BETWEEN:

CANADA STEAMSHIP LINES LIMITED ..... APPELLANT;

AND

THE SHIP *MARIA PAOLINA G* AND HER OWNERS ..... RESPONDENTS.

1953
Nov. 16, 17
1954
Mar. 8

Shipping—Collision—Excessive speed in dense fog—Narrow channels—Articles 16 and 25 of the International Rules—Course of another vessel within a danger zone not yet ascertained—Safety of navigation—Radar aid to navigation only—Common sense duty to avoid danger of collision—Excessive speed in fog being a statutory fault onus on vessel violating the rule to prove speed not the sole or a contributory cause of collision—Appeal from District Judge in Admiralty dismissed.

On June 10, 1950, at about 5.28 p.m., the *St. Lawrence,* owned by the appellant, while in the entrance of the Saguenay River and proceeding up to Tadoussac, came into collision, port to port, with the *Maria Paolina G.* which was proceeding down to the St. Lawrence River. There was a dense fog at the time and an ebb tide running in a westerly direction with a force of about 1·5 to 4 knots.

Alleging that the *Maria Paolina G.* was on the wrong side of the fairway and that this was the cause of the collision, appellant took an action for its damages resulting from the collision. The action was dismissed by the District Judge in Admiralty for the Quebec Admiralty District. On appeal the Court found that the *St. Lawrence* was at fault by

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proceeding at an excessive speed at the time of the collision and that the *Maria Paolina G.* was on her right side of the fairway and committed no fault.

Held: That it is a general rule of navigation when in fog that a vessel hearing a fog signal apparently forward of her beam should slow down her engines and navigate cautiously until the course of the other vessel within the danger zone has been ascertained. The contention that it was impossible because of the danger to the passengers, crew and vessel and would not have been good seamanship is unsound. *The Campania* (1899-1904) 9 Aspinall's Rep. 151 referred to.

2. That radar is an aid to navigation and does not override the principles of article 16 of the International Rules. *Puget Sound Navigation Co.* v. *The Ship Dagmar Salem* [1950] Ex. C.R. 284 referred to and followed.

3. That in a dense fog and knowing the difficulties of navigation on the Saguenay River, one would, as an ordinary prudent person, stop until the direction of the approaching vessel was ascertained and there remain until the danger which might arise had passed. *The Oceanic* (1899-1904) 9 Aspinall's Rep. 378 referred to and followed.

4. That excessive speed in fog being a statutory fault, a vessel violating this rule has to prove that her speed was not the sole or a contributory cause of the collision.

APPEAL from the judgment of the District Judge in Admiralty for the Quebec Admiralty District.

The appeal was heard before the Honourable Mr. Justice Fournier at Montreal.

R. C. Holden, Q.C. for appellant.

Lucien Beauregard, Q.C. for respondents.

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

FOURNIER J. now (March 8, 1954) delivered the following judgment:

This is an appeal from the judgment of the District Judge in Admiralty for the Quebec Admiralty District, whereby in an action for damages arising out of a collision between the ss. *St. Lawrence,* owned by the appellant, and the ss. *Maria Paolina G,* owned by the defendants, he dismissed the plaintiff's action and maintained the defendant's cross-action.

The facts of the collision in dispute are hereinafter summarized. The *St. Lawrence* is a steel twin screw passenger steamship, 329·8 feet in length, 68·1 feet in beam, of 6,828 gross tons, engaged in a regular service between Montreal

and Bagotville. Her full speed was 14 knots, her half speed 7 or 8 knots and her slow speed 3 or 4 knots. The *Maria Paolina G* is a steel single screw steamship, 416 feet in length, 56·10½ feet in beam, of 7,166 gross tons, registered at the port of Genova and engaged in the carrier trade. Her full speed was 10½ knots, her half speed 8 knots and her slow speed 5 knots.

The former was in the entrance of the Saguenay River proceeding up river from Prince Shoal lightship No. 7 to the harbour of Tadoussac and the latter was proceeding down river from Port Alfred to the St. Lawrence River. The critical time runs from 5.13 p.m. (Eastern Daylight Saving Time) on June 10, 1950. At that moment the *St. Lawrence* was abeam the lightship and about 1,000 feet off. She was fitted with triple expansion engines of 4,500 h.p. nominal and equipped with a radar detector screen. There was little or no wind but there was a dense fog and the tide was ebb of a force of about 1·5 to 4 knots. She was making about 14 knots through the water with an ebb tide that may have brought her speed down to approximately 12 knots over land. Her engines were on stand by and she was sounding fog signals regularly at intervals of less than two minutes.

After rounding the lightship she steered a course of 298° magnetic for about one minute and then put on a course of 300° magnetic. All her courses are magnetic. Her witnesses estimate that she proceeded on that course for about 8 minutes. She received a radio telephone message from Pointe Noire warning that a large vessel was downward bound and sounding fog signals infrequently and then her course was altered to 305° for three or four minutes. While on that course, the chief officer, who was at the radar, reported that he saw the other vessel nearing the course line of the *St. Lawrence*. Then another alteration of the course to 310° was made for two minutes and a third alteration to 315° some short time before the collision. The times on these different courses are estimates. As to her speed, she proceeded at full speed till her course was 310°, then reduced to half speed and again reduced to slow speed when on the 315° course. After the collision she continued on course 300° to Tadoussac harbour at full speed.

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The *Maria Paolina G* was proceeding downward on the Saguenay when at 5.20 p.m., approaching Pointe Noire, the weather became misty. The order "stand by" was given on the engines and a lookout was sent forward. Fog signals of one prolonged blast were given regularly at intervals of less than two minutes. The radar was not working properly though it had been repaired a short time previous. At 5.25 Pointe Noire Lower Range Light was abeam and the distance off shore was between 200 and 1,000 feet. Her course was set at 97° true. The fog became dense and her engines were ordered slow. At practically the same moment a long blast was heard forward and her engines were stopped and the vessel navigated with caution. When the lookout shouted that there was a ship ahead, seven or eight minutes later, her engines were put full speed astern and the helm ordered hard astarboard. She was struck by the *St. Lawrence* on her port bow while she was practically still in the water.

