

1938
June 27.
1940
Feb. 12.

BETWEEN :

CANADA STEAMSHIP LINES LIM- } APPELLANT;
ITED (PLAINTIFF) }

AND

MONTREAL TRUST COMPANY (DE- } RESPONDENT.
FENDANT) }

Shipping—Tug and tow—Terms of hiring—No responsibility accepted by tug—Duties of tug and tow—Grounding of tow due to negligence of its officers—Tug not liable for damage suffered by tow—Appeal dismissed.

On the morning of November 5, 1933, the *Gleneagles*, owned by the appellant, engaged the services of the tug *Rival*, owned by Sin-Mac Lines Limited of which respondent is the trustee under a deed of trust and mortgage, to move the *Gleneagles* out of Little Catarauqui Bay, near Kingston, Ontario, into Lake Ontario. During the carrying out of the operation the *Gleneagles* was grounded on Samson Point in Kingston Harbour and was damaged. The Court found that the terms of hiring were that the *Rival* would not assume any responsibility but that the *Gleneagles* would go out at her own risk, and that the *Gleneagles* alone was to blame for the grounding.

Held: That the tug is the servant of the vessel towed or assisted, as the case may be, and is under the control and direction of the officers of the vessel.

2. That in the absence of definite and express limitation of the tug's responsibility such as is established in the present case, a contract of towage implies an engagement that each vessel will fulfill its duty in executing it; that proper skill and diligence will be used on board tug and tow and that neither vessel, by neglect or misconduct, will create unnecessary risk to the other or increase any risk incidental to the service undertaken.

APPEAL from the judgment of the District Judge in Admiralty for the Ontario Admiralty District.

The appeal was heard before the Honourable Mr. Justice Angers, at Ottawa.

F. Wilkinson, K.C. for appellant.

C. Russell McKenzie, K.C. for respondent.

The facts and questions of law raised are stated in the reasons for judgment.

ANGERS J., now (February 12, 1940) delivered the following judgment:

This is an appeal by Canada Steamship Lines, Limited, owners of the S.S. *Gleneagles*, from a decision of His

Honour Judge Field, District Judge in Admiralty for the Ontario Admiralty District, dismissing the action of Canada Steamship Lines, Limited, against Montreal Trust Company, a corporation having its head office at the City of Montreal, Province of Quebec, as trustee under a deed of trust and mortgage made on April 19, 1929, between Sin-Mac Lines, Limited, a corporation having its head office at the said City of Montreal, and the said Montreal Trust Company, securing an issue of 6 per cent first (closed) mortgage sinking fund gold bonds.

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[The learned Judge referred to the pleadings and continued.]

The evidence discloses that on the morning of the 5th of November, 1933, sometime between two and three o'clock, shortly before finishing to unload a cargo of grain at the Kingston elevator in the harbour of Kingston, the *Gleneagles* required the assistance of one of the tugs of Sin-Mac Lines Limited to move her out of Little Catarauqui Bay, which is a short distance from the harbour of Kingston proper, into lake Ontario. The task was assigned to the tug *Rival*.

The *Gleneagles*, a steel freight vessel owned and operated by appellant, has a gross tonnage of 8,233·22 tons and a register tonnage of 4,780·15 tons and is 582 feet in length and 60·2 feet in breadth, as indicated in the transcript of register filed as exhibit K. Her draught, when she left the dock unloaded, was between 16½ and 17 feet aft and from 6 to 7 feet forward.

The tug *Rival*, owned and operated by Sin-Mac Lines Limited, is a steel screw steamship having a gross tonnage of 196·19 tons and a register tonnage of 15·13 tons; it has a length of 84·4 feet and a breadth of 24·06 feet.

When the *Gleneagles* had almost finished unloading, the master Alexander F. MacIennan gave instructions to the mate Charles T. Beatty to telephone to the Sin-Mac Lines' office to request the assistance of a tug for the purpose of leaving the dock and moving out into lake Ontario. The *Gleneagles* was moored at the dock of the Kingston Elevator Company shown on the chart, exhibit A, her bow in and her port side to the dock.

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The mate of the *Gleneagles*, following the master's instructions, called up the office of Sin-Mac Lines Limited and spoke to the night manager, Henry James Nagle.

