
 NOVA SCOTIA ADMIRALTY DISTRICT

1947
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 Oct. 31
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 April 23
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BETWEEN:

HENRY W. ADAMS ET AL.....PLAINTIFFS;

AND

THE SHIP *FANAD HEAD*.....DEFENDANT.

Shipping—Collision at sea in dense fog—Convoy—Ship acting on her own when danger signal heard—Rule 16 International Rules of the Road—Negligent operation of ship in convoy causing collision.

The action is one for damages resulting from a collision at sea between the schooner *Flora Alberta* and the defendant ship on what is known as the Western Bank, a fishing ground 90 miles from the Port of Halifax, N.S. The *Flora Alberta* had spent two days on the fishing grounds and had drifted some distance. She was returning to the grounds when the collision occurred. Defendant ship was one of a convoy from Halifax, N.S., leading the port column, and with one ship only astern. Two hours before the collision occurred a dense fog was encountered which prevailed at the time of the collision. The Court found that defendant ship was not in an *enclosed* position or *enclosed* in the convoy.

Held: That the Master of defendant ship, one of a convoy proceeding in a dense fog, upon hearing a warning signal from another ship ahead of him and taking individual action to avoid a collision was guilty of negligence in assuming on hearing a second signal that such signal was from the same vessel and that she had changed her course and was clear and such negligence caused the collision between the two ships.

ACTION for damages resulting from a collision at sea between the schooner *Flora Alberta* and defendant ship.

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

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W. P. Potter, K.C. and *Donald McInnes, K.C.* for plaintiffs.

H. P. McKeen, K.C. for owners of defendant ship.

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

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

This is an action for damages resulting from a collision at sea between the fishing schooner *Flora Alberta* and the *Fanad Head*, the defendant. The collision occurred on what is known as the Western Bank, a fishing ground 90 miles from the Port of Halifax and in Latitude 43 degrees 31 min. North, Longitude 61 degrees 59 min. West. It is throughout the year frequented by fishing vessels.

The collision occurred on April 21, 1943. The *Flora Alberta* was sunk and of a crew of 28 members, only 7 were saved. The *Flora Alberta* was a power schooner, equipped also with sails; with a length of 145 feet overall, breadth 26.4 feet, depth 10.8 feet and length of engine room 18.4 feet, with a tonnage of 93 and capable of about 10 knots and perhaps a little more. Although neither Master or Mate had any certificates of competency, the ship was *legally* mastered and manned. The Master and crew had an abundance of service in such vessels and until the instant disaster, the Master had never been involved in a collision at sea.

The *Flora Alberta* had been on the fishing grounds since April 18th and continued fishing from that date until the evening or night of the 20th. On the night of the 20th, while hove to under sail, she had drifted some distance in an Easterly direction and about 4 a.m. Daylight Saving Time, the engine was started and a course was set West

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Magnetic to return to the fishing grounds and developed a speed of about 9 knots. Around 4:30 Daylight Saving Time, noting the depth of the water, the Master of the *Flora Alberta* altered course to West by North and about fifteen minutes before the collision, reduced his speed to approximately $4\frac{1}{2}$ knots. The fog had been very dense from the time she got under way, the wind light from the Northwest and a considerable swell on the sea. The fog whistle of the *Flora Alberta* was blown at regular intervals and those on board heard no sound of any fog signal or steamers until about the moment of sighting the *Fanad Head* when a whistle was heard on the starboard side and at the same time the lights of the *Fanad Head* were sighted about a vessel's length away on the starboard bow. The forward lookout on the *Flora Alberta* (I think Mr. Knickle) on seeing the steamer's lights, shouted *steamer* to the men below, (the Captain was below having breakfast) and at the same time yelled "keep off" to the helmsman. Captain Tanner was immediately on deck and ordered the engine stopped and while on the way after, the collision occurred. There was port action by the helmsman, but whether he swung to port or starboard would have made little difference because there was nothing the *Flora Alberta* could have done after sighting the ship, which was almost at the moment she heard the signal from the *Fanad Head*, to avoid the collision. She was trapped and any action would have been of no avail.

There is no doubt, however, that a speed of 9 knots in dense fog is in excess of the *moderate speed* required, under the prevailing circumstances, by the International Rules of the Road (Art. 16). The *Flora Alberta* did slacken her speed to about $4\frac{1}{2}$ knots and I find that was her speed for the period mentioned before the collision, and I am therefore of opinion that her previous speed of 9 knots did not in any way contribute to the collision. It will be noted that the Daylight Saving Time was the time on the fishing schooner. The collision occurred at about 4:20 a.m. Standard Time.

The S.S. *Fanad Head*, mastered by Captain Thomas Heddles, a capable and matured seaman, left Halifax on

April 20, 1943, in convoy, leading the port column, with the S.S. *Timothy Dwight* following. The Commodore's ship S.S. *Telapa*, Captain Hugh Roberts, was leading the centre column. He was in charge of the convoy. The third column, on the starboard side, was led by the S.S. *Tetela*. There were eight ships in the convoy, three in the starboard column, three in the centre column and two in the port column, separated by three cables abreast and two cables in line, steering a course of 132 degrees true, with an ordered speed of 10 knots.

