

BRITISH COLUMBIA ADMIRALTY DISTRICT

1950
March 3, 4 &
6
March 17

BETWEEN:

PUGET SOUND NAVIGATION }
COMPANY Owner of the Motor } PLAINTIFF,
Vessel *Chinook*,..... }

AND

THE SHIP *DAGMAR SALEN*,.....DEFENDANT.

AND

REDERIAKTIEBOLAGET PULP }
Owner of the Ship *Dagmar Salen*, } PLAINTIFF,

AND

THE MOTOR VESSEL *CHINOOK*,.....DEFENDANT.

Shipping—Collision—Both ships proceeding at too great speed in fog-shrouded area—Radar aid to navigation only—Failure to reduce speed when made aware of each other's presence—Defendant ship mainly at fault in violating customary rule for passing—Apportionment of fault—Damages.

In an action for damages arising from a collision between plaintiff and defendant ship in a narrow fog-shrouded channel the Court found both ships to blame. Both ships were proceeding at too great a speed, plaintiff originally and defendant ship as she approached the fog-shrouded area. Both ships failed to reduce speed sufficiently when their respective radars indicated the other's approach on a bearing that changed little, if at all.

Held: That in a dense fog the most extreme degree of caution must be exercised.

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2. That radar is an aid to navigation only and does not over-ride the general principles applicable to navigation in fog, the first of which is moderate speed and second great care.
3. That defendant ship was more at fault than plaintiff ship in choosing to pass starboard to starboard thereby violating the customary rule for north and south bound vessels to pass port to port.
4. That the establishment of different degrees of fault must be a conclusion proved by evidence judicially arrived at and sufficiently made out; conjecture or sympathy or a leaning in favour of one ship rather than the other will not do; nor will the question be answered by deciding who was the first wrongdoer nor even of necessity who was the last.
5. The liability to make good the damages or loss shall be in proportion to the degree in which each vessel was in fault, that is in fault as regards the collision; if she is in fault in other ways which had no effect on the collision such matters are not to be taken into consideration.

ACTION for damages resulting from collision between two ships.

The action was heard before the Honourable Mr. Justice Sidney Smith, District Judge in Admiralty for the British Columbia Admiralty District, at Vancouver.

F. A. Sheppard, K.C. and *W. S. Lane* for M.V. *Chinook*.

W. S. Owen, K.C. and *J. I. Bird* for the Ship *Dagmar Salen*.

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

SIDNEY SMITH, D.J.A. now (March 17, 1950) delivered the following judgment:

This consolidated action arises out of a collision in fog between the American Motor Vessel *Chinook* and the Swedish Motor Vessel *Dagmar Salen*, which occurred in Puget Sound, in American waters, about 8.15 p.m. on 28th September, 1947. The Swedish vessel was arrested in Vancouver, B.C., and thus this Court became seized with jurisdiction. She is now represented by a bond for \$65,000 to secure the *Chinook* damages. Her own damage was much less, approximately \$5,000. The navigation at time of collision was governed by the Inland Water Rules of

the United States; but these, on all relevant points here, are the same as the International Rules. All courses and bearings mentioned in this judgment are magnetic.

The case for the *Chinook*, of 4,106 tons gross and 2,792 net, 273 ft. long, 65 ft. beam, built and registered at Seattle, and then less than one year old, is that she left Victoria at 5.16 p.m. on 28th September, 1947, carrying some cargo and many passengers, on one of her usual scheduled voyages to Seattle. Outside Victoria and crossing the Strait of Juan de Fuca she encountered patches of fog, at times with fair visibility, at other times with very little. Entering the narrow and much frequented waters between Point Wilson and Admiralty Bay she ran into dense fog; and so it was to Marrowstone Point and Bush Point, south and to the westward of which the collision occurred. Her log does not differentiate between any varying densities of fog during the passage. It is simply marked "fog" throughout. During this time, almost 3 hours, she was proceeding at full speed, with the exception of some slowing down between Marrowstone and Bush Points, when passing another vessel. Her speed for the passage, and up to the time when there began the sequence of events which led to the casualty, was approximately 17 knots. I find, after making all due allowance in her favour for radar equipment and unusual power in stopping and reversing, that this speed was clearly excessive. At this stage her speed had no consequences, but nevertheless I think it proper to comment on it now.

The stretch of water between Marrowstone Point and Double Bluff lies roughly northwest and southeast, and is contained between Marrowstone Island and part of Quimper Peninsula on the west, and Whidbey Island on the east. Marrowstone Point is at the northerly end of Marrowstone Island, and Bush Point and Double Bluff are to the southward, on Whidbey Island. From Marrowstone Point to Bush Point is a distance of $5\frac{1}{2}$ miles; from Bush Point to Double Bluff 5 miles. The Channel at Marrowstone Point is $3\frac{1}{2}$ miles wide; at Bush Point $2\frac{1}{2}$ miles; at Double Bluff 5 miles. Mutiny Bay is an indentation in the coast line, one mile deep, two miles long, just to the north of Double Bluff. Although it was pleaded that the Channel hereabouts was a narrow channel within

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Art. 25, the point was not argued; but it was admitted that a well-established practice existed (at least at Double Bluff and Bush Point) for meeting vessels to pass port to port. I think that, independently, I should have held that this was good practice on account of the lay of the land and the run of the traffic.