There is a direct conflict of testimony as to the conditions of hire of the tug.

Beatty testified that he called the office of Sin-Mac Lines Limited and said to the person who answered the telephone that the *Gleneagles* would be unloaded in about half an hour and that the vessel would require a tug to shove her out clear of the elevator slip. According to him that is all that was said on his part. Asked what was the reply, he stated that there was no particular reply that he could recollect, except that the company would send a tug at the time mentioned. The witness added that this was the complete conversation, as far as he recalled it.

Nagle, on the other hand, declared that he received a telephone call from the Kingston elevator for a tug to assist the *Gleneagles*. He asked if the captain were speaking; the reply was that it was one of the crew. Nagle said that he asked him to tell the captain that "the tug would not assume any responsibility, that the steamboat would go out at her own risk."

In cross-examination Nagle repeated his statement that he had asked the member of the crew of the *Gleneagles* to tell the captain that the tug would not assume any responsibility and that the steamboat would go out at her own risk. He added that that was all the conversation.

The learned trial judge accepted the version of Nagle as more reliable, his memory being, in his opinion, more accurate. His Honour Judge Field thought that there was a good reason in the mind of the witness for the limitation of the tug's responsibility, because there had been earlier in the sailing season of 1933, viz. on or about August 17, an accident to the *Lemoine*. According to Nagle the practice of telling whoever wished to have the aid of a tug to shove a steamer from the Kingston elevator dock out into lake Ontario that the tug would assume no responsibility was adopted in the summer of 1933 after the accident to the *Lemoine* and this practice has been followed ever since.

Moreover, as stated by the learned trial Judge, there is the fact to be considered that the mate of the *Gleneagles* as well as her master are mistaken when they say that there was on November 5, 1933, a lighted gas buoy off the end of the breakwater shown on the chart exhibit A. This chart, published by the Canadian Hydrographic Service, Department of Marine, in June, 1933, shows a light; the evidence however establishes clearly that this gas buoy was installed later and that, at the time of the accident, there was at the spot indicated on the chart exhibit A at the end of the breakwater only a black spar buoy; see in this connection the depositions of Captain Miller Begg Donnelly and of Captain Luke Mallan, exhibits L and O, and the admissions of counsel to be found on pages 3 (in fine) and 4 of the argument of counsel on appeal and in the discussion which followed the reading of Mallan's testimony on pages 261 and following of the volume of evidence.

I think that the learned trial judge was right in accepting Nagle's version in preference to that of Beatty regarding the terms and conditions of hire of the tug.

I entirely agree with him when he says that such a limitation as that hereinabove referred to would not excuse any and all negligence on the part of the tug's crew in the latter's share in the manoeuvre. I shall consider in a moment the question as to whether there was on the part of the *Rival's* crew such negligence as to implicate the tug in respect of the grounding of the *Gleneagles'* stern on Samson Point.

In view of this finding with respect to the terms and conditions of the hiring of the tug's services the action, in my opinion, must fail. Seeing however that the learned trial judge has dealt with the acts of negligence ascribed to the defendant and that the same have been discussed at length by counsel, it seems to me apposite to express briefly my opinion on the subject.

As stated by the learned trial judge, up to the time the tug started to shove back the *Gleneagles* it is common ground that no fault is imputable to the tug. She tied herself to the starboard bow of the vessel in compliance with the instructions received from the *Gleneagles* to the satisfaction of captain Maclennan. It is admitted that the *Rival* was a sound and efficient tug.

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The *Gleneagles* was not towed out astern but was pushed out, in accordance with the usual practice.

When the *Gleneagles* was ready to go she was hove back along the dock with the aid of her own winch until her stern was clear of the dock. A line was secured on one of the bow mooring winches of the vessel and on a spile on the dock for the purpose of springing the stern of the vessel out from the line of the dock.

When the *Gleneagles* had been steadied and captain MacLennan felt that she was in a position to be shoved out astern, he gave a signal to his mate to let go the line fastened on the dock and blew a long and a short whistle to notify the tug that it was all right to go ahead. The tug answered with one long and one short blast and started to shove the *Gleneagles* out.

