

Captain W. F. Wake-Walker, O.B.E., R.N. - - *Appellan*

v.

Steamer Colin W., Limited, and others - - *Respondents*

FROM

THE SUPREME COURT OF CANADA

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF
THE PRIVY COUNCIL, DELIVERED THE 15TH APRIL, 1937.

Present at the Hearing :

VISCOUNT SANKEY.
LORD BLANESBURGH.
LORD MERRIVALE.
LORD ATKIN.
LORD MACMILLAN.

Nautical Assessors :

CAPTAIN MACKAY.
CAPTAIN CHAPLIN.

[*Delivered by* VISCOUNT SANKEY].

In the early morning of the 13th of August, 1934, H.M.S. "Dragon" with a pilot on board was proceeding up the St. Lawrence inbound from Quebec. The "Dragon" is a twin screw cruiser, 470 feet long, 41 feet in beam, and was drawing about 16½ feet. Her shaft horse-power is about 40,000 and her cruising speed is 12 knots (105 to 107 revolutions) and her full speed is 27 knots. She intended to berth at the cross-wall at the inner end of the Market Basin, Montreal, which is situated on the north side of the river, and she had received a letter from the Harbour authorities stating that the berth would be ready for her at 9 o'clock, with a tug in attendance to berth her, if required. At a short distance before reaching the Jacques Cartier bridge over the river at the entrance to the harbour she altered her course to port, and passed underneath the middle of the bridge about 8.37 a.m. As soon as she got clear of the bridge her look-out would have a full view of the Basin, but shortly afterwards the course upon which she was proceeding would prevent her having such a view. About 6 to 7 minutes later she came into collision with the "Maplebranch", an oil bunkering steamer of 238·2 feet in length, and with a beam of 35½ feet. At the moment of collision the "Maplebranch" which had shortly before moved to that position was lying moored alongside the steamer "New Northland", at section 23 of the harbour on the north side of the river, and about 300 to 400 feet from the entrance to the Basin. The "Maplebranch" was badly damaged and shortly afterwards sank.

On the 16th of August the owners of the "Maplebranch" began an action against the appellant hereinafter referred to as the defendant for damages arising out of the said collision. The action came on for hearing on the 9th May, 1935, before the Hon. Mr. Justice Demers, the local Judge in Admiralty for the Quebec Admiralty District of the Exchequer Court of Canada, assisted by two nautical assessors. There is no doubt as to the burden of proof in such a case. The fact of a vessel under steam colliding in broad daylight with a ship at her moorings is *prima facie* evidence of fault, and a defendant cannot escape liability except by proving that a competent navigating officer could not have averted the collision by the exercise of ordinary care and skill. The substantial defence was that as the "Dragon" neared the entrance of the Market Basin a small motor schooner called the "Saguenay Trader", which is 103 feet long with a beam of 27 feet, and which had been moored inside the Basin at the Victoria Pier, which forms the south side of the Basin, swung out in order to turn about at her berth, and that to avoid striking the schooner the defendant stopped and reversed the "Dragon's" engines, but the cross-current carried the "Dragon" over against the "Maplebranch". In other words there was no fault on the part of the defendant, and the collision was due to an inevitable accident. The law as to inevitable accident is concisely summed up in the judgment of Dr. Lushington in *The Thomas Powell v. The Cuba* (1866) 14 L.T. at p. 603:—

"To constitute an inevitable accident it was necessary that the occurrence should have taken place in such a manner as not to have been capable of being prevented by ordinary skill and ordinary diligence. We are not to expect extraordinary skill or extraordinary diligence, but that degree of skill and that degree of diligence which is generally to be found in persons who discharge their duty."

See also *The City of Peking* (1888) 6 Asp. M.C. 396.

As soon therefore as the plaintiffs proved that the "Maplebranch" was struck while she was at her moorings, the onus was upon the defendant to satisfy the Court that he was not to blame. Mr. Justice Demers gave his judgment on the 21st June, 1935, and correctly proposed the question for determination, namely: "Did the defendant establish that this was an inevitable accident?" The learned Judge says "The defendant has not satisfied the Court that this was an inevitable accident." From that decision the defendant appealed to the Supreme Court of Canada. Three Judges (Duff C.J., Canon and Davis J.J.) were in favour of dismissing the appeal. They state, at the end of their judgment:—

"While we think the onus lay throughout the case upon the defendant to satisfy the Court that there was no fault upon him which directly caused the collision, the learned Judge has affirmatively found that there was such fault; and where the trial judge, as here, is not only an experienced local judge in Admiralty but had the assistance of two assessors to advise him upon matters requiring nautical or other professional knowledge and arrived at a conclusion of fact upon conflicting testimony, it would need a very clear case of error for this Court, without the assistance of any assessors, to reverse such a finding."

