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Supreme Court – Civil Sittings

Friday 17 June 1870

(Before his Honour Mr Justice Chapman and a Special Jury)

The Accident at Kakanui

Ross v Chapman – This was an action to recover damages sustained by plaintiff consequent on the loss of his daughter by drowning, through the alleged carelessness of James Duncan, one of the defendant's servants.

Mr Harris appeared for the plaintiff, and Mr James Smith and Mr BC Haggitt appeared for the defendant.

Mr Harris opened the case for the plaintiff. He stated that the plaintiff, Donald Ross, was the father of the late Elizabeth Ross, who was drowned in the Kakanui River, on the 15<sup>th</sup> December last, by the upsetting of the coach which ran between Dunedin and Oamaru. The plaintiff was an old settler, and had attained the mature age of 69 years. His late daughter, who had been engaged as a pupil teacher in the North Dunedin District, had contributed, in a very great degree, towards the support of the family. He then related the circumstances under which the accident was stated to have occurred.

The following evidence was called for the plaintiff:

Frank Porter Mansfield said: I am manager for the defendant. There was no passage taken for Oamaru in the name of Elizabeth Ross on the 14<sup>th</sup> or 15<sup>th</sup> December; nor in the name of Laurenson. (The witness here read over the names of those persons booked on the 15<sup>th</sup> amongst whom was that of the late Mr Paterson) The witness continued: There might have been other passengers who proceeded to Oamaru on the day mentioned without their names appearing in this book.

Donald Ross said: I am a settler residing in Dunedin. Elizabeth Ross was my daughter. She was engaged as a pupil teacher at the North Dunedin District School; she was 21 years of age at her death; and she had been receiving 45 or 50 pounds per annum. When the accident occurred, she was proceeding to Oamaru to spend the Christmas holidays with her sister. She left Dunedin on the morning of the 15<sup>th</sup> December by one of Cobb's coaches. She got into the coach at the corner of Duke Street and King Street. I left her in the care of Mr Laurenson, a passenger. I next saw my daughter on the following Friday – a corpse. I was too late to be present at the inquest. My daughter resided at home, and always gave her salary to her mother. I had heard that she was shortly to receive a salary of 100 pounds per annum.

Fleming Laurenson, storekeeper, Oamaru, said: On 15 December, I was a passenger from Dunedin to Oamaru in one of Cobb's coaches. I paid for two seats at Cobb's office, Dunedin. I received the ticket from Mr Mansfield, and paid two pounds ten shillings for the two seats. The vacant seat was taken for the late Miss Ross. There was no name written on the ticket. The coach stopped at Duke Street to take Miss Ross up. As far as Palmerston there appeared to have been a great deal of rain, but beyond that place there seemed to have been considerably more. The rivers between Dunedin and the Kakanui were very high. I have crossed the Kakanui between 50 and 100 times. The Kakanui was very high on 15 December. I never saw it so high before. There is a lagoon on this side of the Kakanui, it is sometimes dry, but even then there is water in the Kakanui. On the 15<sup>th</sup> the lagoon was full from bank to bank. The horses passed through the lagoon at the usual pace – a trot. There was then about 4 feet of water. The water came in over the sides of the vehicle, my feet were wet and Miss Ross was also wet. The driver could have avoided wetting the passengers by going a little out of the ordinary track. I do not think the state of the lagoon would be any criterion of the depth of the Kakanui. There are usually two channels at the point where the coach crosses, and they are separated by a shingle bed. The channel on the Oamaru side was deeper than that on the Dunedin side, on the 15<sup>th</sup> December, and for some months previous. I was inside the coach at the time of the accident. The driver proceeded as far as I am aware without making any enquiries respecting the state of the river; he proceeded up the river a little way, on the bank, and the coach, before it had reached the shingle bed, had passed through about three feet of water. I saw Mr Wheatley on the

