# CASES

DETERMINED BY THE

# EXCHEQUER COURT OF CANADA.

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NEW BRUNSWICK ADMIRALTY DISTRICT.

BETWEEN

BENJAMIN HATFIELD .....PLAINTIFF;

AND

THE SHIP "WANDRIAN"..... .....DEFENDANT.

1906
Oct. 29

*Maritime law—Shipping—Collision—Tug and Tow—Ship at anchor—Negligence—"Inevitable accident"—Burden of proof.*

*Held*, that where a collision occurs between a ship in motion and one at anchor, the burden of proof is upon the moving ship to show that the cause of such collision, so far as she was concerned, was an inevitable accident not arising from negligent navigation. This burden is not discharged by mere proof that the moving ship was navigated with ordinary care and skill. The *Schwan* v. The *Albano*, ([1892] P. D., at p. 428) referred to.

2. The Schooner *Helen M.* was lawfully lying at anchor in the stream of the Parrsboro River. The ship *Wandrian*, in tow of a tug, left her wharf with the purpose of proceeding to sea, those on board the tow as well as those on the tug knowing the position of the *Helen M.* before they left the wharf. The tug and tow started to go through the eastern, or port, channel of the river and proceeded along the same to a certain point when they turned into the western, or starboard, channel. Thinking, however, that they could not keep that channel and safely pass the *Helen M.* and another schooner that was partly beached for repairs on the western side of the river a little below the point where the *Helen M.* was anchored, the helm of the

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tug as well as that of the *Wandrian* was put to starboard, and an attempt was made to cross in front of the *Helen M.* so as to go down on the eastern side of the river, between the *Helen M.* and the eastern bank. In doing so the *Wandrian* struck the *Helen M.* and caused her serious injury.. No signal was given by the tug of her intention to cross in front of the *Helen M.*

*Held*, that the *Wandrian* was responsible for the collision; and that no negligence was attributable to the *Helen M.*, under the circumstances, in failing to slacken her anchor chain, or to take any other precaution to avert the collision.

ACTION for damages for collision that took place beween two ships in the river at Parrsboro, N.S.

The facts of the case are stated in the reasons for judgment.

December 8th, 9th, 11th, 29th, and 30th, 1905.

February 27th and March the 1st and 2nd, 1906.

The case was tried and argued before Mr. Justice McLeod, Local Judge of the New Brunswick Admiralty District.

*C. J. Coster*, *K.C.*, and *F. J. G. Knowlton* for the plaintiff; *H. H. McLean*, *K.C.*, *F. R. Taylor* and *C. F. Inches* for defendant.

McLEOD, L. J. now (October 29th, 1906) delivered judgment.

This is an action in rem brought by the owners of the Schooner *Helen M.*, registered at Parrsboro, Nova Scotia, of about sixty-six tons burthen, against the Ship *Wandrian*, for damages done by a collision in the Parrsboro River, Parrsboro, N.S., on the 28th day of November, A.D., 1904, at about three o'clock in the afternoon and at about half an hour before high water.

As to the facts of the collision and the time of the collision, the state of the weather and the conditions of the tide, there is not much, if any, difference between the parties. The principal difference is as to where the

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*Helen M.* was anchored, that is, whether she was anchored in a proper or an improper place, and as to whether those on board her took the proper precautions to avoid the collision, and whether the *Wandrian* took the proper course in going down the river, or practically, whether the collision was an inevitable accident.

The *Wandrian* was in tow of the tug *Flushing*, and it is further claimed that if there is any liability it is the tug's liability and not that of the tow. That is, that there was no fault at all events with the *Wandrian* or those on board of her, and therefore she cannot be held liable.

It is perhaps better for me to state shortly the facts as I have found them by the evidence. The Parrsboro River at or about the place of the collision is about four hundred feet wide from the western to the eastern bank of the channel. On the western side is a wharf called the Newville wharf, but sometimes in the evidence spoken of as "Black's" wharf, and sometimes "Young's" wharf. Just below this wharf is a beach, I think, called "The Hospital Beach," and below that again is the Cumberland Railway and Coal Company's wharf.

