CASES

DETERMINED BY THE

SUPREME COURT OF CANADA
ON APPEAL

FROM

DOMINION AND PROVINCIAL COURTS

THE SHIP *PERENE* (DEFENDANT).....APPELLANT;

AND

THE OWNERS OF THE *MAID OF SCOTLAND* (PLAINTIFFS) ..... } RESPONDENTS.

THE SHIP *PERENE* (DEFENDANT).....APPELLANT;

AND

R. P. & W. F. STARR LIMITED (PLAINTIFF) ..... } RESPONDENT.

1924

*Dec. 2, 3.
*Dec. 30.

ON APPEAL FROM THE NEW BRUNSWICK DIVISION OF THE EXCHEQUER COURT OF CANADA

Damages—Collision at sea—Insurance—Unexpired portion of premium.

In an action claiming damages for loss of a ship in a collision the owner cannot recover the amount of the unexpired portion of the premium paid for insurance against such loss.

Judgment of the New Brunswick Admiralty Division ([1924] Ex. C.R. 229) varied, Idington J. dissenting.

APPEAL from the judgment of the New Brunswick Admiralty Division of the Exchequer Court of Canada (1) in favour of the respective respondents.

The only question dealt with on this appeal is that stated in the above head-note.

Baxter K.C. and *Carter* for the appellant. Refer to Arnould on Marine Insurance (8 ed.) sec. 1251, page 1510; *Tyrie* v. *Fletcher* (2); *The Geelong*, Registrar's report Roscoe Maritime Collisions, Measure of Damages (2 ed.) 174.

Fred. R. Taylor K.C. for the respondents.

The judgment of the majority of the court Anglin C.J., Duff, Mignault, Newcombe and Rinfret JJ., was delivered by

NEWCOMBE J.—The SS. *Perene* going out of St. John Harbour on 1st February, 1921, at the end of the middle watch,

*PRESENT:—Anglin C.J.C. and Idington, Duff, Mignault, Newcombe and Rinfret JJ.

(1) [1924] Ex. C.R. 229.

(2) 2 Cowp. 666.

1924

THE SHIP *Perene* v. OWNERS OF THE *Maid of Scotland*

THE SHIP *Perene* v. STARR, LTD.

Newcombe J

ran down and sank the three-masted schooner *Maid of Scotland,* which was then off the entrance of the harbour intending to beat her way up. The owners of the schooner, defendants in the first named action, proceeded in the Exchequer Court in Admiralty to recover damages for the loss of the vessel. The schooner was laden with 646 tons, 14 cwt. of anthracite coal from New York belonging to R. P. & W. F. Starr, Ltd., the respondent in the second of the above named actions. This company also proceeded in the Exchequer Court in Admiralty to recover damages for the loss of the cargo. The two cases were tried together before the local judge of the court at St. John, upon agreement that the evidence to be given should apply to both cases. The learned local judge for the reasons stated in the very careful judgment which he delivered found for the plaintiffs in both cases and assessed the damages for the schooner at $26,465 and for the cargo at $10,640.78. From these judgments the *Perene,* defendant in both cases, appeals to this court alleging that the findings are erroneous and that she is not responsible for the collision.

These two appeals, in each of which the *Perene* is the appellant, and in which both respondents were represented by the same counsel, were, for convenience, heard together. At the conclusion of the appellant's argument the court considered that the appellant had not, as to either appeal, made out a case of error in fact, or the disregard of any cardinal principle, such as would justify the court in varying the judgments either upon the main question of responsibility, or as to the quantum of damages, except in one particular, as to which counsel for the respondents were heard and the cases reserved for consideration. It appeared that in assessing the damages of the owners the local judge, having valued the vessel at the time of her loss at $20,000, allowed in addition several items, including one for insurance premium unexpired, amounting to $1,634, and that, in assessing the value of the cargo, he allowed for marine insurance premium $156.93, and he states that as to these special items of insurance premium liability was not disputed. Upon appeal however the appellant maintains that these two items were allowed, the one to the owners of the schooner, the other to the owners of the cargo, without authority in law or precedent, and that the dam-

ages in each case should therefore be reduced by these amounts respectively. As the question in its bearing as to the respective cases depends upon different considerations I shall consider the cases separately.