opposite bank when the coach was near the Oamaru bank, and when it was in the deep channel. Wheatley gave the coachman directions when he saw that by the force of the current he was prevented from reaching the ordinary landing place. When going through the first channel the passengers endeavoured to clear the bottom of the coach of their luggage, fearing the water would come in. I never crossed a river in such a flooded state; the current was very strong. After giving two or three rolls the coach turned over on its side and came to pieces. The fore part of the coach was dragged away by the horses, and the remaining part turned over and lay on the shingle bed, only lower down the river and where the bed was higher. Miss Ross was in the coach at that time; the roof of the coach was carried away, and Miss Ross, who was washed out of the coach was carried down the river and drowned. I was inside the coach at the time; I held onto the side of it and got on shore in about two hours afterwards. Mr Newman and Mr Paterson occupied seats outside the coach.

Cross examined by Mr Smith: The driver got down at the Otepopo River, and with a leather strap secured the main carriage to the fore wheels. We crossed the Rookery; the old crossing of the Rookery is dangerous, but a new crossing is now used during the time of floods. I should have more fear in crossing the Otepopo during the time of a flood than the Rookery. After heavy rains the Kakanui would be more dangerous to attempt to cross. The coachman may have made enquiries respecting the state of the Kakanui, but I did not hear him do so. I passed across the Shag River with Miss Ross on foot. We did not get wet. It is considered dangerous in time of flood; it was not swollen on the 15<sup>th</sup>. W. Wheatley did not warn the coachman to keep off the bank. The horses headed down the river. After they had gone a short distance, the leaders turned their heads, and the coach was upset directly afterwards. When the coach turned over, I was standing up and grasping the bar. The coach was rolling from side to side. I could not say that immediately before the coach rolled over I and others jumped up and attempted to get on the roof, and that at that moment the coach turned over. The coach floated down the river for little more than a minute.

Re-examined by Mr. Harris; Although I saw that the river was high, I did not consider it dangerously. Generally the lagoon is dry. On the 15<sup>th</sup> there was 3ft or 4ft of water in it, and it could have been in that state without a large quantity of rain having fallen.

The Rev. D.M. Stuart said: I knew the late Miss Ross. I had known her for about 10 years; she had been a pupil teacher in the North Dunedin district School for a considerable period. I looked upon her as a healthy young woman, and as a young woman who was likely, at an early period, to earn 100 pounds a year; I would have strongly recommended her to an appointment in any of our schools.

Mark Walkham, contractor, London Street, said: On 15<sup>th</sup> December I was a passenger by Cobb's coach to Oamaru; the coach stopped at the Water of Leith and Miss Ross was taken up. I recollect that at the post office near Kakanui, somebody said the river had fallen two or three feet since morning. I presume that the coachman or some person on the coach asked a question about the state of the river. When the coach got into deep water, and whilst it was floating, three of the male passengers got out of the coach at the same side, and by that means the coach, in my opinion, was upset. I told Miss Ross to hold on to the iron; but when the coach turned over the top became detached and the passengers were carried away. The horses got in deep water, and the current forced them down the stream. The king bolt gave way and freed the front part of the coach, and I by that means escaped, otherwise I should have been killed. I noticed a person on the Oamaru side of the river beckoning when the coach was afloat. I called attention of the coachman to the fact. I understood the man wanted the coachman to go up the river. The coach was upset immediately afterwards. I attempted to throw a 100ft tape to the shore but could not succeed in doing so.

Several persons noticed what I was trying to do, and a rope was obtained and I was dragged to shore.

Cross examined by Mr Haggitt; there was not more water in the coach when I called the attention of the driver to the fact that a man on the opposite shore was beckoning that there was when the coach passed through the Rookery. Directly after I had spoken to the driver the three passengers got out of the coach at the same side and ascended to the roof. I believe the coach was at that time afloat, and that the passengers getting out at the same side was the cause of the upsetting of the vehicle in the river. Laurensen was one of those who tried to get on the top of the coach.

