

[HOUSE OF LORDS.]

THE OWNERS OF THE STEAMSHIP  
“ MEDIANA ” . . . . . }

AND

THE OWNERS, MASTER AND CREW  
OF THE LIGHTSHIP “ COMET ” . }

THE “ MEDIANA.”

APPELLANTS ;

RESPONDENTS.

H L. (E.)

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Feb. 13.

*Admiralty—Collision—Damages—Loss of Use of Lightship — Remoteness of Damage.*

A lightship, belonging to a harbour board and used for lighting approaches, was damaged in a collision caused by the negligence of the appellants. The place of the damaged lightship was during her repair taken by another lightship belonging to the board and maintained at an annual expense for the purpose of such an emergency :—

*Held*, that the board was entitled to recover from the appellants not only the out of pocket expenses caused by the collision, but also substantial damages for the loss of the services of the damaged lightship during the time her place was taken by the substituted lightship.

*The Greta Holme*, [1897] A. C. 596, held applicable.

The decision of the Court of Appeal, [1899] P. 127, affirmed.

THE Mersey Docks and Harbour Board, who as owners of the lightship *Comet* were respondents, are by statute charged with the duty of lighting the approaches to the river Mersey. There are four stations to be lighted, and, for the purpose of carrying out the work, the Mersey Docks and Harbour Board own six lightships, four of which are always in use, and a fifth is kept to replace the lightships as they are brought in for overhaul. A sixth (the *Orion*) lies moored in the Mersey ready to take the place of any one of the four lightships in case of special emergency, such as damage by collision or other accident. On April 23, 1898, the steamship *Mediana*, belonging to the appellants, came into collision with, and sank, the *Comet*, one of the lightships. After the collision the *Orion* was towed out to take the place of the *Comet*, and was so engaged for seventy-four days, during which period she was not required for any other purpose. The appellants

H. L. (E.) admitted liability, subject to a reference to the Liverpool District Registrar to assess the damages.

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The respondents brought an action in the Admiralty Division against the appellants, and filed a claim consisting of eight items, the first seven covering all the actual out of pocket expenses (for removing and repairing the *Comet* and moving the *Orion*, &c.) to which the respondents were put: these were not disputed. Item 8 was as follows: "Loss of the use of the lightship *Comet*, or hire of the services of the lightship *Orion* on the station from April 23 to July 6, 1898—seventy-four days at 4l. 4s.—310l. 6s." The expense to the board of maintaining the sixth lightship, including interest on capital invested in her, amounts to about 1000l. per annum. During the last twenty-five years there had been twenty-three cases of damage by collision, in eleven of which it had been necessary to replace the lightship by the one kept in readiness in the river, and during the same period there had been four cases in which it had been necessary to withdraw one of the lightships in consequence of damage occasioned by heavy weather, and not by collision.

The appellants disputed their liability in respect of item 8, but agreed to the sum of 310l. 6s. if the board was entitled to anything under that head.

The registrar allowed all the items. Phillimore J. disallowed item 8. The Court of Appeal (A. L. Smith and Collins L.JJ.) reversed this decision and confirmed the registrar's report. (1)

Feb. 12. *Joseph Walton Q.C.* and *Horridge* for the appellants. The respondents cannot recover substantial damages for the loss of the use of the *Comet*. A plaintiff is bound to mitigate not aggravate the damages, and the respondents' duty was to substitute the *Orion* for the *Comet*. The *Orion* was lying idle and they were not put to additional expense by the use of her. *The Greta Holme* (2) differed from the present case: there was no substitute dredger, the work of dredging was delayed, and silt was accumulated. In the present case the respondents are better off than if no accident had happened:

(1) [1899] P. 127.

(2) [1897] A. C. 596.

they have paid nothing for the hire of a substitute, and they are in pocket over 300*l.* towards the annual expense of the *Orion*. This is not a case of trover or detinue in which damages may be given on grounds not applicable here. In every case the question is what is the real loss to the plaintiff, and the actual circumstances must be looked at. The mere fact of unlawful injury does not entitle a plaintiff to substantial damages. The loss of use of the *Comet* (apart from the out of pocket expenses which are admitted) gave rise to no claim for actual damages. The case falls not under *The Greta Holme* (1) but under the class of cases considered and followed by Phillimore J. in the Court below (2); and see *The City of Peking*. (3)

*Carver Q.C.* (*Aspinall Q.C.* and *Maurice Hill* with him) for the respondents was heard only as to whether the point raised in this appeal was raised and decided in *The City of Peking*. (3)

Feb. 13. EARL OF HALSBURY L.C. My Lords, I think that this case is really governed by the principles laid down in this House in the case of *The Greta Holme* (1), and I therefore agree with the Court of Appeal and move your Lordships that this judgment be affirmed.