Two questions are to be determined. First, did the *Maria Paolina G* come across to her port side of the narrow channel contrary to article 25 of the International Rules of the Road relating to navigation in narrow channels? This article reads as follows:

> 25. In narrow channels every steam vessel shall, when it is safe and practicable, keep to that side of the fairway or mid-channel which lies on the starboard side of such vessel.

Second, did the *St. Lawrence* contravene article 16 of the International Rules which enacts:

> 16. Every vessel shall, in a fog, mist, falling snow or heavy rain storms, go at a moderate speed, having careful regard to the existing circumstances and conditions.
>
> A steam vessel hearing, apparently forward of her beam, the fog signal of a vessel the position of which is not ascertained, shall so far as the circumstances of the case admit, stop her engines and then navigate with caution until danger of collision is over.

To establish the fact that the *Maria Paolina G* was on her wrong side of the fairway at the time of the collision, three groups of persons were brought forward as witnesses, namely, members of the personnel of the *St. Lawrence,* two passengers travelling on the *Maria Paolina G* and persons who heard the noise of the collision from or close to shore or who from the shore saw the *Maria Paolina G* after the fog lifted.

The evidence of the captain, the chief officer and the pilot is to the effect that after passing Prince Shoal Lightship No. 7 the course of the *St. Lawrence* was changed four times from 5.13 to 5.27. The reason given for changing from 298° to 300° was to take the course she ordinarily followed at ebb tide going up to Tadoussac. Three other alterations were made in the course to try to keep clear of the oncoming vessel, whose direction seemed on the radar screen to close in on the course of the *St. Lawrence*.

The times of the different courses being estimates, it is quite difficult to pin-point the exact spot or location where the collision occurred. No record was kept of the times and of the different alterations of courses. Furthermore the effect of ebb tide on the two vessels is a matter of conjecture and the evidence on that point is far from conclusive. My assessors tell me that at the time of the collision, the water being low the current and tide had little effect on the vessels. The direction of the ebb tide and current was east-west and would not alter their courses to any appreciable degree.

After the collision, no bearings or soundings were taken; she proceeded at full speed in a dense fog on course 300° to the harbour of Tadoussac. There is no evidence that the radar apparatus was used after the collision. It seems to me that the conclusions arrived at by the officers of the ss. *St. Lawrence* as to the place of the collision are based on estimates as to speed, times and courses (magnetic).

One fact seems positive and not contradicted: the course followed by the *Maria Paolina G* from a point close to Pointe Noire was 97° true and no alteration to this course was made from there on to the place of the collision. When the *Maria Paolina G* was first seen on the radar screen on the port bow of the *St. Lawrence* she was at a distance of two miles, the latter being then between buoys 95B and 94B and on a course of 300°. The *Maria Paolina G* had her engines slow at the time and the *St. Lawrence* was proceeding at full speed. The time lapse from the moment the *Maria Paolina G* was seen and the time of the collision was seven or eight minutes. How the two vessels covered this distance is important.

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The *St. Lawrence,* for three or four minutes, was at full speed, till her course was changed to 310°, then at half speed for two minutes or so and for the remaining time before the collision her engines had been ordered at low speed. Fog sounds were heard a few times by both vessels. In my mind she was proceeding fast at the moment of the impact. During all this time and up to the moment the chief officer lost sight of the *Maria Paolina G,* she was seen on the radar screen on the port side of the *St. Lawrence.* The *Maria Paolina G* during the same time had her engines stopped and was moving with the tide and current on her course of 97° true.

As to the other witnesses (Black and McCall) who were passengers on the *Maria Paolina G,* I have read their evidence carefully. They speak of what they saw two hours after the collision when the *Maria Paolina G* was laying at anchor at the end of 800 feet of chain and their evidence was given a year after the event. They give an estimate of the distance from the *Maria Paolina G* to certain rocks on the shore and they say that she was not in mid-channel but close to the shore. At the time of the collision her anchor was dropped and approximately 800 feet of her chain came out. Her length is over 450 feet and she swung around owing to the tide and current. If the collision had taken place where the plaintiff's witnesses contend, I am convinced that she would have grounded. I have given a lot of thought to their testimony without being able to convince myself that I should give it more weight than to the evidence of the witnesses called on behalf of the *Maria Paolina G* who claim that she was on her right side of the fairway.

As to the witnesses that were on shore or in small craft and heard the noise of the collision, they certainly could not judge the position of the vessels at the moment of the impact. Very little reliance can be placed on their evidence on account of the vagaries of sounds in fog. The others saw the *Maria Paolina G* after the fog lifted, at a distance of more than two miles. Their evidence in my mind should not carry very much weight, it being most difficult to establish the location of a body at that distance.

My assessors, basing their opinion on the evidence of the plaintiff's witnesses, who said that all her courses were magnetic, conclude that her course was on her wrong side of the channel. On the other hand, the course 97° true followed by the *Maria Paolina G* would have kept her on her right side of the fairway even taking into consideration the effect of the ebb tide and current on her course. I agree with these conclusions.

As to the second question—Did the *St. Lawrence* contravene article 16 of the International Rules relating to navigation in a thick fog?