At low tide the water is nearly all out of the river, but at high tide the flats on the eastern side of the river are overflowed for about 400 feet. On Plan "A," which is in evidence and which was made by Mr. Scammell, who made a survey of the river and those flats between October 27th and November 2nd, 1905, it is stated at that date the water on the flats would range from somewhere about 20 feet to 14 feet in depth; but Mr. Scammell says that there would be a difference in the depth of the water at the time he made the survey between the 27th of October and the 2nd of November, 1905, and the depth at the time of the collision on the 28th of November, 1904, and the difference he estimates at about 3 feet. In other words, he says that the water would be about three

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feet lower at the time of the collision on November 28th, 1904, than it was at the time the survey was made in 1905, which would make it from fifteen to ten or eleven feet in depth on the flats at the time of the collision.

The course of the river at the place of collision is about or almost north and south. At the upper end of Newville wharf it takes the course more to the east. Huntley's wharf, spoken of in the evidence, is above the Newville wharf in a direct line eleven hundred and fifty feet, but by the course of the river twelve or thirteen hundred feet.

I gather from the evidence that at the time of the collision the tide was nearly slack, probably running up about half a mile an hour, and the wind was blowing north northeast, or nearly down the river, at about four or five miles an hour.

The *Helen M.* came up the river in the afternoon of the 28th of November and anchored, as the plaintiff claims, on the eastern side of the river, in a range of about forty or fifty feet below the Newville wharf, and I gather from the evidence that she was anchored about three quarters or half an hour before the collision occurred. The claim of the defendant is that she was anchored in the middle of the stream. I will consider that fact later.

A schooner called The *Roberts* was on the beach spoken of, below the Newville wharf, being repaired; and about the time the *Helen M.* came up the river, or possibly shortly after, the parties repairing her began to kedge her off into the stream in order to turn her around. Her stern, I think, was never really off the beach, but her bow was swung out into the stream, with a view of turning her towards the Newville wharf. The *Wandrian* was lying at Huntley's wharf, loaded with piling, and when loaded she drew between sixteen and seventeen feet of water. The tug *Flushing* had come up to Huntley's wharf about an hour before to take the *Wandrian*

to sea, the captain of the *Wandrian* at that time or some time previously having made arrangements with him to tow her to sea.

I should say that the *Helen M.* drew about six or seven feet of water; the tug drew a little over nine feet of water. The *Wandrian*, as I said, when loaded drew between 16 and 17 feet of water. I think it is important to notice at this point that both the *Helen M.* and the *Roberts* could be seen from the *Wandrian* while she was lying at Huntley's wharf. Both Isaac Crowell and Knowlton, who were on the *Helen M.* say that they saw the *Wandrian* at the wharf. J. H. Crowell, witness for the defendant, says that just after they left Huntley's wharf he saw the *Helen M.* lying in the channel. Captain Ferris, captain of the *Flushing*, says he saw the *Roberts* when he got the *Wandrian* turned around from the wharf.

As this collision happened in daylight I think it important that these vessels could be seen from each other; that is, those on board the *Wandrian*, if they looked, could see the *Helen M.* while at anchor, and could see the *Roberts* swinging around, and those on board the *Helen M.* could see the *Wandrian*.

The *Wandrian* in tow of the *Flushing*, left her wharf about, or a few minutes before, three o'clock and came down on the eastern side of what is called "The Middle Grounds," in the river. That is, what I presume is a high ground in the river above Newville Wharf, and just below Huntley's wharf. There was a channel both on the eastern and western sides of these Middle Grounds. It is said in the evidence that the western channel was never used, that the eastern channel was the proper channel for the tow and the tug to come down. They did in fact come through the eastern channel and then in consequence of a point that made out from the eastern side of the Parrsboro River they turned westerly towards

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the Newville Wharf. Then having gone over there and coming pretty well down, the captain of the tug—and in this he is supported also by some of the men on board and also by the Captain of the *Wandrian*—thought they could not pass between the *Helen M.* and the *Roberts*, and accordingly the helm of the tug was put to starboard and he turned to pass to the east of the *Helen M.*, or between her and the eastern bank of the river.

I should have said that the *Roberts* was on the western side of the channel and some little distance below the *Helen M.*, and I find from the evidence that there was a distance between them of at least two hundred or two hundred and fifty feet.

The captain of the tug and the captain of the *Wandrian* say they were afraid to go down the western or starboard side of the channel through fear of colliding either with the *Roberts* or with the *Helen M.* Accordingly the helm of the tug and also the helm of the *Wandrian* were starboarded, and an attempt was made to cross in front of the *Helen M.* so as to go down on the eastern side of the river, between the *Helen M.* and the eastern bank. No signal whatever was given, and it was in making this movement to go down the eastern channel past the *Helen M.* that the collision occurred.