After the vessel had cleared the end of the concrete section of the dock, that is when she was opposite the trestle extension marked with a red line on chart exhibit A, which is considerably narrower than the dock itself, the *Gleneagles'* bow began to swing to port, due to the pressure of the tug on her starboard bow.

The engines of the *Gleneagles* were not in use at the time and her rudder was amidships.

Noticing that the stern of his vessel was going to eastward more than it should, MacLennan told his mate to tell the tug to straighten her up. He says that he heard the mate communicating two or three times with the captain of the tug by megaphone. He was not in a position to hear if any reply were made by the tug captain. At all events, according to MacLennan, the tug did not obey the instructions and the *Gleneagles'* stern "kept swinging more to the eastward all the time and faster."

As the *Gleneagles* was continuing to swing, MacLennan states that he got her working ahead on a hard to starboard wheel. Then he gave the tug a check signal consisting of three short blasts, which is a recognized signal between steamers and tugs. This signal means that the tug is to slow her speed.

MacLennan says that a short while after, as the tug did not stop shoving, he blew an alarm signal and in spite of this the tug continued shoving. MacLennan thinks that there was then a second alarm signal.

Beatty corroborates to a certain extent Macleinnan's story. He testifies that the captain instructed him to tell the tug to straighten up the vessel; he conveyed this order with the aid of a megaphone; the words he used were: "Straighten her up." Beatty was then on the bow deck of the *Gleneagles* on the starboard side, almost directly over the tug; according to him there is no question that the tug heard the order. He shouted two or three times, in fact kept repeating the instructions until he received an answer. The tug, in spite of these instructions, kept shoving. In witness' opinion if the tug had endeavoured to straighten up the *Gleneagles* at the time, the accident could have been avoided. Beatty states that the tug captain's reply was that he had his wheel hard over and was doing all he could. Beatty says that he communicated this reply to Macleinnan, who thereupon instructed him to tell the tug captain to stop shoving. Beatty conveyed those instructions to the tug captain by megaphone, but the latter, as far as witness remembers, did not answer.

According to Beatty, almost immediately after this, a matter of seconds, a check whistle was given to the tug by the *Gleneagles*. The witness stated that he was not in a position to see whether or not anything had been done to the vessel's engines. A danger signal followed almost immediately the check signal and the tug backed off to the eastward. Asked if the tug maintained a strain on the line when it backed off, the witness replied: "No, not a strain that would be of any disadvantage or advantage to the boat; it was merely kept clear of water."

In reply to a question as to whether the tug at any time exercised any strain on the starboard bow of the *Gleneagles* which would tend to pull her bow to starboard, Beatty stated:

Not any—no, in the position he was it would be practically impossible to pull her bow to starboard.

According to the witness the *Gleneagles* "in probably a very short time" struck aft.

Robert Bruce Bennett, wheelsman on the *Gleneagles*, testified that, as soon as the vessel had cleared the end of the dock, she started to swing to port, that her master thereupon yelled down to the mate to tell the tug to straighten her up, that he heard the mate convey the order

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by megaphone, that the tug did not comply with the order and that the same was conveyed by the mate a second time; that the mate hollered up that the skipper had said that he was doing all he could and that the tug's wheel was hard over or something to that effect—the witness admitting that he “didn't get it very clear,” that he “didn't get it all”—; that the master called to the mate to tell the tug to stop pushing, that he heard the mate convey this order to the tug captain but that this was not as plain as when he had answered the skipper; that almost immediately after this the skipper blew the tug a check whistle (three blasts), that the skipper operated the telegraph to full speed ahead and instructed the witness to put the wheel hard to starboard, that an alarm signal was blown by the *Gleneagles*, that the vessel stopped swinging and struck something.

According to Bennett the *Gleneagles* had been going full speed ahead with her wheel hard to starboard for about a minute—“a minute, maybe a minute and a half, maybe not quite a minute,” as the witness put it—before striking.

Nicholas Kozak, watchman on the *Gleneagles* on the morning of the accident, was in the windlass room, below the bow deck; there are two portholes on each side of the windlass room; he could see the tug. After the tug got the *Gleneagles* moving, Kozak heard instructions passing between the vessel and the tug; they were given by the mate through a megaphone; he was in a position to hear these instructions, but he was not interested and he paid no attention. He thinks that the captain of the tug should have heard them.