When at Bush Point at 8.04 p.m. the Master of the *Chinook* picked up in his radar screen an object 30° on his port bow, about five miles distant, and in the neighbourhood of Double Bluff. This proved to be the *Dagmar Salen*. He testified that the *Chinook* was then a mile and a quarter off Bush Point. I think it was rather less—certainly not more than one mile. He said, too, that he was mistaken in thinking the object was 30° on the bow; this seems true; for that bearing would have put the *Dagmar Salen* high on the headland of Double Bluff, or out of sight in Useless Bay beyond. Continuing, the Master said that he ran on this then course 133° (roughly SE) for an extra two minutes, and then starboarded 17° to 150° so as to give the other vessel extra sea-room, at the same time reducing to half speed, and a minute later to slow speed. At the end of another three minutes he heard a fog signal from the *Dagmar Salen* and stopped his engines. This was at 8.10 p.m. One-half minute afterwards he went full astern, and another half-minute later he saw the lights of the *Dagmar Salen* on his port bow, and in yet another half-minute the stem of that vessel rammed the *Chinook* on the port side, at the wing of the bridge. I am satisfied that at the time of the collision neither vessel had more than trifling headway, that each was blowing the appropriate fog signals, and that each gave the full astern signal.

I regret to say that I do not altogether accept the evidence given by the *Chinook's* Master and Chief Officer, who were both in the wheel-house at the critical time. My impression was that there was no clear demarcation of duty between them; that the Master had too much to do, the Chief Officer too little. I think the latter could have been usefully occupied in steady observation of the radar screen. As it was, he paid no attention to it, except when he went on watch at 7.50 p.m. Nor am I convinced that the Master paid any proper attention to the radar

screen during the vital eight minutes preceding the collision. I think he made this plain by his testimony, both at the trial and on examination for discovery. Nor can I accept at its face value the deck log-book of the *Chinook*. It was written up for the most part on the evening after the collision, partly from the meagre earlier records in the log, partly from the engine-room bell-book, and partly from subsequent memory of how it must have been. I think the log-book can be relied on only up to the moment when the *Chinook* reached Bush Point. At the same time I have no criticism of the habit of writing up beforehand the headlands to be passed and the courses to be steered, provided any departure from these is properly and instantly noted.

The case for the *Dagmar Salen* of 5,000 tons gross, 405 feet long, 51 feet beam, and registered at Stockholm, was that she left Seattle for Vancouver, B.C. at 6 p.m. on the day in question, in overcast but clear weather; proceeded without incident as far as Double Bluff, and was off the buoy there one-half mile at 8 o'clock, with thickening weather ahead. There and then, or very shortly thereafter, she altered course to 304° (roughly NWxW). The visibility was approximately two miles; they could see into Mutiny Bay, but there was fog at Bush Point. The Chief Officer was with the pilot on the bridge and his chief duty was to attend to the radar. This he did. Just after passing Double Bluff, both the Chief Officer and the pilot saw in the radar screen a vessel at Bush Point bearing 5° or so on their starboard bow, and on a closely parallel course to their own. This vessel turned out to be the *Chinook*, which they estimated as being one-half mile off Bush Point. At 8.05 p.m. the pilot altered course 5° to port, to give the vessel a wider berth and to make sure of a starboard to starboard passing. The visibility lessened; so engines were put at stand-by and fog signals blown. Up till then the ship was going full speed, namely 12 knots, with a two mile ebb tide in her favour, making an over-the-ground speed of 14 knots. Two minutes later she was reduced to half-speed, and a minute afterwards the engines were stopped. This brings the time to 8.08 p.m., and at that moment the pilot altered course a further 10° to port. This brought her head to 289°. They were then in fog.

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After the engines were stopped the pilot and Chief Officer heard for the first time the fog signal of the *Chinook*. The bearing of the whistle, they testified, indicated what the radar also showed: that the *Chinook* was then say 20° on the starboard bow and that the two vessels were safely passing starboard to starboard. Till then and for the ensuing three minutes they had no apprehension of coming danger. But at the end of the three minutes, at 8.11 p.m., their frame of mind suffered a rude shock, for the radar showed a change of course on the part of the *Chinook* and her whistle signals verified this. It was then evident that her bearing was narrowing on the bow and that she was heading towards them. The *Dagmar Salen* at once went full astern and continued so until the collision at 8.14 p.m. (her time). One-half minute before that the *Chinook* had come into sight on the starboard bow, crossing ahead from starboard to port. A second emergency full astern was then rung down to the engineroom. Captain Henshaw, the American pilot on the *Dagmar Salen*, gave his evidence on these points in a straightforward fashion that was altogether admirable.

These converging courses cannot be plotted on the chart with pin-point precision. The evidence of each ship varied to some extent in her pleadings, in previous examinations and at the trial. But the foregoing is accurate enough for determining the issues involved. My task is not so much to reconcile the minor conflicts in evidence given by each vessel, or to decide between stories, but rather to determine, on the known facts and in the light of the regulations, what principles of good seamanship were infringed.