Two Judges (Crocket J. and Rinfret J.) were for allowing the appeal. Referring to the orders given to the "Dragon" to stop and reverse, these Judges say:—

"The undoubted fact is that when these orders were given the 'Dragon' was face to face with an imminent peril and that, unless she herself had then been guilty of some negligence which contributed to bring that peril about, the Warship's Commanding and Navigating Officers, being then in the agony of an imminent collision with the 'Saguenay Trader', could not properly be held to be accountable for any failure to exercise even ordinary care or nautical skill. Unless, therefore, there was some prior negligence upon their part which contributed to bring about the emergency she must be held blameless."

From that decision an appeal was brought by the defendant to His Majesty in Council, and the Judicial Committee has been assisted by two assessors.

Before examining facts, it is necessary to describe the situation of the Market Basin and the course of the trial. The Basin is on the north side of the St. Lawrence and has an open access to the river of a width of only 315 feet measured at right-angles from the north wall to the end of Victoria Pier. To the eye of an approaching mariner the entrance, even when unencumbered by shipping, is considerably narrower owing to the "knuckle" projecting into the river on the north side a little distance below the point from which this measurement is taken. When vessels lie at or near the "knuckle", and particularly when one moors alongside another, as did the "Maplebranch", the space available for vessels entering the Basin is further reduced. There is calm water in the Basin, but a strong current runs outside Victoria Pier, and, as it passes the end of the Pier, it sets strongly towards the north shore and runs diagonally across the entrance to the Basin at a speed variously estimated as being from 5 to 6 knots. On the morning in question, in addition to the "Maplebranch" and the "New Northland" which were moored at the north side of the river, there was another vessel, the "Tadoussac" belonging to the Canada Steamship Lines, at her moorings against the north wall, a little distance above the "New Northland", and partly within the entrance to Market Basin. She has a length of 350 feet and a beam of 70 feet. It is, therefore, obvious that, on this occasion, the entrance to the Market Basin was not an easy one, with the "Maplebranch", the "New Northland" and the "Tadoussac" in the positions described, and with a current of 5 to 6 knots running diagonally across the mouth of the Basin. It was especially difficult for a vessel of the length of the "Dragon" because her bows and forward part might be in the still water of the Basin, while her after part and stern were still in the current setting her over towards the north shore.

On the 18th August, an enquiry was held into the accident before a Wreck Commissioner, assisted by two nautical assessors. Twenty-one witnesses gave evidence. The plaintiffs, on the 1st October, filed their preliminary act, and upon the 22nd of that month, delivered their statement of claim. At the hearing before Mr. Justice Demers, the

evidence given at the wreck enquiry was made part of the Court record, subject to the right of either party to recall any witness or to call new witnesses. The only witnesses who gave evidence in person at the hearing of the action were the defendant himself, his navigating officer Lieut.-Commander West, R.N., Fernand Sioui, a waiter from the "Tadoussac", and Edmund Bennett, a photographer. In addition to these Louis Lecalvez, another waiter from the "Tadoussac" was recalled by the appellant and his evidence taken out of Court by an examiner. During the hearing before their Lordships a great deal of argument centred round five documents. The first was a plan called D.1. Upon this Lieut.-Commander West, Navigating Officer, had marked by a black line the course which he said was pursued by him after passing underneath the bridge to the point from which he first saw the "Saguenay Trader" swinging round in the Market Basin. This chart was so marked at the enquiry before the Wreck Commissioner. At the hearing before Mr. Justice Demers another plan, known as D.9, was produced on behalf of the defendant, upon which had been plotted the course which he said was the one taken by the "Dragon" from the time she passed the bridge to the moment of the accident. Their Lordships are advised by their assessors that D.1 and D.9 are substantially the same, and both assessors say that the black line on D.1, namely, the course alleged to have been taken by the "Dragon", was a proper and seamanlike way of approaching the Basin, and that the course shown on D.9 was not unseamanlike, though they preferred the course shown on D.1. The other documents consisted of an extract from the navigating officer's notebook of the "Dragon" on the 13th August, the entries in which are as follows:—

" 8.33 " (at that time the "Dragon" would have been $\frac{1}{2}$ mile below the bridge) " Altered course to Port.
 8.37 Steady on 201 degrees. 100 revolutions.
 8.39 Altered course to Port.
 8.42 Altered course to Starboard, 30 degrees.
 8.43 Amidships.
 8.45 Full astern both. Hard-a-Port.
 8.45 $\frac{1}{2}$ Stop both engines."