James Wheatley said; I reside on the Oamaru bank of the Kakanui River. The Kakanui commenced to rise at about four o'clock on the 14<sup>th</sup> December, and continued to do so until between 11 and 12 on the morning of the 15<sup>th</sup>. I have seen the river much higher than it was at that time. It was about three feet below the top of the bank on the Oamaru side. It was not safe to cross the river at that time. I stopped several persons from crossing the river at about one o'clock on the 15<sup>th</sup>. Up to the time of the accident no person had crossed the river. I did not see the coach when it first entered the river. I did not see the coach until it was on the shingle bed. I heard the rattle of the coach after it had got into the river and on the shingle bed. If the coachman, before entering the river, had 'cooeyed' to me from the Dunedin side of the river I should have heard him, but I could not have conversed with him, because of the noise of the river. Sometimes the Otepopo and Rookery, and other small streams, are swollen by rains when the Kakanui is not. The lagoon, or rather the water-hole, spoken of, is generally dry in summer and full of water in the winter. The coach came up to the river about 5.15pm. The shingle bed, when the coach passed, was clear. When the coach was on the shingle bed, I called to the driver. I wanted to prevent him proceeding until I had had some conversation with him. He could not hear me because of the noise which was made by the flow of the river. I motioned to him to head well up the river before he attempted to cross. When the leaders got into the river, the current, which was very strong, swept them down the river; the pole horses, together with the coach were pulled into the water by the leaders. The coach also began to roll, which I imagine was caused by the passengers inside the coach moving about. There is a second shingle bank below the ordinary crossing place, and much higher out of the water than the other. The driver tried to pull the horses on to the bank, before he arrived at the highest part. Some of the passengers tried to get out, and that, I believe, caused the coach to turn over. The coach was afloat. The fore part of the coach separated from the hind part; the driver was taken across the river by the horses to the Dunedin side of the river; he held onto the reins; the main part of the coach remained on the shingle bed. I believe that the intention of the driver was to turn the coach and go back to the Dunedin side, which he could have done had it not been capsized. When it was upset it was some distance below the ordinary crossing place. I believe the top part of the coach floated down the river. Miss Ross, I think, was thrown out of the coach when it was capsized. There were two persons on top of the coach, and they could not be removed for two hours because of the state of the river. Search was made for the bodies by Sergeant Naden at 4 o'clock on the following morning. No search was made before, because it was believed that whoever was in the coach must have drowned. The body of the late Mr Paterson was found under the dashboard of the coach at 4am. No attempt was made to search the coach before Sergeant Naden arrived. As soon as Mr Paterson's body was recovered, search was made for the body of Miss Ross.

Cross-examined by Mr Smith: The same driver had crossed the river previously, when it was nearly as high, but when the current was not quite so rapid. The driver obeyed my directions when I waved my hand to keep him up river. He was attempting to cross the river judiciously. He has crossed the river since the accident, and when the river was nearly as high. He is a careful driver.

Correspondence regarding the plaintiff's claim to compensation was read by Mr Cook. The defendant, by his solicitor, denied that he was liable, and urged that the verdict returned by the Coroner's Jury supported the contention that negligence on the part of his driver could not be sustained.

Mr Smith remarked that it was incumbent upon the plaintiff to give direct evidence of negligence, which up to that time, he had not done. That was a ground on which he should ask for leave to move hereafter, if necessary.

His honour said he should direct the jury to find affirmative replies to the four first issues, which were in fact merely formal issues. The fifth was the important issue.