The over-the-ground speeds of the two vessels when each first saw the other in her radar screen, differed very little. The *Chinook* at 17 knots had an estimated 3 knots tide against her; the *Dagmar Salen* at 12 knots had a 2 knot tide in her favour. It must be noted, too, that at that time their courses intersected at an angle of only 8°. I think there can be little doubt that the *Chinook* then had the *Dagmar Salen* closely on her port bow, while the *Dagmar Salen* had the *Chinook* very slightly on her starboard bow; and that these relative bearings changed but little before the *Chinook's* alteration of 17° to starboard, and the *Dagmar Salen's* alteration of 10° (making a total

of 15°) to port. After these alterations the angle of course intersection was 40°. The angle of impact was greater, no doubt due to the ships' changing headings when going astern.

Both vessels must be held blameworthy. Both were proceeding at too great speed, the *Chinook* originally, and the *Dagmar Salen* as she approached the fog-shrouded area. Both failed to reduce sufficiently when their respective radars (properly observed) gave indication of the other's approach on a bearing that changed but little, if it changed at all. American and British Courts alike have stated, again and again, that in dense fog the most extreme degree of caution is exacted; that, with traffic about, it is very easy to go too fast, very difficult to go too slow. No doubt they were each lulled into a sense of security by their radar bearings. But radar is an aid to navigation only. It does not over-ride the general principles applicable to navigation in fog, the first of which is moderate speed and the second great care. Moreover, I am satisfied that if proper use had been made of the radar on the *Chinook*, her Master would have seen the *Dagmar Salen* instead of broadening, was narrowing on his port bow. On the *Dagmar Salen* the bearings were observed more continuously and accurately. But they, too, changed too narrowly to permit of a safe distance for passing in fog. The fact is that during the critical period, and until their respective alterations of course, the two ships were very nearly head-on to each other; and I take it that the sudden narrowing of the bearing observed by the *Dagmar Salen* was the consequence of the 17° alteration to starboard in the course of the *Chinook*. The exact time when the *Chinook* made this alteration is one of the unsettled features of her evidence.

I think however that the main fault (apart from excessive speed) lay with the *Dagmar Salen*. She knew that the customary rule was for north and south bound vessels to pass port to port, yet she chose to pass starboard to starboard. The explanation given to me by her pilot for this decision was this: that he was rather close to Double Bluff (due to alteration of course for a previous passing steamer); that the object he saw in the radar was rather close to Bush Point; that he could not then

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determine what type of craft she was or whither bound; and that in a deeply laden ship he was apprehensive of the shallow water a mile south of Bush Point. But I find all that unconvincing. He was in the better position at Double Bluff, for there the fog lay ahead and he could still see a distance of a mile or two. He could see into Mutiny Bay. He might, after reducing to mere steerage way, have drawn to starboard there in complete safety until the *Chinook's* movements became clarified. I have anxiously reflected whether this finding imposes on the *Dagmar Salen* too exacting a standard of conduct, having in mind her difficulties then and the fact that I view them now with after-the-event knowledge. But reflection has confirmed my first opinion. The pilot had time to spare and to fully appreciate the situation, and to realize that by porting he was almost bound to confuse the other vessel. If the *Chinook* were to alter course at all her natural reaction in the circumstances was to alter to starboard. And so the *Dagmar Salen* should have done.

How must the fault be apportioned? The relevant considerations were stated in the House of Lords by Lord Sumner in *The Peter Benoit* (1) thus:

The conclusion that it is possible to establish different degrees of fault must be a conclusion proved by evidence, judicially arrived at, and sufficiently made out. Conjecture will not do: a general leaning in favour of one ship rather than of the other will not do: sympathy for one of the wrongdoers, too indefinite to be supported by a reasoned judgment, will not do. The question is not answered by deciding who was the first wrongdoer, nor even of necessity who was the last. The Act says, "having regard to all the circumstances of the case". Attention must be paid not only to the actual time of the collision and the manoeuvres of the ships when about to collide, but to their prior movements and opportunities, their acts, and omissions. Matters which are only introductory, even though they preceded the collision by but a short time, are not really circumstances of the case but only its antecedents, and they should not directly affect the result. As Pickford, L.J. observes: "The liability to make good the damage or loss shall be in proportion to the degree in which each vessel was in fault". That must be in fault as regards the collision. If she was in fault in other ways, which had no effect on the collision, that is not a matter to be taken into consideration.

With these considerations in mind I think the *Dagmar Salen's* was the greater fault. I cannot extenuate the effect of her original error in departing from a well-known route. In my judgment she must be held $\frac{2}{3}$ ds to blame and the *Chinook* $\frac{1}{3}$ rd to blame, with corresponding costs.

(1) (1915) 13 Asp. M.C. 203 at 208.

I have given my views fairly fully because I was informed at the trial that an enquiry had been held by Coastguard Officials in Seattle; and in case I should have the misfortune to differ from these gentlemen, I should at least like them to know my reasons—be they good or bad.

The learned Registrar will assess the damages.

Judgment accordingly.

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