The evidence is to the effect that the *St. Lawrence* approached the entrance of the Saguenay River at full speed and in a dense fog. She proceeded at full speed, though the lookout heard and reported a fog signal ahead, until the other vessel was seen on her radar screen at a distance of two miles. Then her engines were ordered half speed and then slow shortly before the collision. The *Maria Paolina G* was lost sight of on the radar screen when she was at about one half mile distant. According to the pilot's evidence, at that moment he was and had been for some time fearful of a collision because he could not ascertain the position of the *Maria Paolina G*. He was listening for a fog sound so as to locate her course and position. That is when he changed the *St. Lawrence's* course to 315°. A few moments afterwards the *Maria Paolina G* was seen by the lookout at a distance of approximately 100 feet and the collision occurred. According to the engine room log, the order "slow" was given at 5.27 and opposite this entry, on the same line, is written the word "collision". I agree with the learned trial judge that the collision took place about one minute after the order slow. It would seem to me that the two vessels were nearly on the same course and that the collision of port to port would indicate that the *Maria Paolina G*, on hearing a fog signal right ahead, ordered her engines full speed astern and hard astarboard.

Proceeding at full speed in a thick fog, having heard a fog sound ahead without knowing exactly the course followed by the *Maria Paolina G*, even apprehensive of a collision after having lost the downbound vessel on her radar screen, was not in my mind good seamanship. I have

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the impression that they relied on their knowledge of the Saguenay River and proceeded on their journey as if there were no fog. Even after the collision they continued on their regular course without stopping or taking soundings or bearings or inquiring about the other ship. I believe they were negligent and careless by proceeding at full speed under the circumstances.

On the other hand, the *Maria Paolina G* at about 5.20 sent a lookout forward. A "stand by" order was given and fog signals were given at regular intervals because the weather was becoming misty. At Pointe Noire her course was set at 97° true and was not thereafter altered. At 5.27 her engines were ordered slow and immediately after stop, upon hearing a fog signal ahead.

When her lookout reported a vessel ahead the engines were ordered full speed astern and the helmsman received the order hard astarboard.

It is a general rule of navigation that in fog, when by one vessel the course of another within a danger zone is not yet ascertained, and hearing a fog signal apparently forward of her beam, she should slow down her engines. I believe that under the circumstances the moment the fog signal ahead was heard she should have slowed down her engines and navigated cautiously. The answer that it was impossible because of the danger to the passengers, crew and vessel and would not have been good seamanship is not a valid one. Those in charge knew this route well. If it was as dangerous as described they should have slowed or stopped when they were advised that a large vessel was downbound. Another vessel which came into the river a short time later stopped and awaited the lifting of the fog before proceeding. If the channel was not dangerous they could have stopped at any time and resumed their journey after satisfying themselves that no danger existed. This point is dealt with in the case of *The Campania* (1), where Barnes J. says (p. 154):

> The 16th article is imperative, and I believe it would be most dangerous, having regard to the traffic to be met with everywhere, especially near to the coasts, in crowded waters, if this contention were to be upheld. It is based on the supposed necessity of the *Campania* to keep the speed at which she was going for the safety of her own navigation. But I am advised that this basis is unsound.

(1) (1899-1904) 9 Aspinall's Rep., 151.

The fog was so dense that vessels could only be seen at 100 or 200 feet. Actually they were seen by each other at about those distances. True the *St. Lawrence* had the help of her radar, but radar is an aid to navigation and does not override the principles of article 16.

In *Puget Sound Navigation Co.* v. *The Ship "Dagmar Salem"* (1) it was held:

That radar is an aid to navigation only and does not override the general principles applicable to navigation in fog, the first of which is moderate speed and the second, great care.

I am not convinced that the radar apparatus was properly used. It is known that objects are lost sight of on the screen at quite a distance, as it happened in this instance. Knowing that fact, it would seem that good seamanship indicated that in those circumstances they should not have relied on the fact that they had those facilities to justify them of proceeding in thick fog at an excessive speed and not stopping her engines when the fog signal of the other vessel was heard.

Though there may be some doubt as to the application to this case of the "Regulations for the River St. Lawrence from Father Point to Victoria Bridge at Montreal", I am of the view that it is a good directive to those navigating the Saguenay River. It reads:

12. All vessels navigating against the current, or tide on each occasion, before meeting another vessel at sharp turns, narrow passages, or where the navigation is intricate, shall stop, then, if necessary, come to a position of safety below or above the point of danger, and there remain until the channel is clear.

It would seem that in a dense fog and knowing the difficulties of the navigation on the Saguenay River, one would as an ordinary prudent person conform to such wise counsel. This is what past decisions in similar cases would indicate.

In re *"The Oceanic"* (2) the Lord Chancellor (Halsbury) at p. 380 says:

. . . Now the rule appears to me to be a very intelligible and common sense one to avoid danger to vessels in the navigation of the seas and the question what is or is not a moderate speed in a fog must depend in a great measure whether the fog is slight or dense, and whether there is an opportunity of seeing the near approach of a ship so as to know what can be done or ought to be done by nautical skill to

(1) [1950] Ex. C.R., 284. (2) (1899-1904) Aspinall's Rep., 378.

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avoid collision. Apart from any rule, one would think that where it was known that two bodies were approaching, and that there was no absolute means of knowing the direction in which they were coming and the danger which was to be avoided, the common sense thing would be to stop until the direction was ascertained, and also whether it was possible to avoid the serious danger which might arise . . .

Excessive speed in fog being a statutory fault, a vessel violating this rule has to prove that her speed was not the or one of the causes of the collision.

In *Griffin on Collision*, pp. 312 et seq., it is stated:

> Since the obligation to go at moderate speed in fog is statutory, a vessel violating the rule has the burden of showing that her speed could not have contributed to the collision,—a burden which can rarely be sustained.

Very little was said by the plaintiff concerning the speed of the *S.S. St. Lawrence* and no serious explanation is given of this way of proceeding in dangerous waters and in a dense fog. The only attempt made by the plaintiff was to try to establish that the *Maria Paolina G* was on her wrong side of the channel and that this was the only cause of the collision. In my view she failed on that point. On the other hand, the evidence is to the effect that she proceeded at full speed up to a minute or so before the impact. Even if her engines were ordered at half speed and then at low speed, her speed was reduced gradually and it is my opinion that she was going at an excessive speed at the time of the collision.