I heard the evidence given and I have since examined it carefully and I think there is no witness, except perhaps one, who says it was safe for the tug and *Wandrian* to attempt to cross the bow of the *Helen M.* and pass between her and the eastern side of the channel. The one exception is Elliott. He, however, was standing on the *Roberts*, on the western side of the river, and as the water was over the flats on the eastern side of the river he could not possibly tell what the distance was between the *Helen M.* and the eastern bank. The other witnesses simply say it was safe to try the eastern channel.

The captain of the tug himself says, using his own words:

"Well, the western channel was closed to me, and I didn't see any other place to go only down the eastern side."

Those on board the *Helen M.* say she could not go safely between the *Helen M.* and the bank. There was about twenty-five to thirty fathoms of hawser between the tug and the *Wandrian*; Captain Ferris puts it at thirty fathoms; some of the others state that it was less. When the tug was turning the *Wandrian* did not answer the helm as quickly, and did not turn as quickly, as the tug to the eastward. In Captain Ferris' evidence, in giving his reasons for going down on the eastern side, he says as follows:

"Q. Have you any further reason to state why you "could not get down on the starboard side of the chan- "nel that day? A. No, that was about the only reason "I had. The channel was closed, there was no chance "for me to go down on that side because of the position "of the vessel.

"Q. Then what course did you go? A. I starboarded "the helm to go to the eastern side of the *Helen M.*

"Q. What course did your tug take then? A. Went "down to the eastward, towards the eastern bank.

"Q. Then when you passed the *Helen M.* how far was "the tug above the bow of the *Helen M.* when you passed "her? A. Away from the bow of the *Helen M.*; I should "judge it would be 80 or 90 feet.

"Q. And at that time what helm were you under? "A. Starboard helm, when we passed her, hard a-star- "board.

Q. "Why did you take that course with the tug? A. "Well, when I got pretty well down to the *Helen M.* I "saw the *Wandrian* wasn't following, hadn't sheered as "quickly as we wanted, and I put my helm hard a-star- "board and tried to pull her over to the eastward.

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Q. "The *Wandrian* was loaded, was she? A. Loaded.
Q. "Do you know how much she drew? A. No, sir, only "what they told me.
"Q. Would she answer her helm as quickly as the tug?
"A. No, sir, she wouldn't.
"Q. In order to assist the boat away from the *Helen* "*M.* you took a course further up? A. Right close."

So that he attempted to carry her across the bows of the *Helen M.* The tug ran clear but the *Wandrian*, being deeply loaded and being in such a depth of water that as she was drawing sixteen or seventeen feet there would not be very much water under her, did not answer her helm so quickly as the tug. I think it will appear reasonable to any man, even if he is not a nautical man, that a heavily loaded vessel, such as the *Wandrian*, drawing 16 to 17 feet, with not very much water under her, would not answer her helm so quickly as the tug, drawing only nine feet.

In addition to this, I gather from the evidence that the *Wandrian* had her head sails up, and with the wind blowing practically down the river those sails would tend to make it more difficult for her to answer her helm and turn to the eastward. Those on board the tug and on board the *Wandrian* both say that when they passed the *Helen M.* they called out to those on board the *Helen M.* to let go their chains, in which case they said she would have dropped back; but they claim that that was not done. I will refer to that again.

The tug crossed safely, being as Captain Ferris says about 80 or 90 feet above the bow of the *Helen M.*, but the *Wandrian* following down, not fully answering her helm, struck the *Helen M.* pretty nearly bow on, glanced and struck on the starboard side of the bow, and, taking her course down, turned the *Helen M.* exactly around, with the bow down stream.

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I should say that the hawser from the tug was cut at or about the time of the collision. No doubt there appears to be some little difference between the parties; some say it was cut at the time of the collision and some a minute or a minute and a half after the collision took place. Of course it is difficult for men in an emergency like that to measure time by the minute or half minute; but I judge, taking all the evidence together and taking the circumstances of the case, that as soon as the captain of the tug saw that the *Wandrian* struck the *Helen M.* he at once cut the hawser, and the *Wandrian* coming down stream, heading a little to the east, with the wind blowing down stream and as I have said, her head sails being up, went down, struck the *Helen M.* and glanced to the starboard side, turned her completely around in the stream, her stern going to the eastward to the bank, and her bow out west, she turned right down stream, the *Wandrian* passing down on her western side and going out to sea.

