

NOVA SCOTIA ADMIRALTY DISTRICT

1948

March 16,  
April 22  
July 23

BETWEEN:

ROVER SHIPPING CO. LTD..... PLAINTIFF;

AND

THE SHIP *KAIPAKI* AND HER }  
OWNERS ..... } DEFENDANTS.

*Shipping—Collision—Duty of ship in fog—Article 16, International Rules of the Road—Defendant ship entirely at fault.*

*Held:* That defendant ship did not take reasonable care to avoid collision between it and plaintiff's ship because it failed to comply with Article 16 of the International Rules of the Road by not stopping its engines on hearing the first fog whistle of plaintiff's ship and in altering course after the first whistle and again on hearing the second whistle of plaintiff's ship without in either instance ascertaining the position of the other ship.

- 2. That plaintiff's ship not having changed her course after hearing the whistle of defendant ship and having exercised reasonable care the sole cause of the collision between the two ships was the negligence of defendant ship.

ACTION for damages resulting from a collision at sea between defendant ship and one owned by plaintiff.

The action was tried before the Honourable Mr. Justice Carroll, District Judge in Admiralty for the Nova Scotia Admiralty District, at Halifax.

*C. B. Smith, K.C.* for plaintiff.

*F. D. Smith, K.C.* for defendant ship.

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

CARROLL D.J.A. now (July 23, 1948) delivered the following judgment:

This action concerns a collision between the S/S *Liverpool Packet* owned by the plaintiff Company and the S/S *Kaipaki*, which occurred in a dense fog on September 24, 1947, at about 8.40 p.m. Daylight Saving Time (on the *Liverpool Packet*) and about 7.30 p.m. ship's time (on the *Kaipaki*). The approximate position of the ships at time of the collision was 45 deg. 30' N. Lat. and 60 deg. 16' W. Long. and about 11 miles off the South Coast of Cape Breton Island.

The *Liverpool Packet* is a steamship built in Saint John, N.B. in 1945, having a length 315 5/10 ft., beam or main breadth 46 5/10 ft., and her depth in hold from tonnage deck to ceiling amidship 23 feet. Her gross tonnage is 2894.31 and registered tonnage is 1651.35 tons. Her dead weight capacity 4,000 tons. She has a reciprocating triple expansion engine and her registered speed between 10 and 11 knots. She was laden with newsprint (a part cargo) of between 2,300 and 2,400 tons.

The *Kaipaki* is a single screw motor vessel; gross tonnage 5,862; net tonnage 3,421; length 460 feet overall; beam 59 ft. 2 in.; dead weight capacity about 9,750 tons; speed fully loaded 12½ knots; Doxford Diesel engines, right handed propellor, and had at the time about 4,000 tons general cargo (partly loaded), and forward draught 16 ft. 10 in. and 22 ft. 10 inches stern—(6 ft. down by the stern).

The S/S *Liverpool Packet* was on a voyage from Botwood, Newfoundland, bound for New York. She called at Sydney, Nova Scotia, for bunker coal, whence she sailed about twelve noon September 24, 1947. At two p.m. thick fog patches were encountered and the engine room telegraph was put on "Standby", which according to the Captain and Chief Engineer meant a speed of eight knots. This weather condition prevailed until about 8 p.m. when the fog became dense. The regulation sound signals were given on the whistle at regular intervals. At about 8.35 p.m. the fog signal of another ship was heard by the *Packet* which sounded ahead or a little on the starboard

bow. The engine room telegraph was put on "Stop" and the engines responded. Two further blasts were heard from the other ship at about one minute intervals which sounded one to two points on the starboard bow. On hearing the last of these blasts the engines of the *Packet* were put "full speed astern" and about one half minute later the masthead and port lights of the *Kaipaki* were seen about three points on the starboard bow. About two minutes later, between 8.40 and 8.42 p.m., the stem of the *Kaipaki* struck the *Liverpool Packet* on the starboard side, in way of the engine room, causing damage to the superstructure and hull through which sea water filled the engine room and stockhold to sea level and eventually some water entered the holds doing damage to cargo.

The S/S *Kaipaki* was bound from Providence, U.S.A., to Montreal with a part cargo (general) on board. Fog was encountered during the voyage, with intervals of clearing, which became dense during the afternoon of September 24th. At 5.59 p.m. the ship was proceeding at half speed, about 8 knots, steering 52 degrees true, sounding the fog signals at regular intervals. At about 7.45 p.m., ship's time, the fog signal of another ship was heard, which sounded right ahead, or fine on the port bow. Captain Cameron ordered "Slow" and then "Dead Slow" was rung on the engine room telegraph, which signal was made effective. This would mean a speed of between  $4\frac{1}{2}$  and 5 knots after the way had run off the ship. At the time the "dead slow" signal was given the course was altered 10 degrees to starboard. After a short interval, another fog blast was heard, which sounded about one point on the port bow. The course was then altered to another 10 degrees to starboard. Shortly after, the *Kaipaki* sighted the masthead light of the *Packet* two or three points on the port bow, and in a few seconds a green light.