My Lords, it is true that in that case there were two circumstances which I mention for the purpose of pointing out that I do not omit to consider them, namely, that the dredger was actually prevented from doing work which the particular corporation entrusted with the duty of doing it had intended it to do; and further, as was pointed out by Lord Watson, the effect of not dredging during the period while the dredger was rendered incapable of doing its proper work was to set up an additional amount of silt which would itself of course be an injury which would properly sound in damages when the person responsible for taking away the dredger was called upon to pay. These two circumstances were not unnaturally pointed out by the learned counsel who challenged this judgment as

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(2) [1899] P. at pp. 129-134.

(3) (1890) 15 App. Cas. 438.

H. L. (E.) shewing that there were grounds for the decision in that case  
 1900 which do not apply here. But, my Lords, I think it is  
 ~~~~~ impossible to read the judgments of those noble and learned  
 OWNERS OF STEAMSHIP Lords who took part in that case without seeing that it rests  
 "MEDIANA" upon a much wider and broader principle than would be  
 v. applicable to the particular circumstances which I have referred  
 OWNERS, MASTER AND to in that case. Lord Herschell in terms did lay down a much  
 CREW OF LIGHTSHIP broader principle, and I may say that I myself intended to lay  
 "COMET." it down, though I may have expressed myself imperfectly,  
 THE namely, that where by the wrongful act of one man something  
 "MEDIANA." belonging to another is either itself so injured as not to be  
 ~~~~~ capable of being used or is taken away so that it cannot be  
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And, my Lords, here I wish, with reference to what has been suggested at the bar, to remark upon the difference between damages and nominal damages. "Nominal damages" is a technical phrase which means that you have negatived anything like real damage, but that you are affirming by your nominal damages that there is an infraction of a legal right which, though it gives you no right to any real damages at all, yet gives you a right to the verdict or judgment because your legal right has been infringed. But the term "nominal damages" does not mean small damages. The extent to which a person has a right to recover what is called by the compendious phrase damages, but may be also represented as compensation for the use of something that belongs to him, depends upon a variety of circumstances, and it certainly does not in the smallest degree suggest that because they are small they are necessarily nominal damages. Of course the whole region of inquiry into damages is one of extreme difficulty. You very often cannot even lay down any principle upon which you can give damages; nevertheless it is remitted to the jury, or those who stand in place of the jury, to consider what compensation in money shall be given for what is a wrongful act. Take the most familiar and ordinary case: how is anybody to measure pain and suffering in moneys counted? Nobody can suggest that you can by any arithmetical calculation establish what is the exact amount of money which would

represent such a thing as the pain and suffering which a person has undergone by reason of an accident. In truth, I think it would be very arguable to say that a person would be entitled to no damages for such things. What manly mind cares about pain and suffering that is past? But nevertheless the law recognises that as a topic upon which damages may be given.

Now, in the particular case before us, apart from a circumstance which I will refer to immediately, the broad proposition seems to me to be that by a wrongful act of the defendants the plaintiffs were deprived of their vessel. When I say deprived of their vessel, I will not use the phrase "the use of the vessel." What right has a wrongdoer to consider what use you are going to make of your vessel? More than one case has been put to illustrate this: for example, the owner of a horse, or of a chair. Supposing a person took away a chair out of my room and kept it for twelve months, could anybody say you had a right to diminish the damages by shewing that I did not usually sit in that chair, or that there were plenty of other chairs in the room? The proposition so nakedly stated appears to me to be absurd; but a jury have very often a very difficult task to perform in ascertaining what should be the amount of damages of that sort. I know very well that as a matter of common sense what an arbitrator or a jury very often do is to take a perfectly artificial hypothesis and say, "Well, if you wanted to hire a chair, what would you have to give for it for the period"; and in that way they come to a rough sort of conclusion as to what damages ought to be paid for the unjust and unlawful withdrawal of it from the owner. Here, as I say, the broad principle seems to me to be quite independent of the particular use the plaintiffs were going to make of the thing that was taken, except—and this I think has been the fallacy running through the arguments at the bar—when you are endeavouring to establish the specific loss of profit, or of something that you otherwise would have got which the law recognises as special damage. In that case you must shew it, and by precise evidence, so much so that in the old system of pleading you could not recover damages unless you had made a specific allegation in your pleading so

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as to give the persons responsible for making good the loss an opportunity of inquiring into it before they came into court. But when we are speaking of general damages no such principle applies at all, and the jury might give whatever they thought would be the proper equivalent for the unlawful withdrawal of the subject-matter then in question. It seems to me that that broad principle comprehends within it many other things. There is no doubt in many cases a jury would say there really has been no damage at all: "We will give the plaintiffs a trifling amount"—not nominal damages, be it observed, but a trifling amount; in other cases it would be more serious.