The first question I will consider is as to the position of the *Helen M.*, in the river. It is said that she should not have anchored there at all, she should have anchored on the flats. There was no rule binding her to go on the flats to anchor. I think she had a legal right to anchor in the stream as long as she anchored judiciously and properly. It is claimed that she was anchored in mid-channel. I think all the evidence shows that she was not anchored in mid-channel and I have gone over the evidence very carefully and weighed it in its different parts and have come strongly to that conclusion. In the first place, the anchor of the *Helen M.* was found on the next morning within ten feet of the eastern bank.

As to the evidence of the different witnesses that she was in mid-stream, or about mid-stream, I may say the evidence of the two men who were on board the *Helen M.* was that she was anchored over towards the eastern shore.

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Captain Roberts who was on the schooner *Roberts*, which was being turned around, in his evidence says she was anchored from the western shore two hundred feet, or two thirds of the way across the stream. Now I take that to mean that she was anchored more than half way across the stream. Whilst he says 200 feet he is giving his estimate of the distance, but when he says two-thirds he is giving his idea that she was anchored more than half way across the stream.

I cannot agree with the argument, and the very strong argument made by the counsel for the defendants, that in the course of the collision the anchor of the *Helen M.* was dragged to the eastward; if their contention is right it must have been dragged from 100 to 150 feet. I think that looking at it it was impossible that that should be so. We will bear in mind that the *Wandrian* was going down stream, her helm had been put hard a-starboard and the tug was drawing her towards the east, her head sails were up. He had not turned her towards the east. It is admitted she did not answer her helm well, and while going in an easterly course she was at the same time going down stream and striking the *Helen M.* and glancing and striking the starboard bow, her course was not direct east, possibly and likely a little in towards the east, so that the anchor may have been dragged a little, but certainly not dragged to the distance claimed by the defendant. The great force of the *Wandrian* was down stream and not to the east.

Taking the statement of Captain Ferris, the captain of the tug, it seems to me almost impossible that the *Wandrian* could cross the river to go down the eastern bank without coming in collision with the *Helen M.* He says that when he crossed above the bow of the *Helen M.* the tug was about 80 or 90 feet from the bow of the *Helen M.* There was about 30 fathoms of hawser between the tug and the *Wandrian.* The *Wandrian* had her head

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sails up, and she did not quickly answer her helm so having her head sails up made it still more difficult. Under those circumstances I do not see how it could ever have been supposed that she could be brought around to go down the starboard side of the *Helen M.*, without coming in collision with her.

My own opinion is that the *Helen M.* was anchored on the eastern side of the river. It has been said that she had no right to anchor in the river. There is no rule, as I have said, that prevents a vessel from anchoring in the river. The captain of the *Wandrian* says that he never anchored in the river and never saw a vessel anchored in the river; but Roberts, called by the defendants, says he had at different times anchored in the river, and no rule was produced before me and nothing to show me that the *Helen M.* did not have a right to anchor in the river as she did anchor.

I should probably have said that the *Helen M.* was going up the river for the purpose of seeing whether she could get a load of coal at the Cumberland Railway & Coal Company's wharf, and it was said she came up that far above that wharf with a view of turning and going down by the wharf.

Then I have these facts, that the *Helen M.* was at anchor before the *Wandrian* left her wharf, that the *Wandrian* came down and ran into her while she was at anchor. Now, the rule is well known that a ship under way running into a vessel at anchor, whether anchored in a proper or improper place, is to blame and can only relieve herself by saying that the accident was practically inevitable.

I first refer to :

The *Batavier* (1), Dr. Lushington says as follows :

" The presumption at law where a vessel at anchor is " run down by another, I take to be is this : That the

(1) 10 Jur. at p. 19.

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"vessel running down the other must show that the "accident did not arise from any fault or negligence on "on her own part, and, for this reason, that the vessel "at anchor has no means of shifting her position, or "avoiding the collision; and it is the duty of every "vessel seeing another at anchor, whether in a proper or "improper place and whether properly or improperly "anchored, to avoid, if it be practicable and consistent "with her own safety, any collision. This is the doctrine "not merely of Maritime Law, but of common sense, it "is the doctrine which prevails on roads, where, sup-"posing a carriage to be standing still on the wrong "side, it is no justification for another running against "it, though the latter be on the right side. It is always "incumbent on the person doing the damage, to show "that he could not avoid it, without risk to himself."