George Edwin Price, chief engineer of the *Gleneagles*, was in the engine room when the signal full speed ahead was given. The engines remained at full speed for about twenty seconds, until they were stopped. About ten seconds after the *Gleneagles* started full speed ahead, there was a slight rub, as if the vessel had rubbed against coarse gravel; the witness went over and looked into the steering gear room and, as he was coming out, there was a rumbling noise at the shoe or rudder position; this happened approximately twenty seconds after the engines had been put full speed ahead.

Price said he did not recollect hearing any whistle signals.

William Francis Gogo, deckhand on the tug, said that he heard a signal from the *Gleneagles*, one long and one short blast, which meant that the vessel was ready to leave; that was the only whistle signal given by the *Gleneagles*. He heard, however, a danger signal given by the tug; it was a series of short blasts; that was about eight or ten minutes after the tug had started to shove the vessel. According to witness there was no check signal nor danger signal given by the *Gleneagles*.

Fred Crepeau, chief engineer on the *Rival*, said that he was in the engine room when a danger signal was given by the tug some ten minutes after she had started to go ahead; within a few minutes he got a signal to stop his engines, which he did. The danger signal was sounded by the tug's whistle.

Captain Luke Mallan, master of the tug *Rival*, was, on account of illness, examined before a Commissioner at his house and a transcript of his deposition was deposited in the record.

Early in the morning, on November 5, 1933, Mallan received orders from Nagle, night watchman at the office of Sin-Mac Lines at Kingston, to go to the Kingston elevator to shove out the *Gleneagles*, which he did. After a while the captain of the vessel, who was ashore, got aboard and a few moments later gave the tug one long and one short blast, indicating that the vessel was ready to go. The tug answered the signal.

The *Gleneagles* had a shore line out in order to spring her stern off the dock. The *Rival* was attached to the *Gleneagles* by a line off the latter's starboard bow.

After being hove back some distance (indicated by the witness, likely with the aid of the models) by means of her own winch, the *Gleneagles* blew one whistle to cast off the line; the tug thereupon started to push the vessel astern. According to witness the *Gleneagles* kept going towards Samson Point all the time. When Mallan noticed this he hollered to the mate of the *Gleneagles* to come ahead but received no reply. He blew the vessel a danger signal; this was eight or ten minutes after the tug had started to shove her out.

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Asked who, as between the *Gleneagles* and the tug, was in charge of the manoeuvre, Mallan replied:

A. Well, of course, the captain would be in charge of his own boat, certainly; he is always in charge of his own ship; he would do as he likes; we are only the tug; he can shove her back or go where he likes; he is in charge of his own boat.

In answer to a question as to what had happened after the danger signal, Mallan stated:

A. Well, when I seen she was going to go on the bank I hollered and hollered at him to come ahead on her; I didn't get any answer; somebody said that some of the crew or somebody hollered but I didn't get any answer anyway—and when I seen she was going to go on the bank I backed away from her, back here (indicating) but I still had a line on her—and she went into the bank.

In cross-examination, Mallan stated that he did not want the *Gleneagles* to back up, which was the worst thing that she could have done. He blew her a danger signal and yelled for her to come ahead.

Mallan declared that it is easier to handle a big boat from the bow, when she is light and explained the reason for this as follows:

A. Of course, the stern is deeper than the bow and naturally they have got their own power to help themselves, they can come ahead or go back; if they come ahead they can shove me right back if they want to or if they want to go back we will shove them on down

The witness explained with the aid of the models the manner in which a tug attached to the starboard bow of a vessel can manoeuvre to direct her bow to port or to starboard; I must say that without the illustration given by the witness by means of the models his testimony on this point is somewhat difficult to follow.

According to Mallan, there is no reason why a tug on the bow of a ship, with a line attached to the bridle of the ship, could not go back and get on the other bow, if she wished to do it; however, it would be up to the captain of the ship to ask the tug to do this.