It seems to me that the *St. Lawrence* did not know the position of the *Maria Paolina G* from the time she passed Prince Shoal Lightship No. 7 to the time of the collision. True, she had the help of a radar apparatus but she does not seem to have taken the bearings of the oncoming vessel. She saw it at all times on the port side but could not ascertain if both vessels could proceed without risk of collision. Her pilot admitted so much in his testimony. Her duty under the circumstances was to follow the dictates of article 16. In my view she failed to do so and those in charge were negligent in their seamanship. On the other hand I find that those in charge of the *Maria Paolina G* acted in conformity with the rules of good seamanship and committed no fault.

There is no doubt in my mind that had the ss. *St. Lawrence* conformed to rule 16 the collision would have been avoided. In the circumstances I find that she was responsible for the collision and the damages resulting therefrom.

Therefore the appeal is dismissed with costs.

Judgment accordingly.

Reasons for judgment of Smith, D.J.A.:—

This case relates to a collision between the ss. *St. Lawrence*, owned by the plaintiff company, and the ss. *Maria Paolina G.* which occurred in dense fog on the 10th of June 1950, at approximately 5.30 p.m. (Eastern Daylight Saving Time) in the entrance to the Saguenay River. (Plaintiff's Preliminary Act fixes the time of the collision at about 5.29, while according to the defendant's Preliminary Act it took place at 5.35 or 5.36).

In the plaintiff's Preliminary Act the collision is stated to have occurred on the North side of the channel in the vicinity of Red Can Buoy 94½B, whereas according to the defendants' Preliminary Act it took place at a point South Easterly from Pointe Noire at a distance of 1½ and 1¾ miles from Pointe Noire, whose approximate bearing was 271° true.

The ss. *St. Lawrence* is a steel twin screw passenger steamship of the Port of Montreal of 6,328 tons gross and 3,650 tons net registered, 329·8 feet in length and 68·1 feet in beam fitted with triple expansion engines of 4,500 h.p. nominal and manned by a crew of 195 all told. At the time of the collision she was carrying 400 passengers. Full speed for the ss. *St. Lawrence* (128 revolutions) was 14 knots; half speed (63 revolutions) 7 or 8 knots, slow 3 or 4 knots.

The *Maria Paolina G*, is a steel single crew steamship registered at the Port of Genova of 7,166 gross tons and 4,312 tons net registered, 416 feet in length and 56·10½ feet in beam equipped with triple expansion engines of 2,500 h.p. and manned by a crew of 35 all told and owned by Sicieta Gestioni Esercizio G.E.N. Full speed for the *Maria Paolina G.* was 10 or 10½ knots; half speed 7 or 8 knots.

The case for the plaintiff is that the ss. *St. Lawrence* in the course of a regular voyage from Montreal to Bagotville via Tadoussac was in the entrance of the Saguenay River proceeding on her usual course from Prince Shoal Lightship No. 7 to the Harbour of Tadoussac. There was little or no wind but the weather was foggy and the tide was ebb of a force of about 4 to 5 knots. The engines of the ss. *St. Lawrence* were on "stand by" and she was sounding fog signals regularly at intervals of less than two minutes, a good lookout being kept.

It is alleged that in these circumstances, the ss. *St. Lawrence* observed in the radar a downbound vessel which later proved to be the *Maria Paolina G.* distant about two miles and bearing a little on the port bow. The course of the ss. *St. Lawrence* was thereupon altered 5° to starboard to take her further to her right side of the channel. Subsequently, the course of the ss. *St. Lawrence* was twice altered an additional 5° to starboard and she was taken as close to her right side of the channel as it was possible for her to go and her engines were reduced to slow speed but the *Maria Paolina G.* improperly came across to the north side of the chan-

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nel and with her stem and port bow struck the port side of the ss. *St. Lawrence* causing serious damage.

On the other hand the case for the *Maria Paolina G.* is that she was in the Saguenay River, with a licenced pilot on board, in the course of a voyage from Port Alfred bound for Lisbon and Mediterranean Ports with a general cargo of 9,964 tons, her draft being 27·07 feet forward and 28·03 feet aft, fresh water. At about 5.20 p.m. while the *Maria Paolina G.* was approaching Pointe Noire the weather became misty and although visibility was still comparatively good, the order "Stand By" was given on the engines and a lookout was sent forward and fog signals of one prolonged blast were thereafter given regularly at intervals of less than two minutes and a sharp look-out kept. The radar was ordered into operation, but was reported not to be working properly. In fact, the screen became blank and remained so, although the radar had been repaired before the vessel left Montreal. At 17.25 Pointe Noire Lower Range Light was abeam and the distance off shore was approximately 200 feet. At this moment the course of the vessel was set at 95° by gyro compass to make 97° true, there being an error in the gyro compass of 2° low. It is alleged that shortly afterwards the fog became dense and the engines were ordered to slow; at the same time a prolonged blast was heard forward of the beam, whereupon the engines of the *Maria Paolina G.* were stopped and the vessel navgated with caution. About eight minutes thereafter the look-out shouted there was a ship ahead and the engines were put full speed astern and the helm ordered hard astarboard, but the ss. *St. Lawrence* was seen coming forward at great speed and she struck the port bow of the *Maria Paolina G.* with her own port side, the *Maria Paolina G.* being then stopped in the water.

Although other faults were alleged against the defendants, the one upon which the plaintiff appeared to rely and the only one which any serious attempt was made to prove, was that of having contravened Rule 25.