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At 2 a.m. Standard Time, on April 21st, a very dense fog was encountered. The convoy was running, under orders, without lights, except for a white cluster shown at the stern of vessels as a guide for the following ships, and starboard lights on the *Fanad Head*; starboard and port lights on the Commodore's ship and port lights on the leader of the starboard column as a guide for the leaders. These were put on, I understand, after fog enveloped the ships. At this time the speed of the convoy was 8 knots—reduced from 10, not on account of the fog, but because at 10 knots it would arrive at a planned rendezvous with other ships joining the Halifax convoy at too early an hour. Fog signals were blown every ten minutes, consisting of various blasts indicating the leaders' numbers in the convoy, beginning on the Commodore's ship and then on the leader on starboard, the *Tetela* and then by the port leader, the *Fanad Head*. The period occupied by those blasts was about one minute. These, of course, are not the fog signals required by the collision regulations, but were the signals ordered for convoys,—this particular convoy, at any rate.

At 4:10 a.m. the officers on the bridge and the lookout on the forecastle head of the *Fanad Head* heard the sound of a high pitched whistle, which Captain Heddles and the lookout said sounded nearly ahead or fine on the port bow. Captain Heddles *at once took individual action and ordered the navigation lights switched on his ship*, and gave his column number independently to draw attention to the ship ahead, not waiting for the Commodore, and in three or four minutes blew his column number again independ-

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ently. This blast was apparently heard by the Commodore on his ship, the *Telapa*. He testified on this incident as follows:

Shortly after four o'clock (Standard Time) in the morning I thought I heard a faint whistle—I was not sure of it—but I was the only one (on his ship) who heard it. It appeared to come from the port side, fine on the port side of the convoy and as a precaution I sounded my column number and the other column leaders sounded theirs.

At about 4:17 a.m. Standard Time Captain Heddles of the *Fanad Head* and officers on the bridge and I think the lookouts heard the sound of a whistle about, the Captain thought, $3\frac{1}{2}$ points on the port bow. About this whistle Captain Roberts of the *Telapa* and the Commodore testified:

I heard some time afterwards a definite sound signal a little forward of our port beam, one long blast, and close to the convoy. I formed the opinion (view) at that time that this signal had some connection with the previous one that I thought I heard. I was suspicious and I was on the alert and I knew definitely then that there was a ship in that vicinity.

On further examination Captain Roberts said, "She was about 2 or 3 points forward of our port beam and apparently close to the convoy." On cross-examination Captain Roberts said, regarding the first whistle he heard, "Well, sound at sea is very deceptive but I should say that it bore about 1 or 2 points on (my) port bow".

Captain Heddles of the *Fanad Head* on hearing the second whistle, sounded his column number without waiting for the Commodore to blow first. He testified that on hearing the second whistle about 3 points on his port bow, he was led to believe that the ship whence the sounds came had passed out of danger. In about four or five minutes afterwards he testified that a white light and a green light appeared out of the fog about $3\frac{1}{2}$ points on the port bow, I would estimate about 300 or 400 feet from his bow. He ordered "Hard astarboard and full astern" and three short blasts were blown on the whistle. At that time the collision was inevitable and nothing that Captain Heddles could do would have availed, that is from the time he saw the lights. At about 4:20 the collision took place. The *Flora Alberta* went down with the disastrous results already mentioned.

A suggestion was made by Captain Heddles that the *Flora Alberta* had changed her course, had turned around

in an easterly direction, probably after he heard the first blast. I do not so find. I find that she held her westerly course, the course outlined by the Master of the fishing vessel, and from the time he stated. There is also some evidence that the red light of the *Flora Alberta* was observed just before the accident, or at the time she was sighted by the *Fanad Head*. I do not so find. In fact the witness, the only witness I think who suggested it, finally said that he "believed he did see the red light but that he might well have been mistaken".

I am attaching very little importance to the conversation between Captain Tanner and Chief Officer Rea which is said to have taken place after the collision and on board the *Fanad Head*. Both denied making certain statements attributed to them and it may well be that under the circumstances that each misinterpreted what the other said.

I have said that from the time the *Flora Alberta* saw the *Fanad Head*—the signal from the *Fanad Head* was heard at about the same time as the ship was sighted—there was nothing she could do to void the collision. She made, however, what I consider, under the circumstances, the proper manoeuvre. The *Fanad Head* I think sighted the *Flora Alberta* a little before the *Flora Alberta* sighted her, but there was nothing the *Fanad Head* could have done after the sighting of the *Flora Alberta* that would have avoided the collision. She too made the proper movement. In a word, I consider that after the vessels were in sight of each other, everything possible was done by both vessels to avoid the collision. But that does not end the case.