It appears to me, therefore, that what the noble and learned Lords who gave judgment in your Lordships' House intended to point out, and what Lord Herschell gives expression to in plain terms, was that the unlawful keeping back of what belongs to another person is of itself a ground for real damages, not nominal damages at all. Of course I observe that it has been suggested that this was not an action for trover or detinue; but although those are different forms of action, the principle upon which damages are to be assessed does not depend upon the form of action at all. I put aside cases of trespass where a high-handed procedure or insolent behaviour has been held in law to be a subject of aggravated damages, and the jury might give what are called punitive damages. Leaving that aside, whatever be the form of action, the principle of assessing damages must be the same in all Courts and for all forms of what I may call the unlawful detention of another man's property.

My Lords, that seems to me to be so plain that I confess I have been somewhat puzzled to learn that it has been decided in the Admiralty Courts that the loss of the use of a vessel under the circumstances of this case has been treated (if it has really been so treated I have serious doubt about it) as something for which no moneys counted could possibly be allowed. I can only say that I am very glad such a principle has not been affirmed by your Lordships' House, because it seems to me to be inconsistent with principle and very unreasonable in itself.

My Lords, the only difficulty I have had in this case has been in regard to the case in the Privy Council (*The City of Peking*. (1)) I think, with some labour, I have discovered the clue which guided the learned judges in coming to the conclusion that they did. It is to be observed in the first place that there is a difficulty in understanding that case without the reports of those persons who had to assess the damages—it was the registrar, not a jury; and the report certainly is not a model of clearness so far as it is quoted. It is very difficult, indeed, to understand the judgment without having the report before one, but I think I have discovered the clue to the judgment which was arrived at. At page 447 of the report I find this as part of the judgment: “It would be very unjust to charge the defendant 95*l.* a day or anything for the loss of the use of the *Saghalien* during her detention at Hong Kong for the time during which the *Melbourne* and her crew were doing” (this is I think the clue to the whole story) “at the defendants’ expense the work which the *Saghalien* and her crew ought to have done.” I have not been able sufficiently to disentangle the facts to say whether that included anything for the use of the vessel or not; but the principle upon which they decided it was that the defendants were themselves chargeable and paid for the use of the *Melbourne* in place of the other vessel—that it belonged as a matter of fact to the plaintiffs is immaterial. The principle of the decision, as I gather it from that passage, is that the defendants had already paid for the use of it and for the use of the crew and for the navigation of it, and therefore if during that period when the defendants were actually called upon by the registrar’s report to pay for the use of the *Melbourne* they had had to pay 95*l.* a day also for the detention of the *Saghalien*, it is very obvious that they would have been paying twice over, and therefore not unnaturally, I think, the Court came to the conclusion in that case, not as a principle of law at all but as applicable to the particular facts of that case, that, to put in plain terms what I understand to be the effect of the judgment, you cannot have damages for that detention because you have already got paid for the use

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H. L. (E.) of the substituted vessel in the form of the damages that the registrar has assessed. If that is the principle of the case, of course it is not inconsistent with, but, on the contrary, on the same lines with the judgment which the Court of Appeal has given in the present case. Whether the question was raised or not of the absolute use of the vessel as distinguished from the payment of the crew and all the other things that were included in the lump sum in the registrar's report, I am not able to say. Happily we have present to-day one of the noble and learned Lords who took part in that judgment, and he will probably be able to tell your Lordships whether that question was raised or not. Undoubtedly it is not raised in the report at all, but, as I say, the clue to the judgment is what I have already pointed out, and therefore, to my mind, that decision presents no difficulty at all in arriving at the conclusion I have indicated, namely, that this judgment ought to be affirmed; and I therefore move your Lordships that this appeal be dismissed with costs.

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LORD MACNAGHTEN. My Lords, I am of the same opinion. I think this case comes well within the principle of decision in *The Greta Holme* (1), and on that I do not propose to add a single word. But as I happen to have taken part in the decision of *The City of Peking* (2) in the Privy Council, I will say a few words about that case. I do not pretend to have a very accurate recollection of the argument, but I have endeavoured to refresh my memory, and as far as my recollection goes the question at issue in this case was not raised there. Certainly it was not raised directly, and I do not think it was presented to the Court at all. In that case both the parties accepted up to a certain point the ruling of Dr. Lushington in the case of *The Black Prince*. (3) The only question was whether Dr. Lushington's ruling upon the particular facts was applicable to *The City of Peking*. (2) In *The Black Prince* (3) substituted service was provided, but the substituted service was not a benefit to the persons injured by the collision, but to

(1) [1897] A. C. 596.

(2) 15 App. Cas. 438.