Mallan said that there were certain recognized signals between tug and steamer and he described them at length, if not very lucidly. He summed up his description substantially as follows: If the tug is going ahead, one whistle from the steamer means for her to stop; if the tug is stopped one whistle means to go ahead; two whistles,

whether the tug is going ahead or stopped, mean to back up; three whistles mean to check down; according to witness, that is the whole system of signals.

If the captain of the vessel decides to work her engines he has no signal to give to the tug; he handles his vessel as he wishes.

The tug can direct the vessel either by whistle or verbal instructions to the mate. One blast to the vessel means to stop, if she is working her engines; if she is not moving her engines, it means to come ahead on her. Two blasts mean for the vessel to back up.

In cross-examination Mallan maintained his statement that there was no conversation between him and the captain or the mate of the *Gleneagles* as to what was to be done to shove the *Gleneagles* out.

Mallan was unable to say what caused the *Gleneagles* to go on shore; he shoved many steamers out from Kingston elevator, including the *Lemoine*, the biggest boat on the lakes.

There is a kind of current at that place; Mallan said that he has gone out several times right and straight; at other times he would have "quite a little bit of bother with the current." Ever since the breakwater was erected, there has been a certain amount of eddying.

If a vessel is going out and her stern is dropping down, the tug has to shove her over (witness indicating, obviously with the models). In this case Mallan put his tug across the bow of the *Gleneagles* and the vessel went over until he hollered for her to come ahead, so as to stop going into the bank.

Mallan said that he worked his wheel to port from the start. The master of the *Gleneagles* swung her off the dock; usually she will straighten up pretty well. Witness thought he would get her straightened up a little more, because she was going down towards the shore; he swung across the bow and tried to straighten her up; he does not know what happened aboard the *Gleneagles*, but she seemed to go right back and, when she got back so far he saw that she was going into the bank, he blew a danger signal and hollered for her to come ahead; she did not do it and the tug backed away from her. He was pulling on her all the time, intending to pull her port to bow, but her stern kept going down towards the bank.

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Asked if the *Gleneagles* were close to the bank when he blew the danger signal, Mallan replied:

A. Well, she was quite a ways off. Well, if he had come ahead on her and straightened her stern up we would not have went on; that is how far she was off the bank when I blew my whistle.

Dealing with the manner in which the *Gleneagles* was swinging, Mallan made the following comment:

A. Well, now, she was not swinging so fast; she was going down all the time on me, that is all; of course, if she had been swinging fast we could not have told him to come ahead on her. He had all the chance in the world to *back her up* (?) after I had yelled at him.

Mallan said that in an emergency the master of the ship has command. Asked if, supposing the weather were clear and the tug were able to steer a good course, the captain would use the steamer's engines, Mallan replied:

A. No; I have shoved her out there and he never used his engines because he had no need to; she has gone out—no wind blowing or anything; I have gone out there when I wanted them to use her engines because the wind was blowing, taking her down, and probably they would come ahead on her just to take her off there—and straighten her stern up, you see.—I have gone out there nights when there would be no trouble at all and I have gone out when it was all we could do to get out, sometimes.

Reverting to the question of signals, counsel for plaintiff asked the witness if the steamer should give a signal, supposing she decided to go ahead; Mallan apparently misunderstood and answered in the affirmative; he corrected his answer however and reiterated the statement he had made in his examination in chief to the effect that the vessel blows signals to the tug to indicate to the latter what she wants the tug to do, but not for the purpose of letting the tug know what she is doing herself; it may be apposite to reproduce an extract from Mallan's testimony on the subject:

Q. Then supposing the captain of the steamer decided for some reason or other he ought to come ahead he should blow you one, should he?

A. Yes.

Q. And what would that mean to you?

* * * *

A. Well, that would mean that he was going ahead if he gave me one whistle.

Mr. McKenzie—Q. If he gave it to you?

Q. If he blew it to you?

A. No, I am wrong there; you see, he blows for me—he don't blow anything that he is doing himself but he blows to me what he wants me to do; he is handling the ship, tug, tow and all, in a way of speaking; if he wants me to back up he will tell me to back up. If he wants me to stop he will tell me to stop, and if he wants me to come ahead he will give me one—but he don't give me any signals of his, understand, at all; he cannot give me signals what he is doing and give me the same signals for the tug. If he gives me any signals what he is doing I would think he wanted the tug to do it and I would answer him back and do it.