Some attempt was made, it is true, to establish that the *Maria Paolina G.* failed to give the regulation fog signals. The evidence of her own officers, however, is that from the time she entered the fog bank, almost immediately after passing Pointe Noire, until the time of the collision, fog signals were given at regular intervals of less than two minutes. It is true that several witnesses heard on behalf of the plaintiff testified respectively to having heard only one, two, three and four fog signals from the *Maria Paolina G.* The evidence on this point has however been carefully considered, and I am satisfied that the proof does not justify the conclusion that the defendant vessel failed to comply with the rule as to fog signals. That the *Maria Paolina G.* gave some fog signals is admitted by the plaintiff's own witnesses. The evidence of those on board the *Maria Paolina G.* is that they were given regularly and at intervals of one minute. The vagaries which characterize the carriage of sound over water and particularly in heavy fog are well known and moreover were testified to, and there is also—the possibility that some of her fog signals synchronized with some given by the ss. *St. Lawrence.* The positive evidence of those in charge of the *Maria Paolina G.* that the statutory fog signals were given, corroborated by the testimony of the various witnesses heard on behalf of the plaintiff to the effect that, at least, some fog signals were heard from the *Maria Paolina G.* must be accepted.

Moreover, even if the proof did establish the failure of the *Maria Paolina G.* to comply with the rule requiring fog signals at regular intervals, such failure would not have been a fault contributing to the accident since it is admitted that the ss. *St. Lawrence* heard the first fog signal of the *Maria Paolina G.* while she was still at a distance of two miles and thereafter the ss. *St. Lawrence* was fully aware of her presence and followed her course superficially, at least, until she no longer became visible in the radar. The plaintiff's case can therefore be properly said to rest upon the allegation that the *Maria Paolina G.* contravened Rule 25 of the International Rules which reads as follows:

Article 25.—In narrow channels every steam vessel shall when it is safe and practicable, keep to that side of the fairway or mid-channel which lies on the starboard side of such vessel.

The burden of proving this allegation rested upon the plaintiff and it must first of all be determined whether it has been established that the *Maria Paolina G.* was on her wrong side of the channel when the collision occurred.

In an effort to discharge this burden the plaintiff:

1o. Attempted *to fix the point* at which the collision occurred at a spot close to the north side;

2o. Sought to establish that the ss. *St. Lawrence* was at all times on *her right side of* the channel;

3o. Attempted to prove that after the collision the *Mario Paolina G. was seen* to be *anchored* close to the north side of the channel in the vicinity of Red Can Buoy *94½B.*

The only direct evidence that the collision occurred at the point contended for by the Plaintiff and marked on the chart produced as Exhibit P-10 is the testimony of Captain Simard.

There is however no proof that either bearings or soundings were taken by those on board the ss. *St. Lawrence* immediately prior to or following the collision. The evidence is rather that no thought was at the time given to the matter of establishing the position of the collision, insofar as the ss. *St. Lawrence* is concerned. In fact, following the accident the ss. *St. Lawrence* proceeded at full speed to the pier at Tadoussac. The record does not disclose any direct proof of the statement of Captain Simard to the effect that the collision occurred at the point marked on Exhibit P-10, and I am completely in the dark as to how this witness was able to state that it did.

As to the plaintiff's attempt to establish that the ss. *St. Lawrence* was at all times on her side of the channel, plaintiff's position would seem to be little better. Captain Simard and the witness Savard, who acted as pilot on the ss. *St. Lawrence,* testified in detail as to the courses steered by the ss. *St. Lawrence* after she rounded the Lightship and the respective times during which she held to these various courses. My assessors have plotted the course of the ss. *St. Lawrence* on the basis of the testimony of these witnesses, and I am advised that her said course would have taken her slightly to her left of the center of the channel and that, on this course, it would have been impossible for her to be at or near the point which the plaintiff fixes as being the point where the collision took place.

Finally, the plaintiff endeavoured to establish that the collision occurred on the North side of the channel by bringing a number of persons who testified to having been on the pier at Tadoussac and to having seen the *Maria Paolina G.* upwards of an hour and a half after the collision when the fog had partially lifted and while she was still at anchor. The purport of this evidence is that the *Maria Paolina G.* appeared to be anchored North of the center of the channel and in the vicinity of Red Can Buoy 94½ B.

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The Court is satisfied, however, that no great reliance can be placed upon this evidence as proof of the point at which the collision actually occurred. These witnesses on the pier at Tadoussac approximately two miles distant from the said vessel, the fog being only partially lifted, were obviously not in the best position to determine exactly how the vessels lay in relation to the center of the channel. The Court is satisfied that looking at the *Maria Paolina G.* at that distance and from that angle, it would have been almost impossible for these witnesses to determine whether she was in the exact center of the channel or 400 to 500 feet on either side of the center. Moreover, at the time the *Maria Paolina G.* was riding at anchor at the end of 800 feet of chain.

Two fishermen who were in small boats close to the North shore at the time of the collision and distant respectively ½ and ¾ of a mile from Red Can Buoy 94½ B, testified to having heard the collision. They, of course, saw nothing. While these witnesses expressed the opinion that the collision took place near the North side of the channel, their testimony on this point must also be considered with caution. The fact that it is most difficult to judge of distance travelled by sound over water, particularly in a fog, is common knowledge.

The channel at the point where these witnesses were is a little over 3,000 feet wide and I am convinced that they, under the conditions then prevailing, could not be relied upon to calculate with any degree of accuracy whether the collision occurred 1,000 or 1,500 distant from the North side of the channel.

The plaintiff also called as witnesses two persons who were passengers on the *Maria Paolina G.* Messrs. Black and McCall. These young men testified that after the fog had lifted and while the vessel was still anchored, she was not more than 1,000 feet from rocks which, it is claimed, were on the North side of the channel. Here again there was considerable uncertainty and diversity in the testimony of these witnesses as the distances testified to and moreover it must again be borne in mind that the *Maria Paolina G.* was at that time riding at anchor with some 800 feet of chain out and was probably swinging towards the North side of the center of the channel, the tide not having yet turned. Moreover had the *Maria Paolina G.* come to anchor at the point where, according to the plaintiff the collision occurred, with 800 feet of chain out and had she been swinging to starboard, as the proof shows she did for some time after coming to anchor, she would almost certainly have gone ashore.