So far as I have been able to find, and I have looked at a number of cases, that has always been the rule, I will just refer to the remarks of Lord Watson in the *City of Peking* (1).

"When a vessel under steam runs down a ship at her "moorings in broad daylight, that fact is by itself *prima* "*facie* evidence of fault; and she cannot escape liability "for the consequences of her act, except by proving that "a competent seaman could not have averted or mitigated "the disaster by the exercise of ordinary care and skill."

The defendants on their part say they could not have helped this collision, that they were coming down the stream and if they went on the western side of the channel they were sure to run into either the *Helen M.* or the *Roberts*.

I may say that it is a well known rule that vessels in narrow channels must keep to the starboard side. The western channel was the starboard side for the *Wandrian* and she was obliged to keep it unless she can show a

(1) 14 App. Cas. p. 43.

good reason for not keeping it. Her reason for not keeping it is that she could not go down between the *Helen M.* and the *Roberts*, and therefore, as I take it from the evidence, that she had a right to attempt to go down the eastern side of the channel, as they thought they had a better chance, at all events, of avoiding a collision.

In my opinion, from the evidence, there was a better chance to go down the western, or defendant's starboard side of the river, than there was to go down the eastern side. I think from the evidence the captain thought his greatest danger was colliding with the *Roberts*, but he had no right in order to avoid that danger to take a wrong course and without any signal attempt to go down past the *Helen M.*, or between her and the eastern side of the channel, when as I think there was no evidence to show that it was safe, and in fact it was not safe as the collision occurred in consequence of that manœuvre.

When they turned to go towards the eastern side they gave, as I have said, no signal whatever, and in that I think they were wrong. When the vessel changed her course and proposed to go to the other side, to the port, and proposed to meet the *Helen M.* and pass her starboard to starboard, I think it was her duty to give some signal in order that those on board the *Helen M.* might be prepared to take some steps to avoid danger; but no signal was given, she followed no rule in regard to it; the captain of the tug when he got in a certain position, feeling he could not go down on the western side safely, thought he would go to the eastern shore.

To begin with, the parties in the tug and the *Wandrian* could see before they left Huntley's wharf both the *Helen M.* and the *Roberts*, and should have been able then to come to some conclusion as to whether they could get down or not, and if there was danger, as they thought there was danger, they should not have left the wharf.

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Second, I think it is not a good answer for them to say that the *Wandrian* being so deeply laden did not answer her helm so quickly as the tug. Any seaman should know that in going down a river such as that a vessel drawing 16 or 17 feet of water would not answer her helm so quickly, laden as she was, as a vessel of lighter draught, and they did or should have known that keeping her head sails up would make it still more difficult.

Furthermore, the captain of the *Wandrian* says he was not looking ahead and did not see the *Roberts* till he got nearly down. All that I think was wrong. I think they should have watched and when they saw the danger then it was their duty to bring their vessel into the Newville wharf and anchor and wait. The only reason I find for them leaving Huntley's wharf and proceeding as they did, or practically the only reason, is that given by Mr. Paterson, the captain of the *Wandrian*, and is as follows:

"Q. You stated that the *Roberts* had not begun to "pull around until you were half the way down? A. No, "sir, that is the first I noticed her.

"Q. Could you see her all the way? A. I didn't "happen to be looking that way until I got about half "way down. If I had been looking I could have seen "her."

Stopping right there, it seems to me when the captain of the vessel was coming down the river and through a narrow channel it was his duty to be on the lookout to see if there were any vessels coming or going, because it was a river that vessels were in the habit of frequenting, indeed it was his duty, before he left Huntley's, where, of course, he could see both these vessels, to make sure there was no chance of collision before leaving. He further says:

"Q. You knew she was there? A. Yes.

"Did you know she was going to come out that "morning? A. No, sir, I didn't know it.

"Q. Had you waited until a little later the *Roberts* "wouldn't have been in your way at all, would she? A. "Well, I don't know. We couldn't wait any longer.

"Q. Why? A. On account of the tide.

"Q. How long does it take you to get down out the "river? A. We were about forty minutes from the time "we left the wharf till we were out to sea.