These entries were made by the midshipman, but the defendant has added a note to them:—

" There were orders to helm which were given but which the midshipman has omitted to record, e.g., ' Stop both ' somewhere before 8.45."

The other documents were the movements of the main engines of the "Dragon" when arriving at Montreal. Those of the starboard engine are as follows:—

" 8.37 100 Revolutions.
 8.43 $\frac{1}{2}$ Stop.
 8.44 Full astern.
 8.44 $\frac{3}{4}$ Excessive vibration on Starboard shaft."

The clocks which recorded the times in these two documents were in agreement. The clock from which the movements of the port engine were recorded was one minute behind. They are as follows:—

“ 8.36 100 Revolutions.
 8.42½ Stop.
 8.43 Full astern.
 8.43¾ Bumped.”

To these latter times one minute has to be added in order to synchronize them.

The defendant said:—

“ As I approached the harbour Bridge I could see the . . . entrance to the Victoria Basin, and as I came up I saw a ship moving down the starboard side of that entrance. I was at least a mile away, looking through my glasses. That ship was the ‘ Maplebranch ’ which was going to her moorings alongside the ‘ New Northland ’.”

When the “ Dragon ” passed underneath the Harbour Bridge she would be at a distance of about 3,450 feet from the Market Basin. The defendant continued:—

“ Across the mouth of the Basin a current sweeps at an angle of about forty-five degrees with my course with a speed of about 5 knots. I had, therefore, to allow in entering the Basin for the side movement of the ship which that current will give me, and I, therefore, steer, not directly in the Basin, but to port of it, so that as I get close to the mouth of the Basin I am swept then by the current and find myself passing into the Basin. It is essential that my speed should be kept high because otherwise the sideways movement of this current as I pass through it will move me too far to one side and press me crossways on to the wall. So that it is essential to cross into this cross current at a good speed. . . . I was proceeding at about 11 knots. . . . My full speed is 27.”

There was much controversy as to the exact position the “ Dragon ” was in when those on board of her first saw or ought to have seen the “ Saguenay Trader ”. The defendant continued:—

“ On the south side I could not see the ‘ Saguenay Trader ’, because I was shielded to some extent by the sheds which were on the pier. As I got closer I was able to see it, but not until I got very close. I realized at once that she was going to get into my way if she continued to move. . . . As a result of this ship appearing suddenly and swinging out I stopped my engines . . . I went astern and took the way off the ship or slowed the ship up . . . I did not immediately go astern because I did not want to lose way too quickly. As we moved on towards the Basin the current swung my bows to starboard very violently and helm was given to correct it. . . . At about the same time I went full speed astern on both. . . . Owing to the fact that I had to pull the ship up while she was still in the current instead of in the still water in the Basin the current caught my stern and swung it over so that it hit the ‘ Maplebranch ’.”

Undoubtedly it was an extremely difficult piece of navigation to enter the Market Basin on the day in question. Mr. Justice Demers in his judgment says:—

“ It appears that the Harbour authorities of Montreal did not notify the ships moored at or near Market Basin that the ‘ Dragon ’ was to arrive, which is to be regretted and explains this unfortunate collision.”

The majority Judges in the Supreme Court of Canada say:—

“ It seems unfortunate that the Master of the Montreal Harbour should have allotted to the British cruiser such an inconvenient berth to be reached through a comparatively narrow entrance, and while the Harbour Commission is not a party to this action and has not been called upon to justify the designation of the particular

berth, it is a little difficult to refrain from comment upon what appears to have been a most inappropriate location for the 'Dragon'."

With these remarks their Lordships agree.

Now the evidence was of a very conflicting character: there were a great number of witnesses, and a great number of topics upon which they were examined, for example: (1) What was a proper and seamanlike course for the "Dragon" to have pursued after she passed the bridge? (2) Did she follow that course as she said she did or did she follow some other course? (3) Where was the "Dragon" when she altered her course to starboard thirty degrees? (4) What was the effect of this manoeuvre? (5) Whereabouts was the "Dragon" when she first saw the "Saguenay Trader", and ought she to have seen her before? (6) What was the exact speed of the "Dragon" when she first saw the "Saguenay Trader", or when she first ought to have seen her? Mr. Justice Demers says:—

"the Court is of opinion, and so is the opinion of the assessors, that the 'Dragon' turned too early or, if you prefer it, too sharply. I am told by my assessor that the proper way of entering that Basin on account of the current running from Victoria Pier towards section 23 of the wharf, is to keep a course well south-west of the extremity of Victoria wharf—at a certain moment, a few hundred feet of this point, to proceed slowly in the current until she is in a proper position to enter the Basin. This permits the ship to thus attain safely the dead water of the Basin. Of course, if you turn too sharply, on account of the current you must maintain the speed, otherwise you are carried by the current against the wharf, but the entrance to be safely executed must be as I have said, and diagonal."