So much for the attempt on the part of the plaintiff to establish that the collision took place to the North of the center of the channel and that it was caused by defendants' breach of Rule 25.

On the other hand, there is positive evidence that the *Maria Paolina G.* was not on the wrong side of the channel. The testimony of those in charge of her navigation is that she passed Pointe Noire at a distance of approximately 200 feet and set a course of 97° true. The light-keeper at Pointe Noire estimated that the vessel was nearer mid-channel or approximately 1,000 feet off shore as she passed the point.

In any event the testimony of the officers of the *Maria Paolina G.* is that she kept on a course of 97° true from the time she passed Pointe Noire to the moment of the collision, and the assessors advise me that on this bearing whether the point of departure is taken as being 200 or 1,000 feet from Point Noire the vessel would have been to her right of the center of the channel throughout its entire length.

Moreover, the proof, which on this point is uncontradicted, is that at the moment of the impact the port anchor of the *Maria Paolina G.* was dislodged or broke loose and went to the bottom with the result that the vessel was brought up at the end of some 800 feet of chain and continued to ride at anchor for approximately one hour and a half until the fog had sufficiently lifted to permit her to proceed.

It was doubtless the noise of the anchor chain running out which was described by the witness Hovington, one of the fishermen above referred to.

There is furthermore the evidence of those in charge of the *Maria Paolina G.* (and there is nothing to discredit this testimony) that after the fog had lifted and before the anchor was hove up bearings were taken by which the position of the *Maria Paolina G.* was established as being that indicated by Captain Martinolli on the Chart Exhibit D-6.

It was argued on behalf of the plaintiff that the bearings taken by the *Maria Paolina G.* after the fog had lifted tended to support the plaintiff's contention that the collision occurred on the North side of the channel because before the said bearings were taken, the *Maria Paolina G.* must have swung on the rising tide and been then riding at the end of 800 feet of chain and heading towards Tadoussac. This is not the proof. According to the book of "Information concerning the River St. Lawrence Ship Channel" issued by the Department of Transport for the year 1950, low water at Tadoussac on the evening of June 10, 1950 came at 6.16 o'clock (D.S.T.) and the turn of the tide two hours later at 8.16 o'clock. The proof is that bearings were taken by the *Maria Paolina G.* at 7.45 p.m. The evidence is that the tide had just commenced to change as the anchor was heaved and Captain Martinolli is definite in stating that at the moment when said bearings were taken the tide had not yet changed and the *Maria Paolina G.* was still heading towards Pointe Noire.

In the view which I take the plaintiff has failed to establish that the *Maria Paolina G.* was at any time prior to the collision on the wrong side of the channel. On the contrary, I find that the collision occurred close to the center of the said channel and near the point indicated on Exhibit D-6. It is approximately at this point that the course 97° which was being steered by the *Maria Paolina G.* meets the course on which, according to the evidence of Captain Simard, the ss. *St. Lawrence* was being steered.

The proof establishes that on reaching the fog bank just after passing Pointe Noire, the engines of the *Maria Paolina G.* were stopped and that they remained stopped for a period of eight minutes and until the time the ss. *St. Lawrence* was sighted when they were put full astern.

It appears that those in charge of the *Maria Paolina G.* were fully aware of the danger of collision in the dense fog and that they adopted those measures which, in the circumstances, were demanded by prudence and good seamanship as well as by the rules of navigation. Such is the advice of the assessors and with it I completely concur.

There was no other course of action which the *Maria Paolina G.* could have followed with safety. In view of the dangerous reefs to starboard and the strong set of the current in that direction she could not have anchored. She stopped her engines and proceeded with the current holding her course of 97° true. There is no proof that she came off this course. To the contrary, there is the evidence of those in charge of her navigation who continued to check her course and

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who say she did not. The proof indicates that the speed through the water of the *Maria Paolina G.* at the moment of the collision, must have been low since otherwise her anchor chain would almost certainly have parted as soon as it caught and held.

I accordingly conclude that the plaintiff has failed to establish that that *Maria Paolina G.* was guilty of any fault or negligence contributing to the collision.

It remains to deal with the cross-action taken by the owners of the *Maria Paolina G.* charging the ss. *St. Lawrence,* in particular, with the contravention of Art. 16 of the International Rule which reads as follows:—

> Art. 16—Every vessel shall, in a fog, mist, falling snow, or heavy rain-storms, go at a moderate speed, having careful regard to the existing circumstances and conditions.
>
> A steam vessel hearing, apparently forward of her beam, the fog signal of a vessel the position of which is not ascertained, shall, so far as the circumstances of the case admit, stop her engines, and then navigate with caution until danger of collision is over.

The proof is that the ss. *St. Lawrence* approached the entrance to the Saguenay River at full speed and in a dense fog.

According to her story she passed to her right of and about 1,000 feet from Prince Shoal Lightship No. 7 at 5.13 p.m., her engines being on "stand by" and steered a course at 298° magnetic for about one minute after which her course was altered to 300°. Shortly thereafter she received a radio-telephone message from Pointe Noire warning that a large vessel was downward bound and was sounding fog signals infrequently.

After the ss. *St. Lawrence* had run for several minutes on course 300° the mate reported seeing a boat in the radar slightly off the port bow and about 2 miles distant and well to the North side of the channel. About the same time a fog signal was heard from this vessel. At this moment the ss. *St. Lawrence,* according to the testimony of those navigating her, was about mid-channel between Buoys 94 B. and 95 B. (at the point marked X on Exhibit P-10). On hearing the fog signal of the other vessel the course of the ss. *St. Lawrence* was altered 5° to starboard which put her on course 305. She continued on course 305 for two or three minutes when the mate reported that the other vessel was approaching the course of the ss. *St. Lawrence* and was then about one mile distant. The course of the ss. *St. Lawrence* was thereupon altered another 5° to starboard to put her on course 310, she having been on course 305 for a matter of about four minutes.