Perene v. *Maid of Scotland*

No explanation is given in the judgment for including the insurance premium as part of the respondents' damages except the statement that the right to the unexpired insurance premium was not disputed. The schooner was insured by a time policy, and the $1,634 is claimed as that part of the insurance premium paid by the owners of the schooner which, it is said, was attributable to the unexpired period of the policy. The appellant, however, now contends that, the risk having attached, there can be no apportionment of the premium by reason of the loss of the ship by the perils insured against before the expiry of the policy, and that the premium does not constitute an element of loss which can properly be considered in the assessment. On the other hand it is urged that either the premium should be apportioned and the amount attributable to the unexpired period of the policy made good by the appellant, by whose negligence the schooner was sunk; or that the value of the schooner for purposes of assessment should be regarded as enhanced by the fact that she was covered by insurance which had at the time of the loss a considerable period to run. The question is not, so far as I have been able to discover, directly covered by judicial decision. In the case of *The Harmonides* (1), a similar claim was made and disallowed by the District Registrar, but although the report was reviewed on appeal upon other grounds, no question was raised as to the propriety of the District Registrar's disposition of the item for insurance premium; also it appears from Mr. Roscoe's valuable book on The Measure of Damages in Maritime Collisions, 2nd edition, pp. 37, 38, 174, that such claims are not allowed in the Registrar's office. It seems clear enough that no proportionate allocation of the premium upon a marine risk can be referred to any part of the period for which the risk is contracted; the contract is entire and the premium has relation only to the risk in its entirety; therefore it is

(1) [1903] P.D. 1.

1924

THE SHIP *Perene* v. OWNERS OF THE *Maid of Scotland*

THE SHIP *Perene* v. STARR, LTD.

Newcombe J

difficult to perceive how any just distribution can be made. If the risk had not attached presumably the premium would be adjusted by refund from the insurer to the insured, and in such a case, upon obvious principles, neither would be entitled to recover from the wrongdoer through whose fault the property was lost before the attaching of the risk. The expense of the premium is directly attributable to the contract, not to the collision, and damages based upon interference with the insurance contract are too remote. Moreover, since it is the insured and not the wrongdoer who has the benefit of the insurance, it is incompatible with principle that the latter should pay for it. This objection is well stated by Mr. Roscoe, citing *Yates* v. *White* (2); and *Bradburn* v. *Great Western Ry. Co.* (3), where he says:

> If any part of the premium could be recovered from the owner of the wrongdoing ship the latter would be fairly entitled to ask that the amount paid under the policy should be taken into consideration in the assessment of the damages; and it has been held that a wrongdoer is not entitled to claim any reduction in respect of money received by an injured party under a policy.

For these reasons I am disposed to think that, notwithstanding the absence of any objection at the trial, the learned judge had no authority in law to bring the insurance premium into the assessment of damages.

I do not think, however, that either because of the insurance or for any other reason the value of the vessel as found by the local judge should be increased, and therefore in the result the conclusion upon the whole case with regard to the schooner is that the judgment below should be varied by reducing the amount found, namely, $26,465 by $1,634, the amount included in it for insurance premium, and that in all other respects the judgment should be affirmed for the reasons stated in the judgment at the trial. But inasmuch as the defendants in the Exchequer Court did not dispute the insurance premium, which also represents only a comparatively small item of the aggregate amount involved in the appeal, they will, notwithstanding the variation of the judgment, have no costs of the appeal.

Perene v. *Starr, Ltd.*

In figuring the value of the cargo the local judge includes the amount paid for the coal, 10 per cent added for profits,

(1) 4 Bing. N.C. 272.

(2) L.R. 10 Ex. 1.

commission brokerage and overhead, a small advance on freight, cost of exchange and marine insurance premium, $156.93, the latter being the cost of insurance for the voyage, and beginning with a quotation from Halsbury's Laws of England, vol. 26, p. 541, he says:—

> Cargo owners who have lost their goods carried in one vessel in consequence of a collision due to the negligent navigation of another vessel, are as a rule entitled to recover from the owners of the other vessel the value of the goods at the place and time and in the state at and in which they ought to have been delivered to the owners, as the value is the market price of the goods if there is a market there. If not, such value has to be calculated, taking into account among other matters the cost price, the expenses of transit, and the importer's profit.
>
> No evidence was given before me to show what the market price of the goods was at the city of St. John, the place at which the coal ought to have been delivered to the plaintiffs. Such value must, therefore, be calculated, and among other matters to be taken into account as laid down in the paragraph which I have quoted from Halsbury, are the cost price, the expenses of transit and the importer's profit.
>
> It was not contended on behalf of the defendant that ten per cent of the amount of the coal was too large a sum to be allowed to cover the items mentioned and which were described by Mr. Starr as covering profits, incidental expenses, brokerage, cost of telegraphing and other items. I am of opinion that the charge was a moderate one, and as no objection was taken to it on the ground of the percentage charged, and as in calculating the market value the items mentioned should be taken into account, I will fix the damages at the full amount of $10,640.78 with interest from the first day of February last.