"Q. So you would just get to sea at the same time "after high tide as if you started before, wouldn't you, "had you waited the forty minutes? A. It would be a "little after high water."

"Q. In time so you couldn't get out? A. It wouldn't "be safe to try it.

"Q. Why wouldn't it be safe with the same tide? "A. You are liable to get ashore and damage the vessel.

"Q. Why are you more liable to get ashore with "water at the same height? A. I don't know as you "are any more liable, but you are liable to do most any-"thing in those rivers.

"Q. That is your explanation for not waiting till the "*Roberts* got out of the way?"

If it was simply for the purpose of gaining time, as it would appear from his evidence that it was, it was not a good reason or any reason at all for taking a risk to his own vessel and much less for taking the risk of damaging any other vessel, especially one at anchor.

The best that can be said, I think, for the defendants, is that they were anxious to get to sea and anxious to get to sea at that tide. When they started out and got partly down seeing the *Roberts* they feared they could not pass between the *Helen M.* and the *Roberts* and they thought there would be a better chance to pass on the eastern side of the *Helen M.*, and therefore went across her bows with that view.

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I think the reasons given for taking the course they did are not good reasons and are reasons that cannot prevail. It was claimed on the argument that it was an inevitable accident. I will refer to a few cases on that point. In the *Annot Lyle* (1) Lord Chancellor Herschell, says :

" In this case the *Neuphar* was at anchor in the downs " when the collision, the subject of this action, occurred. " No blame could, therefore, be attributed to her. Under " these circumstances the burden is on the defendants to " discharge themselves from the liability which arises " from the fact that the *Annot Lyle* came into collision " with and damaged a ship at anchor. The cause of the " collision in such a case may be an inevitable accident " not arising from negligent navigation, but unless the " defendants can prove this the law is clear and they are " liable for the damage caused by their ship. I advert to " this point although the arguments addressed to the " Court today were in regard to the conduct of the *An-* " *not Lyle* there are expressions in the judgment of the " learned Judge which seem to indicate that the plaintiff " must prove that those on board the *Annot Lyle* were " negligent and that unless they do show that the defen- " dants are entitled to judgment. I do not think that " this could have been the intention of the learned Judge " but the expressions are somewhat unguarded in their " form and therefore it is desirable that the Court should " not allow any misapprehension to exist in regard to " this point."

In the *Indus* (2) the same principle is laid down.

I may say here that the defendants claim, in addition to the fact that the *Helen M.* was at anchor in an improper anchoring place, that all due precautions were not taken to avoid the collision. The defendants claim that if the *Helen M.*'s anchor chains had been let out she

(1) 11 P. D. at p. 114. (2) 12 P. D. at p. 46.

would have dropped down sufficiently to have cleared the *Wandrian*. As it is claimed that if she had been two or three feet further down the *Wandrian* would have passed her, and those on board the tug and those on board the *Wandrian* say that they called out to those on board the *Helen M.* to let go their chain. The two men on board the *Helen M.*, however, say they did not hear that call, but they both say that they went forward with a view of letting out the chain so that she might drop back; but they could not do it as the *Wandrian* was so close to them that they had not time to do it but had to leave. It is true that in the preliminary act the plaintiffs say that the chains were let go, but they say in their evidence that they went forward for the purpose of doing that and endeavored to do it, but the collision was then imminent and the *Wandrian* so far down on them that they were obliged to fall back as the *Wandrian* was striking and their own masts were falling and they went back to save their lives; and, therefore, they did the best they could, but they had not time to let go their chains.

Some of the witnesses (I think Roberts is one) say that they do not know that letting go the chains would have done very much good as at that time of the tide she would not fall back much, if any.

Some of the witnesses suggested that the *Helen M.*'s head sails should have been put up, which would have thrown her off. This was not done, and I cannot on the evidence say that it would have assisted in any way to prevent the collision. It is, however, a rule that where one ship puts another in extreme danger, where that vessel is in what may be called the very agony of a collision, then if such vessel does fail to do what is best and makes a movement which may be wrong she cannot be held responsible. (1)

(1) See the *Bywell Castle* 4 P.D. 221, 222 and 226

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Dealing further with the question of inevitable accident I will refer to the *Schwan* and the *Albano*, (1892) P. D. 419, and I will read shortly from Lord Esher's judgment on page 428. In referring to the *Annot Lyle* he says: "It was a judgment given by Lord Herschell "in the presence of myself and Fry L. J., who agreed, "therefore, according to the report that the definition of "the law with regard to this matter was as laid down by "Lord Herschell and agreed with him in the deliberate "terms which he used and these terms were, 'Under "these circumstances the burden is on the defendants "to discharge themselves from the liability which "arises from the fact that the *Annot Lyle* came into "collision with and damaged a ship at anchor. The "cause of the collision in such a case may be an inevitable "accident not arising from negligent navigation, but un- "less the defendants can prove this the law is clear and "they are liable for the damage caused by their ship.'"