The fog signal of each vessel was heard by the other at about the same time, a little more than five minutes before the actual collision. During the interval the movements of the S/S *Liverpool Packet* were in compliance with the Rules of the Road:

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 circumstance of the case admit, stop her engines and navigate with caution until danger of collision is over.

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There is not any doubt that the movements of the S/S *Kaipaki* were not in accord with the Rule, indeed neither were her engines stopped nor caution displayed in the ships' navigation. In other words there are two distinct faults attributable to the Master of the S/S *Kaipaki* during that five minute interval:

1. In not stopping his engines on hearing the first fog whistle of the other ship;

2. In altering his course 10 degrees to starboard after the first whistle and again 10 degrees to starboard on hearing the second whistle of the other ship, without in either instance ascertaining the position of that other vessel.

A submission is made on behalf of the Master of the *Kaipaki* that there were circumstances which excused him from complying with the rule, or perhaps that the circumstances of this particular case did not admit or permit him applying the rule. In the preliminary Act it is set out in question 12 "it was considered neither safe nor prudent to stop the engine by reason of the strong westerly set striking the vessel" and in his evidence Captain Cameron suggested what amounts to the same thing; that stopping would cause his ship to lose steerage way; swing his ship's head around and put her across the track and in the road of the approaching vessel. There is far from sufficient evidence before me to warrant a finding that the set there had any such force at or near the place indicated—in fact some of the results of the soundings indicate a contrary conclusion. Putting it another way, it has not been shown to my satisfaction that the circumstances of the case rendered a departure from the rule necessary, that is the part dealing with engine stoppage. In the case of *The Vernon City* (1), the trial judge points out (and is quoted with approval in the Appeal Division by Mr. Justice Lewis):

That in the case of a ship apparently acting in breach of Article 16 he would require strong evidence of special circumstances or special danger to exonerate her from non-observance of her duty under the rules.

It seems quite plain to me also that the *Kaipaki* did not take reasonable care to avoid the collision after breach of the first part of the rule, because she changed her course 10 degrees to starboard on two occasions without having

(1) L.R. (1942) P.D. 61.

ascertained the position of the *Packet*. I have no intention of giving any dissertation as to the unreliability of sound signals in fog as a means of ascertaining the position of the instrument whence the sound comes. It is accepted by all marine authorities, and is taken cognizance of by all courts having admiralty jurisdiction, that inferences made from fog signals as to locations of ships are not considered ascertainment of their positions. I quote from the judgment in *Nippon Yusen Kaisha* (1):

In order that position of a vessel whose fog signal is heard by another vessel may be "ascertained" within the meaning of Art. 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.

Lord MacMillan in his speech in the same matter said:

The position of the *Toyooka Merie* was not in their Lordships' opinion "ascertained" within the meaning of the regulations. It was inferred not ascertained.

The observations of Sir Gorell Barnes in the case of *In Re Aras*, (2), has special application to the facts of the instant case, especially to the changes of the *Kaipaki* to starboard:

I think it is exactly the same because it is so well known—so absolutely well known—that it is impossible to rely upon the direction of whistles in a fog, that I do not think any man is justified in relying with certainty upon what he hears when the whistle is fine on the bow and is not justified in thinking that it is *broadening* unless he can make sure of it.

I find as a fact that the *Packet* did not change her course after hearing the whistle of the other ship. Her Master and others testified to that fact. The Master of the *Kaipaki* gave evidence that from his observations the *Packet* was swinging to port and continued to do so after sighting her. A very strong argument was advanced by *Kaipaki's* counsel that Captain Cameron's evidence should be accepted; this argument was implemented by other circumstances, and he suggested that I would have to find Captain Cameron a prevaricator if I accepted the evidence of the *Packet*. I do not think that is the necessary consequence. One is giving direct evidence of something, of his actual movements, the other is giving the result of his observations which under

(1) (1935) A.C. 177.

(2) (1907) P. 28.

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the circumstances of the sudden surprise of finding the *Packet* where he did not expect to find her, and of his own instant manoeuvre led him to believe that she must have changed her course to port. I think Captain Cameron became a bit confused at the moment—indeed his recollections under cross-examination in England were confused. There are of course other circumstances in the whole case that indicate that there was no change in course by the *Packet*.

It is also urged by counsel that the *Packet* was not proceeding at a moderate speed through fog which is in direct violation of the first part of Article 16:

Every vessel, shall in a fog mist, falling snow or heavy rain storm go at a moderate speed having careful regard to the existing circumstances and conditions.

For some time previous to the hearing of the whistles the *Packet* was proceeding at more than 8 knots. Under the conditions this was not a moderate speed within the meaning of the rule but it did not contribute to the collision. I am also of the opinion that the speed of the *Kaipaki* over 10 knots per hour—before the whistles were heard was also immoderate.

I am also of opinion that there was nothing the *Packet* could have done to avoid the collision; every reasonable care was exercised by her and as already indicated, I find that the sole and only causes of the collision and consequent damages was the defaults and negligence of the *Kaipaki*.

Both these vessels were properly manned and equipped and proper lookouts were being kept.

I have the concurrence on all these findings of the two nautical assessors who assisted me, that is on all findings which came within the ambit of their advice.

There will be judgment for the plaintiffs with costs.

*Judgment accordingly.*

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