(3) (1862) 1 Lush. 568.



a different shipping company. In the case of *The City of Peking* (1) the parties admitted that substituted service was provided at the expense of the wrongdoers, the Peninsular and Oriental Company, and that there had been no loss of profit whatever. Under those circumstances they claimed an extravagant amount of money in respect of demurrage simply upon the authority of *The Black Prince Case*. (2) They asked for nothing less. They asked for the whole sum as demurrage upon a vessel of that tonnage on the strength of the judgment of Dr. Lushington in *The Black Prince*. (2) Their Lordships had no hesitation in rejecting that claim, because, as my noble and learned friend has said, that would have been paying them twice over. I really do not think the point now at issue was raised in *The City of Peking* (1), and I observe that that case was not cited in the Court of Appeal on either side or mentioned in the judgment.

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LORD MORRIS. My Lords, I am of the same opinion. I am clearly of opinion that this case comes within the principle asserted by this House in the case of *The Greta Holme* (3), which I am equally clearly of opinion overruled the decision of the previous cases as regards the mode of the assessment of damages.

LORD SHAND. My Lords, I will only add a few words in expressing my entire concurrence in the decision about to be pronounced by this House.

There is no question of amount here involved, because the parties are agreed by the case that if any amount of damages is to be given the sum to be awarded is 300*l*.

On the principle to be applied to the case, I think it important to notice what is observed by A. L. Smith L.J., that there was a finding in the case by the registrar that this sixth lightship was kept at an expense of about 1000*l*. a year. The ship *Orion* was kept, therefore, as it appears from the report, expressly for the purpose of meeting such an emergency as this,

(1) 15 App. Cas. 438.

(2) 1 Lush. 568.

(3) [1897] A. C. 596.

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and it appears from the report itself that on no less than eleven occasions in twenty-five years a substitute has been called for and used in the case of a lightship being run down. In those circumstances it appears to me that if the commissioners had hired a ship for the purpose of doing duty as a sixth lightship, finding that necessary in the course of their administration, there could have been no answer to their claim for the cost of hiring that ship. It appears to me that if there could have been no answer in that case, as little is there any answer here. Instead of waiting for an emergency suddenly occurring, they have thought fit to have a ship ready. It costs them 1000*l.* a year to have it ready. It appears to me that the expense of having this ship ready instead of having to look for a ship when the emergency occurs, or rather a part of that expense, must properly fall upon the person who has been guilty of running down the lightship.

I am therefore of opinion that the judgment ought to be affirmed.

LORD JAMES OF HEREFORD. My Lords, I entirely concur in the judgment moved by the Lord Chancellor, and I will only add that I think there is a distinction between the case now at the bar and the case determined in the Privy Council, arising from the fact that in this case there has been expense incurred in providing the very remedy supplied in order to get rid of the effect of the act of the wrongdoer, whereas in *The City of Peking Case* (1) there was no expense incurred in order to remedy the injury. All that was done was to use a particular vessel that was already in existence without adding to the cost of the existence of that vessel. I think that is an additional ground for distinguishing the case in the Privy Council from the present case.

LORD BRAMPTON. My Lords, I am of the same opinion. I concur entirely in the judgment which has been pronounced by the Lord Chancellor in, I think, much better language than that in which I could have expressed it myself. One word

(1) 15 App. Cas. 438.

however, I desire to say with regard to the *Orion*, which was the substituted vessel in this case. She had been built by the respondents and was maintained by them at great expense in order that as between themselves and the public they might have ready means at their command to obviate the great danger and inconvenience which might arise from such a misfortune as befell the *Comet* by the negligence of the appellants ; but as between themselves and the wrongdoer causing the damage to the *Comet* they were under no obligation whatsoever to use the *Orion* at all. They might have used a hired vessel had they so pleased, in which case the liability for the hire would have been clear. But the respondents prudently, having a vessel suited for the purpose lying idle, thought it right in their discretion to use her instead of hiring perhaps a less efficient substitute for the *Comet*. The services of the *Orion*, however, were valuable, and why should the appellants claim to have them gratuitously, including the wages of the men who might have been employed on board her ? They might equally claim gratuitously to have the services of skilled workmen—engineers hired by the year and paid by the respondents—who happened at the time to be idle, or to have no particular work in hand. That cannot be, and in my judgment is not, the law. In my opinion the value of the services ought to be paid as a compensation for the damage which accrued to the respondents by reason of the detention of their vessel under the circumstances. I concur, therefore, in thinking that this judgment ought to be affirmed with costs.

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Lord Brampton.

*Judgment appealed from affirmed and  
appeal dismissed with costs.*

*Lords' Journals, February 13, 1900.*

Solicitors for appellants: *Thomas Cooper & Co., for Hill,  
Dickinson & Co., Liverpool.*

Solicitors for respondents: *Rowcliffes, Rawle & Co., for  
Squarey, Liverpool.*