The ss. *St. Lawrence* continued still at full speed on course 310 for about two minutes when the mate reported that the vessel continued to approach the course of the ss. *St. Lawrence.* The engines of the ss. *St. Lawrence* were then put at half speed; the time being 5.26 according to the engine room log. At the same time the course of the ss. *St. Lawrence* was altered another 5° to starboard which put her on course 315 and almost immediately thereafter the mate reported that both the other vessel and Red Can Buoy 94½ B. which had been seen on the starboard bow, had ceased to be visible in the radar. At the same time the mate warned that the other vessel could not be far off. Upon this the engines of the ss. *St. Lawrence* were ordered at slow and the collision appears to have followed almost immediately.

The testimony is not satisfactory as to how long an interval there was between the time the order slow was given and the collision. The estimates vary from one to three minutes. According to the engine room log, however, the order slow was given at 5.27 and opposite

this entry on the same line is written the word "collision". Having regard to the evidence as to the speed at which the ss. *St. Lawrence* was going at the time of the collision and to the entries in her engine room log, I accept the estimate of one minute as being the approximate time which elapsed between the signal for slow and the collision.

The *Maria Paolina G.* was seen for the first time by those on board the ss. *St. Lawrence* as she emerged from the fog at the distance of 75 to 100 feet. Although some of the crew of the ss. *St. Lawrence* testified that the *Maria Paolina G.* appeared to come at the ss. *St. Lawrence* at an angle of 30 to 40°, I am satisfied that this is an error which is understandable having regard to the excitement of the moment and the fact that they had merely a glimpse of the *Maria Paolina G.* before the collision occurred. I find that just prior to the collision the vessels were approaching each other almost, if not actually, head on.

While the evidence does not establish that the course of the *Maria Paolina G.* was altered immediately prior to the collision, I am inclined to believe that her helm may have been put hard astarboard a matter of seconds before the ss. *St. Lawrence* was actually sighted and this for the reason that there is evidence that those on board the *Maria Paolina G.* heard a fog signal ahead and very close, just prior to sighting the ss. *St. Lawrence.*

I am, however, satisfied that the *Maria Paolina G.* had only started to swing to starboard when the collision took place and it was this light swing which accounts for the fact that the ss. *St. Lawrence* came into only glancing contact with the curve of the port bow of the *Maria Paolina G.* with the fortunate result that much greater and more disastrous loss or damage was averted.

In such circumstances, I have no doubt that those in charge of the ss. *St. Lawrence* were gravely negligent in continuing at the speed and in the manner they did in contravention of Article 16 which required them to navigate with caution if not to stop and await the lifting of the fog. The conditions were surely such as to bring her within the application of the well recognized rule stated in Marsden's Collision at Sea. 9th Edit. page 347, as follows:— "In a fog so dense that it is not possible for a ship to see others in time to avoid them, she is not justified in being under way at all".

Moreover there is rule 12 of the Regulations for the River St. Lawrence from Father Point to Montreal which provides that:

12.—All vessels navigating against the current or tide on each occasion before meeting another vessel at sharp turns, narrow passages or where the navigation is intricate, shall stop, then if necessary, come to a position of safety below or above the point of danger and there remain until the channel is clear.

It was argued on behalf of the plaintiff that this rule is without application, because the collision did not take place in the St. Lawrence River. It is however unnecessary for the purposes of the recent case to decide whether or not the collision took place in the navigable waters of St. Lawrence within the meaning of the said regulations since Counsel for plaintiff in their notes and authorities admit that the entrance to the Saguenay, at least up to Buoy 94 B. on the North side of the channel, does form part of the "navigable waters of the River St. Lawrence lying between Victoria Bridge at Montreal and Father Point".

It has already been noted that prior to reaching Buoy 94 B. the ss. *St. Lawrence* had received a radio-telephone message warning her that a large vessel was down bound and had also heard the

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Maria Paolina's fog signal. The ss. *St. Lawrence* was at that time in waters to which Rule extended and the nature of the channel and the conditions then prevailing made the rule applicable.

In this connection it is not out of place to note that the ss. *St. Lawrence* was not carrying a licenced pilot and that the plaintiff's employee Savard, who was acting as pilot, admitted at the hearing that he was completely ignorant concerning Rule 12 as well as the other regulations.

It should also be noted that the ss. *St. Lawrence* was being navigated exclusively by her magnetic compass without reference to her gyro compass. In such circumstances, I have doubt as to the accuracy and reliability of much of the testimony of those who were in charge of the ss. *St. Lawrence* as to the courses steered and the positions testified to.

It is common knowledge that the magnetic compass is subject to variation due to the influence of metallic objects in its vicinity and it is, at least, noteworthy that at the time of the collision the ss. *St. Lawrence* had several automobiles stowed on the freight deck immediately below the navigating bridge and there is no evidence that this was considered or that any attempt was made to verify the correctness of the magnetic compass by checking it with the gyro compass. In this connection it is noteworthy that, according to the chart, this is an area of magnetic disturbance.

In any event, and regardless of these considerations, there is no evidence to show that the ss. *St. Lawrence,* at the time she received the radio-telephone message warning her that a large vessel was down bound or even later when she heard the first fog signal of the *Maria Paolina G.* would not have stopped and come to a position of safety below the point of danger. This is the course which was adopted by the Dominion Coal vessel which entered the mouth of the River shortly after the ss. *St. Lawrence,* and it was the course which was made obligatory by Rule 12 and by the dictates of prudence and good seamanship.

In any case whether or not the circumstances were such as to require the ss. *St. Lawrence* to stop until such time as the fog had lifted, she was guilty of grave fault in proceeding at the speed she did. She was required by Rule 16 of the International Rules and by ordinary prudence to first ascertain the position of the *Maria Paolina G.* and having done so to navigate with extreme caution having regard to the dense fog, the nature of the channel, and the fact that she had warning of the approach of the *Maria Paolina G.* In the circumstances, I have no doubt that the ss. *St. Lawrence* had not "ascertained" the position of the *Maria Paolina G.* or established that she could proceed without risk of collision within the meaning of Article 16.