He then refers to the *Indus* and approves of the judgment as there given and referring to the words, "inevitable accident," there used, he says as follows: "Now "these words were used with reference to what is taken "to be a well known phrase, inevitable accident and "which is a head of law well known and distinguished "by the Courts from mere negligence. The ship in "motion is not allowed in such a case to say merely, 'I "was not guilty of an ordinary want of care or skill.' It "must be shown that it was an inevitable accident. This "is the law laid down by the Court and that only leaves "open this, what is the proper definition of inevitable "accident? To my mind these cases show clearly what "is the proper definition of inevitable accident as distin- "guished from mere negligence, that is a mere want of "reasonable care and skill. In my opinion a person "relying on inevitable accident must show that some- "thing happened over which he had no control and the

"effect of which could not have been avoided with the "greatest care and skill. That seems to me to be the "very distinction which was taken and which was meant "to be taken between an inevitable accident and a mere "want of care and skill."

I read this to call attention to the fact that in cases like this Lord Esher makes a distinction between ordinary want of care and skill and inevitable accident. It must be shown to be an inevitable accident and the words, "inevitable accident," are rather broader and cover more than simply ordinary care and skill.

This extract from the judgment of a very eminent Judge seems to me to explain very clearly and plainly what is the proper definition of "inevitable accident."

In my opinion the defendants have not shown in any way that this collision was the result of an inevitable accident. Those in charge of the tug and the *Wandrian* knew that the *Helen M.* was at anchor before they left Huntley's wharf, and they could also see the *Roberts* and they could and should have remained at that wharf until all cause of danger was past. As to the Captain of the *Wandrian* he did not take the trouble to look ahead to see what, if any, vessels were before him until they were fully half-way down to the *Helen M.* Under these circumstances it is not open to the defendants to say that the collision was caused by an inevitable accident. They took the course they did of their own motion. There is no evidence, in my opinion, to show they were justified in believing they could get safely down on the eastern side of the *Helen M.* I gather from all of the evidence that the tug, at the time of the collision, was up on the flats. Captain Ferris said in his direct examination and on his cross-examination that she was up on the flats. On his re-examination he says he had just come to the flats at the time of the collision, but having examined carefully all the evidence I have con-

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cluded that on his re-examination he is wrong and that he is right on his direct examination, and that when the collision occurred the tug was up on the flats and that she backed off and came down to the *Wandrian*.

It was further contended by Mr. Inches on behalf of the defendant that if there was a liability at all it was a liability of the tug and not of the *Wandrian*. I think this contention cannot be maintained. The *Wandrian*, or rather the master of the *Wandrian*, hired the tug to tow his vessel to sea. The tug was, therefore, the servant of the *Wandrian* and the *Wandrian* was liable. It is a well known rule of law that in cases of towage, especially in matters of collision, the tug and the tow are one vessel; and in cases towed as the *Wandrian* was the motive power is in the tug and the govering power in the ship. Without discussing this matter at full length I think the tug was but the servant of the tow and that the tow, that is the *Wandrian*, is liable.

A number of cases may be cited but I will refer only to the *Cleadon* (1); also the *African* v. *The Union Ship Company* (2); the *Devonian* (3); the *Niobe* (4).

Under these circumstances I think the *Wandrian* has not relieved herself of the responsibility placed upon her, that is to show that this accident was an inevitable accident. I think she must be held to be entirely in fault.

The decree will be that the *Wandrain* be condemned in damages and costs.

There is no evidence as to the damages, and if the parties cannot agree as to them I will order a reference.

*Judgment accordingly.**

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(1) 14 Moo. P. C. 92.
(2) L. R. 6 P. C. 127.
(3) [1901] P. D. 221.
(4) 13 P. D. 55.

* Affirmed on appeal to the Supreme Court of Canada. See 38 S. C. R. 431.