Counsel for the defendant bitterly complained that this suggestion had never been put to the defendant either at the enquiry before the Wreck Commissioner, or during the hearing of the case before Mr. Justice Demers, and he relied upon the case of the *Marpesia* (1872) L.R. 4 P.C. 212 as entitling him to succeed for that reason. Their Lordships think that this point cannot be successfully maintained. It must be remembered that the onus was upon the defendant to prove that he was not to blame. This view of the facts was, however, clearly put to several witnesses. Captain Lacouture, who was the Master of the "Maplebranch" says, in describing what he saw: "According to what you saw what was it that brought the 'Dragon' away over like she came?". "That is the current." "And you think she altered to starboard too soon?". "Yes." Captain Hatfield, who was standing on the deck of the "New Northland" and saw the collision, was asked: "What I would like to know, Captain, is whether, in your opinion, she started to swing at the right place or too soon or too late?". He said, "In my judgment, she swung a little bit too sharply."

Both the Canadian Courts were of opinion that after the defendant saw the "Saguenay Trader" he did everything that a prudent and competent navigating officer could to prevent a collision with the "Maplebranch". The learned trial Judge also expresses the opinion that if there had been no movement on the part of the "Saguenay Trader" there would have been no collision. The question, there-

fore, remains can he rightly be held to blame for anything he did or failed to do during that part of his course from the time that he passed under the Harbour Bridge to the time when he first saw the "Saguenay Trader". The contention of the plaintiffs was—and there was evidence to support it—that the "Dragon" kept too much towards the north shore; that she starboarded sooner than she said or thought she did, with the result that she was carried over by the current and so collided with the "Maplebranch". In their Lordships' view the real question is that which Mr. Justice Demers proposed to himself and which the Supreme Court of Canada also proposed to themselves: "Has the defendant established that this was an inevitable accident?". It was contended by the learned counsel for the defendant that there was no duty upon him to anticipate a movement of the "Saguenay Trader" in the Basin. Their Lordships, however, are of opinion that whatever may have been the right of the defendant, after he had received notice from the Harbour authorities, to expect an empty berth, he had no right to expect an empty Basin, or a Basin either devoid of ships or with ships absolutely motionless. Their Lordships asked their assessors what course and speed ought the "Dragon" to have adopted from the bridge onwards with a view to entering the Basin, on the assumption that the "Dragon" was under a duty to expect that there might be a movement of vessels within the Basin which she could not see. One assessor was of opinion that the "Dragon" should have reduced to no more than three knots headway at the time of entering the Basin. The other said that she did not come up too fast. The assessors were further asked if the "Dragon" had taken a proper course at proper speed from the time she passed under the bridge could she have dealt with the emergency with which she was confronted by the movement of the "Saguenay Trader" so as to avoid a collision with the "Maplebranch"? One assessor said, in answer to the question, "If the 'Dragon' had taken a proper course and at proper speed from the time she came under the bridge she could have dealt with the emergency with which she was confronted, and avoided collision with the "Maplebranch". The other assessor said, "No. Current at a reduced speed too strong for a ship of her length." Their Lordships in this conflict of evidence and opinion have reached the conclusion that after she passed the bridge the "Dragon" took a course and speed which placed her in a position in which she ought not to have been when approaching the entrance of the Market Basin. If she had been in a proper position for entering the Basin she could have dealt with the emergency created by the "Saguenay Trader" without colliding with the "Maplebranch". In other words, their Lordships agree with the Courts below that the appellant has not discharged the onus which in law was placed upon him to show that the accident was an inevitable one. Their Lordships will humbly advise His Majesty that this appeal ought to be dismissed. The appellant will pay the costs of the appeal.

In the Privy Council.

CAPTAIN W. F. WAKE-WALKER,
O.B.E., R.N.

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STEAMER COLIN W., LIMITED, AND
OTHERS

DELIVERED BY VISCOUNT SANKEY

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