Mr Smith then called the following evidence for the defence:

James Alfred Duncan, coach-driver to Mr Chaplin said: I am driver of the coach which runs between Palmerston and Oamaru. I have driven on the Oamaru road about 18 months. At the time of the accident I was well acquainted with the road. The coach and harness on 15<sup>th</sup> December were in proper order. The last change of horses was made at Otepopo; the horses were very quiet. The Otepopo was not very high on the 15<sup>th</sup> December. On arriving at the Post Office, near Kakanui, I asked the Postmaster whether the river was high. He replied, "If you had arrived at 11 o'clock this morning you could not have crossed the river, but it has lowered three feet since." The late Mr Paterson was sitting on the box near me. When the coach reached the brink of the river, I stopped the horses for a minute, and Mr Paterson remarked to the effect that there was no danger – that he had crossed rivers when they were more flooded than the Kakanui. I myself have crossed rivers when they were more flooded than the Kakanui. I myself have crossed the Kakanui when it was as deep as it was on the 15<sup>th</sup> December. I saw Mr Wheatley waving his hand. I thought he wished me to cross the stream direct, but I drove the horses to the right, and before the coach had proceeded far, I felt it oscillating. I looked round and saw some of the passengers trying to get on top of the coach. I told them to sit still; and almost at the same instant the coach upset. The leaders had their feet on the ground when I spoke to the passengers; and had it not been for the top weight caused by the passengers getting on top of the coach, there would have been no accident. Mr Devine has frequently crossed rivers when his coach was floating; and provided there was no top weight, he has always calculated upon getting across safe. He has always done so, in fact.

Cross-examined by Mr Harris: If the Postmaster had said the river was too high, I should have crossed the river notwithstanding. Two months after the 15<sup>th</sup> December I crossed the Kakanui when it was nearly as high. I have crossed it at a time previous to the accident when it was quite as deep. The horses were not carried off their legs immediately they got into the north bank of the river. I did not 'cooey' to Wheatley or anyone when I was on the south bank, because I knew I could cross the first branch without difficulty. I consider it a safe thing to swim a coach across a river. I have done it without incurring an accident.

Re-examined by Mr Smith; I judged by the shingle that it was safe to attempt to cross the river.

Benjamin Newman, shopkeeper, Oamaru, said: I was a passenger by the coach on the 15<sup>th</sup> December. I was inside the coach at Water of Leith, but when it stopped to take up Miss Ross, I got on the box to make room for her inside the coach. The coach and horses appeared to be alright. I was satisfied with the driver. On arriving near the Kakanui I heard the driver ask the Postmaster about the condition of the river. The Postmaster said that the river had been very high, but that it lowered 3 ft. On reach the brink of the river Mr Paterson said in reply to a question asked by myself, "Oh, the river is nothing to those I have crossed in Canterbury." The coach went in the river at the usual crossing place and reached the shingle bank. Mr Wheatley was waving his hand to the driver to go up and he did so. Shortly afterwards I saw three of the passengers trying to get on the top of

the coach; the coach capsized almost at the same moment; I got away from the coach and swam across the stream to the Oamaru side. The driver in my opinion shewed great skill in the management of his horses, and the accident resulted from the passengers not keeping their proper seats.

By Mr harris: I believe that the fore wheels were touching the ground at the moment that the coach was upset. The leaders had gained their footing just before the coach was upset, and they would no doubt have taken the coach safely across the river had the passengers kept their seats.

By the Jury: The three passengers attempted to get on the top of the coach from the same side.

James Hunter, contractor, Dunedin, said: I arrived at Kakanui about 30 minutes after the coach attempted to cross. The appearance of the shingle bank in the middle of the river would have led me to suppose there would be no danger in attempting to cross it, but when I heard that the coach had met with an accident I determined not to attempt to do so.

J.M.Fish, coachbuilder, said: I have had 25 years experience in connection with American coaches. They are constructed with a loose king bolt, so that if the coach should be capsized, the fore part of it can separate from the hind part. I know several instances where death has been prevented by coaches being so constructed.

James Thomson, groom for Mr Chaplin, at Palmerston gave evidence showing that the coach and harness were, on the 15<sup>th</sup> December, in an efficient state of repair.

Mr Smith then addressed the jury, on behalf of the defendant, and Mr Cook was heard in reply.