There appears to be no misdirection here. It is true that the selling price of coal at St. John is not proved by evidence of the market, but Mr. Starr who was called to establish the value gave his testimony without any objection whatever, and from this it would appear that according to the actual price paid, plus the additions above mentioned, the coal would have a value of less than $16.50 per long ton at St. John, and seeing that the local judge found the value in accordance with the proof so made; that the admissibility of the evidence was not questioned; and particularly that no objection to any item was made, except as to the propriety of including any sum for estimated profit; it would seem, having regard to the course of the trial, that his finding ought not to be disturbed. The cost of the insurance, if the cargo had safely come to hand, would have been realized out of the proceeds of the sale, and I see no reason why the total value as found by the local judge should be reduced by the amount of the premium; it really would form part of the cost of the goods to the owner at St. John.

1924

THE SHIP *Perene* v. OWNERS OF THE *Maid of Scotland*

THE SHIP *Perene* v. STARR, LTD.

Idington J.

For these reasons and for the reasons stated by the local judge, this appeal should be dismissed with costs.

IDINGTON J.—The steamship *Perene,* in the Bay of Fundy, on the 1st of February last, ran down in collision the sailing schooner *Maid of Scotland* and thereby sank her and her cargo and four of her crew, which consisted of six men in all. The result was the total loss of the schooner and her cargo, as well as of four lives.

The learned Chief Justice Hazen, as Local Judge in Admiralty, having tried the claims of the owners of the schooner *Maid of Scotland* arising out of said collision, and the claims of the respondent R. P. & W. F. Starr, Limited, owners of the cargo, delivered, on the 30th of April, a long and well considered judgment finding the appellant wholly to blame.

At a later date, the 13th of May last, he heard the counsel for the respective parties relative to the damages to be allowed as flowing from and recoverable by the respective respondents, and delivered, as result thereof, on the 19th of May last, a lengthy and able judgment covering in every reasonable way the entire questions arising in both cases.

From these judgments the *Perene* appealed to this court and, after a long argument by the leading counsel (exceeding the limit of time allowed by the rules of our court), we came to the unanimous conclusion that as to the question of which party was to blame, there was no doubt in our minds that the judgment of the learned trial judge was right, and there was no need for counsel for respondent to deal with anything except the question of damages, and the appellant's counsel were heard as to the items they objected to.

They objected to the principle upon which the learned trial judge proceeded, in assessing the damages for the loss of the schooner.

That seemed to me hardly arguable as there was ample evidence for him to have allowed more for the value of the schooner than he did. I will advert to that later in considering some objections taken to some of the other items that the owners of the schooner were allowed.

Meantime I will take up the claims for the loss of the cargo with which the learned judge dealt first.

He sets forth the claims made in respect thereof, and deals therewith, as follows:—

In the case in which R. P. & W. F. Starr, Limited, is plaintiff, being No. 227, the amount which the plaintiff claims is $10,640.78, with interest at five per cent from the first day of February, and the claim is made up as follows:

Amount paid for coal	$ 9,215 48
Ten per cent which Mr. Starr gives as the amount to cover commission brokerages and overhead	921 54
Advance made on freight	58 20
Premium actually paid for U.S. funds	288 03
Marine Insurance premium	156 93
	$10,640 78

together with interest from the time of the loss at five per cent.

Of these items the only one to which objection is taken by counsel for the defendant is the second item, viz., $921.54, and it is submitted that so far as that covers profits and commissions it is not competent to the plaintiff to claim it and he is not entitled to it. In support of this proposition two cases were cited—*Ewbank* v. *Nutting* (1), *and British Columbia, etc., Co.* v. *Nettleship* (2), both of which are common law cases, the facts being entirely different from those in the present case, and it is admitted by the defendant's counsel that they are not directly in point.

He then proceeded to quote the rule laid down in Halsbury, vol. 26, page 541, and refer generally to the evidence, and continued as follows:

It was not contended on behalf of the defendant that ten per cent of the amount paid for the coal was too large a sum to be allowed to cover the items mentioned and which were described by Mr. Starr as covering profits, incidental expenses, brokerage, cost of telegraphing and other items. I am of opinion that the charge was a moderate one, and as no objection was taken to it on the ground of the percentage charged, and as in calculating the market value the items mentioned should be taken into account, I will fix the damages at the full amount of $10,640.78 with interest from the first day of February last.

I see no ground for complaining of said finding and would dismiss the appeal with costs to the said owners of the cargo.

Then as to the claims of the owners of the *Maid of Scotland*, the learned trial judge presents that as follows:—

Coming now to the other case, No. 226, *Frank K. Warren* v. *SS. Perene*, the plaintiff claims damages for the loss of the *Maid of Scotland* of $40,000, and the following additional amounts:

Value of stores and ship chandlery	$ 1,300 00
Cost of removing spars	1,000 00
Insurance premiums unexpired	1,634 00
Freight on coal for Starr payable in U.S. funds	750 00
Earnings of voyage to Canary Islands payable in U.S. funds	2,000 00
Premium on freight on coal and lumber to the Canary Islands for U.S. funds	81 00
	$46,765 00

(1) 7 C.B. 797. (2) 37 L.J.C.P. 235.