Nippon Yusen Kaisha [1935] A.C. 177:

> In order that the position of a vessel whose fog signal is heard by another vessel may be "ascertained" within the meaning of Article 16, *"the vessel must be known* by the other vessel to be in such a position that both vessels can proceed without risk of collision. An *inference* as to the vessel's position based upon the direction from which the fog whistle was heard, the probable course she is taking and the improbability of her crossing the fairway in a fog is not an ascertainment justifying a disregard of the precautions enjoined by the Article.

See also *Rover Shipping Co. Ltd.* v. *The Ship Kaipaki* et al [1948] Ex. C.R. 507.

Those in charge of the ss. *St. Lawrence* therefore not only failed to take reasonable steps to satisfy themselves that they could proceed with safety but they ignored and failed to act on clear notice of the

existence of risk of collision, a risk which Savard, who was acting as pilot, admits he realized for some time prior to sighting the *Maria Paolina G.*

Marden's Collisions at Sea, 9th Edit. page 351:

Risk of collision can, where circumstances permit, be ascertained by watching the compass bearing of an approaching vessel. If the bearing does not appreciable change, such risk should be deemed to exist.

In this connection the following excerpt from the testimony of Savard, who acted as pilot on the ss. *St. Lawrence* is noteworthy:

D. Par conséquence, vous saviez parfaitement qu'il y avait un navire qui descendait?—R. Oui, monsieur.

D. Aviez-vous eu des moments d'anxiété en aucun temps, avez-vous pensé qu'il pouvait y avoir danger d'abordage?—R. Non, je n'y ai pas pensé. J'ai pensé qu'il pouvait y avoir danger d'abordage quand le bâtiment est venu assez proche.

D. Est-ce à dire quand vous l'avez vu?—R. Avant de le voir.

D. Vous avez cru qu'il y avait danger dabordage. Qu'est-ce qui vous a fait penser qu'il y avait danger d'abordage?—R. Parce qu'on avait le rapport par le radar que le bâtiment ne changeait pas de position. Alors il fallait naviguer en conséquence pour clairer le bâtiment. C'est ce que j'ai fait.

D. Savez-vous si on vous a rapporté à un moment donné qu'on avait perdu de vue le navire?—R. Oui, ils m'ont rapporté qu'on l'avait perdu.

D. C'est à ce moment là que vous avez cru qu'il pouvait y avoir danger d'abordage?—R. Là, j'ai cru qu'il y avait danger et j'ai crains avant cela.

It appears therefore not only that the relative positions of the vessels and the courses which they were following indicated risk of collision, but that although its risk was realized by those navigating the ss. *St. Lawrence* they took no reasonable steps to avert the danger. Although the *Maria Paolina G.* was seen in the radar to be following a converging course which was bringing her closer and closer to that of the ss. *St. Lawrence,* and although at a given moment she ceased to be visible in the radar there is no proof that actual bearings of the *Maria Paolina G.* were taken and all that was done was to alter her course 5° to starboard apparently on the chance that she would thereby clear the *Maria Paolina G.* I find that this was a flagrant contravention of Rule 16 and that it was the failure of the ss. *St. Lawrence* to comply with the requirements of this rule which alone brought about the collision. If the speed of the ss. *St. Lawrence* had even been reduced to a speed not exceeding that required to give her steerage way, it is probable that, with the *Maria Paolina G.* proceeding slowly as she was, it would have been possible for the vessels to avert the collision notwithstanding the fact the visibility was almost zero. As it was, neither those in charge of the *Maria Paolina G.,* who had acted with prudence and good seamanship, nor those navigating the ss. *St. Lawrence* were able to take any effective steps to avoid the collision because of the excessive speed of the ss. *St. Lawrence,* which I am satisfied was from 8 to 10 knots, if not more, at the moment of the collision. In so finding I not only take into consideration the testimony of those on board the *Maria Paolina G.* but also the fact that, according to her own engine room log, she continued at full speed up to within a minute of the collision.

From the testimony of Captain Simard I derive the impression that those in charge of the ss. *St. Lawrence* were lulled into a false sense of security by the mere fact that the vessel was equipped with radar. There is some evidence, however, to indicate that the reliability and usefulness of radar in such narrow waters are subject to limitation. Moreover of what value is such equipment unless an efficient and

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intelligent use of it is made. Reference to the following excerpt from the judgment rendered by the Honourable Mr. Justice Pilcher in *The Southport,* 82 L.L.L.R. 862 at page 871 would seem to be pertinent:

> The point raised by Mr. Hayward, namely, that a speed in fog which would in ordinary circumstances be regarded as excessive may still be a moderate speed under Art. 16 of the Regulations for a vessel fitted with radar, will, no doubt, have to be decided in some future case. The proposition seems to me to involve at least an assumption that a vessel fitted with radar in fact makes proper use of the apparatus with which she is fitted.
>
> I am satisfied in the present case that those on board *The Southport* who were concerned with the radar apparatus made no proper use of their instrument, and are consequently not entitled to rely upon the fact that they had facilities, of which they made no intelligent use, to excuse them for proceeding in thick fog at a speed which, but for the existence of such facilities, would have been highly excessive.

In the result I find the ss. *St. Lawrence* solely responsible for the said collision and the damages resulting therefrom for the reason that she failed to comply with the requirements of Art. 16.

The assessors concur in all findings upon matters on which it was within their province to advise.

There will therefore be judgment dismissing plaintiff's action and maintaining defendant's cross-action, the whole with costs and in the event that the parties fail to reach an agreement as to the amount of defendant's damages there will be a reference to the Registrar to fix same.

D.J.A.

Montreal, 5th May 1952.