His Honour, in summing up, said it was necessary that in the first place, he should caution the jury to suppress those natural feelings with which men could not fail to regard a case of this kind. They could not help feeling great commiseration for the fate of the poor girl who had been drowned, as well a deep sympathy for the family, who, by her loss, had been deprived of pecuniary support and great comfort. Naturally the feelings of the public, in such a case, would lean towards the plaintiff, but it was his duty to warn the jury against permitting such feelings to affect their verdict, which they were bound to give according to the conclusions which they could conscientiously draw from the evidence adduced.

There was only one issue which the jury would have to consider, namely, the fifth issue; it read as follows: -

Was the said Elizabeth Ross, while being carried in one of the defendant's said coaches from Dunedin to Oamaru aforesaid, in pursuance of the said contract, drowned in the Kakanui river, by and through the insufficiency of the coach, and by and through the use of untrained and unbroken horses, or the insufficiency of the harness belonging thereto, or by and through the negligence and carelessness of the driver of the said coach."

Before, however, he proceeded to deal with the question involved in that issue, he would refer to that of damages. If the jury found a verdict for plaintiff they would, in assessing damages, take into consideration that the late Miss Ross had been in receipt of 45 pounds per annum; that she bore an excellent character; that she was skilful and healthy, and, what was an important point in this case, that she was not entangled by a marriage engagement; and that, therefore, the plaintiff could with certainty have calculated upon being assisted by her for a lengthened period. In assessing damages the jury must also consider the condition in life of the respective parties. Coming to the question of negligence, he remarked that, in the first place, evidence had been given to shew that the coach and

harness were examined before an attempt was made to cross the Kakanui; and the plaintiff's counsel, in support of the question of negligence, urged that the state of the river on the afternoon of the 15<sup>th</sup> December was such that the driver of this coach ought, in the exercise of ordinary prudence, to have abstained from attempting to cross it. Now in considering this question, the jury must not jump to the conclusion that because there was some risk involved in attempting to cross the river, the driver ought to have remained on the Dunedin side. There would generally be some risk in attempting to cross many of the rivers in this country. In these days public opinion demanded an extra degree of speed, and that necessarily created an extra degree of risk; and the jury had to consider whether there was such a risk in crossing the Kakanui on the afternoon of the 15<sup>th</sup> December as amounted to a danger; or whether the state of the river was such that a driver of a coach having imposed upon him the carrying of his coach safely, if he could, ought in common prudence, to have remained on the southern bank of the river and not attempted to cross it. He referred to the evidence of the witness Laurenson, and said he had been contradicted by several of the witnesses in regard to several points. Speaking of the shingle bank in the middle of the river, Laurenson stated that it was covered with water, but that some of the grass, which was very tall was visible. That statement was contradicted by several of the witnesses, more especially by Mr Wheatley, who stood on the bank on the Oamaru side, and must, from the position he occupied, have seen everything that took place. He stated that the shingle bank was not covered. The driver of the coach made a similar statement. Laurenson was also contradicted in regard to his statements as to attempts to get on top of the coach when it was in the river; but he (the learned Judge) pointed out that a man might easily forget much that occurred under such circumstances, and that his statements should not therefore be taken as any intention on his part to deceive. Stripped of these two important points, there was nothing in Laurenson's evidence which was inconsistent with that adduced by other witnesses. If the jury considered that the upsetting of the coach was entirely and solely the work of three men who, it was stated, attempted to get on top of it, whilst it was water-borne, it would be their duty to give a verdict for the defendant; but that, even supposing the jury came to that conclusion, if they considered there was negligence on the part of the driver, it would be competent for them, notwithstanding the action of the three passengers who did not possess the ordinary courage to remain in their places, and thus enable the coach to pass through the river in safety, to give a verdict for the plaintiff.

The jury being absent from Court for about ten minutes, gave a negative reply to the 5<sup>th</sup> issue, which was a verdict for the defendant.  
The Court then adjourned.