THE PLEIADES:
Owners of The Pleiades v Page and others

Privy Council
Lord Watson, Lord Morris and Sir Richard Couch
3 February 1891

Admiralty — contributory negligence — whether arguable for first time on appeal.

An issue of contributory negligence may not be raised for the first time on appeal.

Case referred to in judgment

The Tasmania, (1890) 15 App. Cas. 223

Appeal

This was an appeal from the Vice-Admiralty Court in three consolidated actions, in which the trial judge found the Pleiades solely to blame for a collision.

Myburgh, Q.C., and Raikes for the appellants.
Sir Walter Phillimore Q.C., and Aspinall for the respondents.

14 February 1891: Lord Watson:

This is an appeal by the owners and master of the steamship Pleiades from a judgment of the Vice-Admiralty Court of Gibraltar, in three consolidated suits, arising out of a collision between their vessel and the steamship Jane. Two of these are cross-actions of damage by the respective masters, and the third an action by the owner of the Jane's cargo against the Pleiades and freight. The learned judge of the Vice-Admiralty Court found that the Pleiades alone was to blame for the disaster; and he has disposed of each action in accordance with that finding.

(After reciting the evidence as to the collision, his Lordship continued)

The only case made by the appellants in their pleadings and in their evidence was, that both ships ought to have maintained their original courses, with unaltered speed, in which case there would have been no risk of collision, and that the collision which ensued was entirely owing to the Jane's departure from her original course. In their preliminary act, they state that "the collision was caused through the steamship Jane not keeping her course: arts. 16 and 22." The case presented on the other side was that the Pleiades occasioned the collision by failing to observe art. 16, and keep out of the way of the Jane; that the Jane ported because the starboarding of the Pleiades indicated that she had determined to disobey the rule inculcated by art. 16; and that the result of her disobedience was to render collision inevitable. It was not suggested by either party that, in the event of their vessel being found to have been in the wrong, there was contributory fault on the part of the other vessel, which would imply joint responsibility.

Their Lordships have no hesitation in holding that the decision of the Vice-Admiralty Court upon the issues submitted to it was fully justified by the evidence. They have, with the assistance of their assessors, formed a clear opinion (1) that, if both vessels had continued on their original courses,

with unabated speed, to the point of intersection of these courses, there would have been imminent danger of collision; (2) that the attempt of the Pleiades to pursue her original course was in plain violation of the 16th article of the Regulations; and that, having regard to the proximity of Europa Point on the one hand and the abundance of sea-room on the other, an endeavour to pass ahead of the Jane was an improper and unseamanlike manoeuvre; and (3) that up to the time when she starboarded the Pleiades could, by porting and directing her course to starboard, have complied with the Regulations, and passed astern of the Jane without involving risk of collision.

On the argument of this appeal, counsel for the Pleiades maintained for the first time that, assuming her to have been culpable by reason of her failure to keep out of the way, the Jane was also in fault, and ought to be jointly condemned in damages, in consequence of her failure to comply with the 18th article of the Regulations. If the argument were admissible at this stage of the proceedings, it would raise the very serious question whether the Jane was justified in steaming ahead instead of reversing when it became apparent that a collision was unavoidable; and the onus of shewing that her action was justifiable would undoubtedly rest upon the Jane. Upon the merits of the argument, their Lordships purposely refrain from expressing any opinion in the present condition of the evidence. They did not call upon the respondents' counsel for a reply, because they were satisfied, upon the appellants' own shewing, that they ought not to entertain the question. The point was not taken in the court below, where no reference was made to the 18th article either in the preliminary acts, the pleadings, the evidence, or in the argument. The evidence upon which the contention is now based was elicited from the witnesses in loose and general terms, not for the purpose of ascertaining the precise state of the facts, but simply by way of narrative. The master of the Jane was asked on cross-examination why he ported his helm; but not a single question was put to any of the Jane's witnesses in regard to her going ahead instead of reversing. In these circumstances, their Lordships are not satisfied that they have before them—to use the language of Lord Herschell in *The Tasmania* [1]—"all the facts bearing upon the new contention, as completely as would have been the case if the controversy had arisen at the trial; and next, that no satisfactory explanation could have been offered by those whose conduct is impugned if an opportunity for explanation had been afforded them when in the witness-box."

Their Lordships will, therefore, humbly advise Her Majesty to affirm the judgment appealed from. The appellants must pay to the respondents, who have appeared, their costs of this appeal.

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1 (1890) 15 App. Cas. 223.