If the tug wanted the vessel to use her engines and blew her one blast, that would mean for the vessel to come ahead; the latter would answer and the tug would know that the vessel was coming ahead. If the tug blew two blasts and the vessel answered, the tug would know that the vessel was backing up.

There is no change in the system of signals once command of the manoeuvres is understood. The *Gleneagles* being in control, Mallan said that he had never changed the signals which he was to receive from the vessel.

The only signal which the tug received from the *Gleneables* was the "all right" signal, viz. one long and one short blast, at the time of leaving the dock. Asked if every other whistle had been blown by the tug, Mallan replied:

A. I did not blow any at all until he was going shore and I blew a danger whistle at him; I blew him a lot of danger signals when I seen he was going on and I didn't get any answer; that is all I can tell you.

Recalled to explain certain answers to questions put to him by the nautical assessor, which he said he had misunderstood, Beatty declared that he had never known of a vessel blowing whistles to a tug to indicate what the latter is to do with her engines and that, if the *Gleneagles* had blown two whistles to the tug, it would simply have indicated that the vessel's engines were working astern. It is customary for a tug on the lakes, when she wishes a steamer to go astern, to blow two whistles. If the steamer had blown first, it would only have implied that her engines were going astern.

Asked if Nagle had requested the witness, when the latter telephoned asking to send a tug to the elevator dock, to tell the captain of the *Gleneagles* that the tug would not assume any responsibility and that the vessel would go out at her own risk, Beatty replied that at no

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time during 1933 was this stipulation ever conveyed to him by telephone or otherwise; he added that these words were not used in the conversation between Nagle and himself on November 5, 1933. It is only in the spring of 1934 that these words limiting the responsibility of the tug were first conveyed to him. He remembers that, when these words were used for the first time in the spring of 1934, he conveyed them to the captain and made the remark that this limitation of responsibility was probably due to the accident in the previous fall.

Maclennan, called in rebuttal, testified that if Nagle, after August, 1933, had invariably made the restrictive stipulations mentioned in his testimony when he hired a tug, they were not conveyed to him.

According to Maclennan it is customary for a steamer having occasion to use her engines to give the tug a signal: one blast to indicate that the vessel is working ahead and two blasts to indicate that she is going astern. If a tug was pushing a steamer astern there would be no occasion for the steamer to blow a back-up signal to the tug. If the tug thought that a steamer was getting out of control and cared to use the steamer's engines, the tug would blow one whistle to go ahead and two to back up.

When she takes hold of a steamer, a tug is more or less always in control. The tug asks the assistance of the vessel if needed; that is common practice on the lakes. The steamer is never in control; the only time she might possibly use her engines without the request of the tug is in the event of her getting into trouble.

Maclennan said that if he wanted to work the *Gleneagles'* engines ahead he would signal one whistle to the tug; this would not mean that the tug was to stop working. He has never notified a tug to back up; in his experience that has never been done.

The three-blast signal was given to the tug because the latter did not pay any attention to the verbal orders which the witness gave her. The check signal is the only one which a vessel can give to a tug, except when the vessel is through with the tug, the signal being then one long and one short blast.

To avoid trouble witness moved the *Gleneagles* ahead on a hard to starboard wheel. He told the mate to ask

the tug to stop shoving and he blew the check signal. The tug did not heed the stop signals but kept shoving until after the second alarm signal.

Putting the *Gleneagles*' engines full speed ahead and her wheel hard to starboard, when her stern was swinging over to Samson Point, was designed to drive the vessel back against the force of the tug; she would then be working full speed against the pressure of her rudder only, going back in the direction of the dock from where she had come.

The rudder of the *Gleneagles* was not to be of effect in the operation, until the vessel had to use it for protection; when she used it, the effect of the rudder was overcome by the tug pushing on the bow.