1924

THE SHIP *Perene* v. OWNERS OF THE *Maid of Scotland*

THE SHIP *Perene* v. STARR, LTD.

Idington J.

Of these items those for the unexpired insurance premium, the freight on the Starr coal, the earnings of the voyage to the Canary Islands and the premium for the United States funds are not disputed. The plaintiff also claims interest from the first day of April last, the date on which under the charter party the vessel after discharging its cargo at St. John and loading there with lumber, would have delivered the same at the Canary Islands. That charter party was given in evidence. It was dated on the 17th January, 1924, and under it the vessel was chartered from St. John to Las Palmas, Grand Canary, to carry a cargo of pine or spruce lumber not exceeding 450,000 s.f. The amount to be paid under the charter party at $10 s.f. amounted to $4,500, and the evidence was that the disbursements and expenses in connection with this would amount to $2,500, leaving a balance of profit of $2,000. Under the authorities it is quite clear that the plaintiff is entitled to this amount.

The principal controversy was over the amount that should be allowed as damages for the total loss of the *Maid of Scotland,* and it will be necessary to consider the principles that should be applied in arriving at such damages.

I wish to draw particular attention to the statement of the learned judge in the foregoing as to those items not disputed, and which, practically, I submit, must be taken as attesting an admission as made by the appellant at the trial.

Now it is in regard to one of these very items that is for the proportion of the insurance premium allowed, that the counsel for appellant had most to say here, in dealing with the minor items.

I pressed him for evidence relevant thereto for, as I pointed out to him, there might be some very satisfactory explanation, but he could not point to any; however he was frank enough to admit that he had not taken any objection thereto at the trial, or on argument below, and only thought of it afterwards.

Counsel for respondent affirmed he had never heard of this objection until he read the factum of appellant.

It is to be observed that the case was tried without any pleadings. The preliminary act of each party is all that appears in the record. Counsel for respondent suggested that the learned trial judge no doubt had in mind the contest over the value of the vessel and that he may have borne that in mind in trying to do justice herein between the parties, for the estimate upon which he proceeded was so far below the claim made and the last word in that connection upon which I surmise he acted, was by Mr. Warren, who put it at $20,000 to $25,000, and he allows only the lower of these estimates when I imagine he might have

easily gone a few thousand dollars higher, and that may be simply because he felt he was making allowances in other items which must be considered.

Of course such speculative reasoning is not very satisfactory.

But upon thinking this matter over and reading further than the argument led me, I find that in the conclusion the learned judge reaches, he allows interest to the respondent only from first of April next, whilst in the other case he allows interest from the first of April last; and gives reason therefor as follows:

with interest at five per cent on this amount from April 1 next, the date at which the charter for carrying lumber to the Canary Islands would have expired.

If I am right in my conjecture that he was trying thereby and by the freight allowances he made, to arrive at a just dealing between the parties, then I feel, as respondents were entitled to interest from the date of the accident and wrong done by the appellant, which has not been allowed but postponed till following April, which, at five per cent, would balance things up, the claim now made by appellant is rather frail, indeed has no proper foundation in justice to be given effect to in this court.

There is a freight claim also allowed which may be viewed in same light.

I am not at all in doubt that a judge or jury think interest should be allowed from the date of the accident; the law will give it unless there is some special provision relative to such a case as this.

Often there is a very great difference in this application of the allowance of interest to the particular case in question in the varying jurisdiction we have to deal with.

All the other grounds of objection on the part of counsel for appellant are matters involving no principle of law.

And I submit that the case of *Tyrie* v. *Fletcher* (1) does not touch what we have to deal with herein. As between insured and insurer it is clear law, unless by the contract differed from, but it is not what is involved herein.

And the cases cited by appellant of *Cattle* v. *The Stockton Waterworks Co.* (2), and *La Société Anonyme de Re-*

(1) 2 Cowp. 666.

(2) L.R. 10 Q.B. 453.

1924

THE SHIP *Perene* v. OWNERS OF THE *Maid of Scotland*

THE SHIP *Perene* v. STARR, LTD.

Idington J.

morquage à Hélice v. *Bennetts* (1), do not touch this case and, though cited as doing so in principle, I respectfully beg to differ.

I would dismiss this appeal with costs throughout.

Appeal dismissed with costs.

Solicitors for the appellant: *Baxter, Lewin, Carter & Hunton.*

Solicitor for the respondents: *Fred. R. Taylor.*