidly enough to be of service (case, p. 164, ll. 28-41).

Sixth: The PAISLEY'S starboard anchor, which had been properly hove home, was hanging on the compressor of the windlass and could have been dropped in three seconds by one man (case, p. 177, ll. 2-27). The excuses given for failing to drop this anchor are that owing to the soft bottom it would have done no good, and that if it had been dropped it might possibly have damaged the PAISLEY. These excuses are inconsistent because the softness of the bottom would have prevented damage to the PAISLEY. Penrice says that he thought of dropping the anchor when the PAISLEY was within one hundred feet of the SASKATCHEWAN (case, p. 166, ll. 7-29), and it is apparently to this situation that the Appellant's evidence was directed as to the futility of dropping the anchor.

It is submitted that the proper time to have dropped the anchor was the moment it appeared there might be difficulty in getting lines ashore at the proper point. If the starboard anchor had been dropped at the proper time, it would have had a distance of at least a length in which to take effect (see Ex. S-1). The attempt should in any event have been made, and it is submitted that the probability is that either by checking the way of the PAISLEY or swinging her head to starboard, and by giving the tug more time to work on the second line, the collision and damage might have been prevented.

These negligences on the part of Penrice would render the owners of the PAISLEY liable even if it were shown that control of the operation was in the tug since towage is a joint undertaking and both tug and tow are bound to take reasonable care and use reasonable skill;

Cory vs. France Fenwick (1911) 1 K.B. 114, at p. 130.

The Appellant seeks to escape liability for all these acts of negligence of its servant by the contention that the voluntary handing over of possession and control of the PAISLEY to John Harrison & Sons Co. Limited, for the purpose of the said movement to the elevator, would prevent a maritime lien from attaching to the PAISLEY in respect of the damage done by the PAISLEY through the negligence of those so placed in charge of her navigation.

It is submitted that there is nothing in the contract or in anything which appears in evidence as to the conduct of the parties prior to the collision, which indicates that possession and control of the PAISLEY were to be handed over to John Harrison & Sons Co. Limited. If it had ever been intended that the whole responsibility and direction were to be delegated to the tug owners, one would expect that Penrice would be so informed, and that Waugh also would have been instructed accordingly by the owners of the tug. So far as the actual conduct of the operation is concerned, it appears that Penrice rather than Waugh was the one who undertook to give orders. Much was made of the circumstance that a steam coupling was provided so that the tug's steam might be furnished to the windlass and that the shackle of the port anchor had been left available for the purpose of re-shackling the chain to that anchor; but it appears that when the tug's boilers had been connected with the windlass Penrice was the one who operated the windlass, and that Penrice was the one who got the shackle and with some assistance re-shackled the chain to the port anchor (case, p. 44, ll. 1-7), and that Penrice alone released the compressor to drop the port anchor to the position in which it finally caused the damage to the SASKATCHEWAN (case, p. 52, ll. 9-15). The manner in which Penrice disposed of the question of taking the cable off the anchor after ascertaining that Waugh would not, as a matter of affecting the safety of the tug, object to its being left hanging, indicates very clearly, it is submitted, that Penrice conceived that he had the right to control the matter, and that Waugh's acquiescence indicates equally clearly that he agreed Penrice had that right. There is no suggestion that the tug owners or any one in their employ had anything to do with the hiring of the other men on board the PAISLEY.

It is submitted also that so far from the written contract supporting the Appellant's contention on this point, the clause appearing in Exhibit S-9 (case, p. 309): "It is understood that the work will be done at owner's risk", is quite inconsistent with the idea of possession and control being relinquished by the PAISLEY'S owners and handed over to John Harrison & Sons Co. Limited. If such relinquishment had been intended, one would have expected to find that the contract contained a clause whereby the tug

owners agreed to indemnify the PAISLEY'S owners against any loss resulting from negligence of the tug owners' servants in the course of the towage over which the PAISLEY'S owners had relinquished control.

Assuming, however, for the purposes of argument that the entire possession and control of the PAISLEY had been handed over to the tug owners so that the PAISLEY'S owners no longer had any voice in or control over the conduct of the moving operation, the PAISLEY would still be subject to a maritime lien in respect of the damage sustained by the SASKATCHEWAN and her cargo. On the Appellant's theory the tug owners would be in a position analogous to that of charterers by demise of the PAISLEY or of contractors to whom possession had been relinquished for some purpose of the ship owners. It has long been settled that such charterers or contractors are, for the purpose in hand, to be regarded as owners pro hac vice of the ship which has been handed over to them:

The TICONDEROGA (1857) Swabey 215;
The RUBY QUEEN (1861) Lush. 266;
The LEMINGTON (1874) 32 L.T. 69;
The RIPON CITY (1897) P. 226;
Sandhill vs. Hodder (1926) S.C.R. 685.

The decision in the SYLVAN ARROW (1923) P. 220 does not affect the question, and the cases referred to in The SYLVAN ARROW do not touch the point because, assuming all of them to have been rightly decided, it was not necessary for the decision in any one of them that the word "owner" be construed otherwise than as including an owner pro hac vice within the meaning of the cases above cited.

It is obvious that if it were held that negligent operation by charterers by demise could not subject a ship to a maritime lien, no ships would henceforward be operated by their owners, and the collision action in rem would speedily become a matter of ancient history.

It is submitted that in this case there was no general handing over of the ship such as is the case in an ordinary charter by demise. It was simply an arrangement for the conduct of a particular operation necessarily to be performed in the course of the business of the PAISLEY'S owners and for their benefit. The operation of moving in this narrow and congested harbour of Owen Sound was one necessarily involving risk of damage to other vessels in the harbour, and the PAISLEY'S owners could not relieve themselves from responsibility by employing a contractor to do the work.

The SNARK (1900) P. 105, quoted by the learned Trial Judge, and DALTON vs. ANGUS (1881) 6 A.C. 740, per Lord Blackburn at p. 829, and Lord Watson at p. 831, are, it is submitted, conclusive against the Appellant even if the tug owners are to be regarded as independent contractors, and all the men in charge as servants of the tug owners.

It is therefore respectfully submitted on behalf of the Respondent, James Richardson & Sons, Limited, that the judgment of the learned Trial Judge is right and should be affirmed.

S. CASEY WOOD,

G. M. JARVIS,

Of Counsel for the Respondent,

James Richardson & Sons, Limited.