I share the view of the learned trial judge when he says that the allegations of negligence set forth in sub-paragraphs (e), (f) and (g) of paragraph 9 of the statement of claim are shown not to have been factors in the failure of the operation. There is no evidence establishing that the tug proceeded at an excessive speed. As regards the wind the proof discloses that on the morning of the accident it was light and that it could not have any effect on the vessel or the tug. As stated by the learned trial judge, if a "system of signals" between the tug and the steamer were an essential feature in executing the manoeuvres safely, it was as much the duty of the *Gleneagles* as it was of the tug to arrange one.

This leaves the elements of negligence mentioned in sub-paragraphs (a), (b), (c) and (d) of paragraph 9. They refer to the alleged ignoring by the tug of instructions and of danger signals or warnings given by officers of the *Gleneagles* and the adoption of a course liable to bring the *Gleneagles* into dangerous proximity to Samson Point and the failure of the defendant's agents in charge of the tug to alter or check her course or speed even when warned of the imminent danger to the *Gleneagles*. The evidence in this connection is conflicting and, I must say, not very satisfactory. There is some confusion incident to the signals given at the time of the emergency. We are again faced with a question of credibility. The learned trial judge saw the witnesses (except Mallan, who, as already stated, was examined at his residence), listened to

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them, watched them explain the movements and positions of the vessel and tug with the models; he was unquestionably in a better position than I am to judge of the credibility of the witnesses and of the plausibility of their versions; he came to the conclusion that the witnesses heard on behalf of the defendant were to be preferred to those heard on behalf of the plaintiff and that their statement of the facts was to be given credit to. After reading the depositions attentively and comparing the two versions I do not feel inclined to adopt a different conclusion from that arrived at by His Honour Judge Field.

The tug is the servant of the vessel towed or assisted, as the case may be, and is under the control and direction of the officers of the vessel: Bucknill, *Tug and Tow*, 2nd ed., pp. 14 *et seq.*; Halsbury's *Laws of England*, 2nd ed., vol. 30, No. 840.

The master of the *Gleneagles* was in charge of the operation. He was standing in the *Gleneagles'* pilot house from where he could see all about him. He was in a position to determine when he should undertake to manoeuvre his vessel in the manner he subsequently did so as to keep her in the channel and off Samson Point, viz. to put his engines full speed ahead and his wheel hard to starboard.

Fifteen minutes elapsed from the time the *Gleneagles* started to be hove back with her own winch to the time she touched the bottom off Samson Point; the operation started at three o'clock and the vessel grounded at a quarter past three. From the moment the vessel cleared the dock and the tug started to shove her back, which the evidence discloses to have occurred seven or eight minutes after three o'clock, the vessel was going back towards Samson Point and getting into a more dangerous position all the time and nobody on board her appears to have done anything to protect her stern movement. The second mate, who is supposed to have been at the stern of the *Gleneagles*, either was not at his post or was not on the alert and vigilant; the proof establishes beyond doubt that he made no report to the captain that the stern of the vessel was getting into a dangerous position.

In the absence of definite and express limitation of the tug's responsibility such as is established in the present case, a contract of towage implies an engagement that

each vessel will fulfill its duty in executing it, that proper skill and diligence will be used on board tug and tow and that neither vessel, by neglect or misconduct, will create unnecessary risk to the other or increase any risk incidental to the service undertaken: Bucknill, op. cit.; Halsbury's Laws of England, 2nd ed., vol. 30, No. 839; *The Julia* (1); *Read v. The Tug Lillie* (2); *Spaight v. Tedcastle* (3); *The Valesesia* (4).

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After a careful perusal of the evidence, I can reach no other conclusion than that adopted by the trial judge, to wit, that the order to put the engines full speed ahead and the wheel hard to starboard was given too late; in fact only forty seconds, if not less, before the vessel stranded. For this reason I believe that the *Gleneagles* is alone to blame for the grounding.

I was assisted by Captain J. W. Kerr as nautical assessor and I may say that I find myself in accord with his views.

On the whole, I am of opinion that the appeal fails and it is accordingly dismissed, with costs.

Appeal dismissed.

- (1) (1860) 14 Moore's P.C. 210,
230.
- (2) (1907) 11 Ex.C.R. 274.

- (3) (1881) 6 A.C. 217, 220.
- (4) (1927) P. 115, 118.