The *Fanad Head* was in convoy. If she were not, it is clear that she would have been at fault for the collision by reason of the fact that she was obviously not going at a moderate speed in a fog and in a place, which to the knowledge of the Captain, is frequented by fishing vessels. The fog was very dense and eight knots an hour under those conditions was most certainly not a moderate speed. Being in convoy, however, she was subject to the orders of the Commodore, and his direction as to speed was eight knots for the convoy vessels. Under what I shall call Admiralty Regulations made by virtue of a Canadian Statute, similar I think to the British enactment, the

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Commodore had the legal authority to pass on an order as to speed and there is English legal authority for the proposition that the *Fanad Head* was under a legal compulsion to obey the order of eight knots *while in convoy* and subject to those orders. *The Vernon City* (1) and on Appeal, page 61. In that case, however, it was pointed out that each case "will depend on its own facts and circumstances" and that it was not his (the trial Judge's) desire or intention—

to lay down any principle by which vessels in convoy can be said to be excused from any obligation under the Sea Rules which they could properly fulfil.

The trial Judge also points out (as quoted by Mr. Justice Lewis on appeal)—

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

This case was followed a few months later by *The Scottish Musician* (2), and tried before and decided by Langton, J. who presided at the trial in the *Vernon City*. Mr. Justice Langton found the ship in convoy at fault and that negligence caused the collision and observed—

A vessel enclosed in convoy has the same duty as every other vessel on the sea to take every possible means to avoid a collision. She is not to regard herself, because she is in convoy as a vessel which is excused from keeping a lookout outside the convoy . . . On the contrary she has to take every possible means of avoiding a collision which she can take without danger, *that is to say without creating more imminent danger still to her consorts in the convoy*. She has a duty to the convoy to keep her station, but she must not press that duty to the point of never taking measures to keep out of the way of some other vessel that is threatening her with collision.

The Justice had some caustic words to say regarding the interpretation of Direction 4 of No. 7 of the Admiralty Notices to Mariners which reads:

In circumstances where a single vessel has not taken early measures to keep out of the way of a squadron . . . the Regulations for preventing collisions at sea must be the guide.

In that case as in the instant one the single vessel did not know of the presence of the convoy until almost the actual collision. That Regulation has, I think, been changed in wording and meaning, and made effective in 1943 after the judgments in the two mentioned cases were

rendered. I do not know that it has the actual force of law. It is a "directive" and I think is more for the purpose of giving an interpretation to the rather stringent convoy regulations. I give the directive or regulation:

No. 7—CAUTION WITH REGARD TO SINGLE SHIPS APPROACHING SQUADRONS OR AIRCRAFT CARRIERS.

Former Notice—No. 2175 of 1942; hereby cancelled.

(1) The attention of shipowners and mariners is called to the danger to all concerned which is caused by single vessels approaching a squadron of warships or merchant vessels in convoy so closely as to involve risk of collision or attempting to pass ahead of or through such a squadron or convoy.

(2) Mariners are therefore warned that single vessels should adopt early measures to keep out of the way of a squadron or convoy.

(3) The fact that it is the duty of a single vessel to keep out of the way of a squadron or convoy does not entitle vessels so sailing in company to proceed without regard to the movements of the single vessel. Vessels sailing in a squadron or convoy should accordingly keep a careful watch on the movements of any single vessel approaching the squadron or convoy and should be ready, in case the single vessel does not keep out of the way, to take such action as will best aid to avert collision.

(4) Attention is also drawn to the uncertainty of the movements of aircraft carriers, which must usually turn into the wind when aircraft are taking off or landing.

NOTE—This Notice is a repetition of the former Notice quoted above
(Notice No. 7 of 1/1/1943)

Authority—The Lords Commissioners of the Admiralty. (H. 339/42).

In this connection I refer to the evidence of Captain Roberts, the Commodore of the convoy. In dealing with convoy orders and referring to a ship in convoy—

If she is *in danger she has to take individual action*. The Admiralty instructions are that the Master of the ship is responsible for the safety of his ship and that if there is any position of danger it is up to the Master to take what action he thinks fit.

Questioned on the particular situation and circumstances of the present case, he answered as follows:

Q. Did you expect a ship under your command to go on and to continue steaming after hearing a ship ahead of her sounding?

A. No.

Q. Or a ship forward of her blow?

A. No.

He further testified that by virtue of the cluster of lights carried by the *Fanad Head* that the ship astern, the *Timothy Dwight* could take the necessary action to avoid the *Fanad Head* if any changed movement was made by the latter. He might also well have said that the signals required for any change of movement by the *Fanad Head*

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would be heard by the following ship and the necessary action taken by her, and I think without danger of collision between the two if both actions were promptly performed.

The Commodore further said:

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But if I thought there was danger, if I thought the whistle was close to . . . naturally I would take some action irrespective of any ships astern or on either side of me.

While dealing with the Commodore's evidence, I must point out that the Commodore testified that he could not identify the second whistle he heard as coming from the same ship as the first blast.

Now the Master of the *Fanad Head* on hearing the first high pitched whistle nearly ahead, took individual action. He switched on navigation lights and also blew his column number independently. Then he put himself "on his own". He must have felt there was danger ahead before taking himself out of the orders for the convoy. I think with deference that having regard to the fact that the location of the ship whence the whistle came was not ascertained nor the direction in which she was going, that the *Fanad Head* should have complied with the latter part of Rule 16:

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.

There can be little doubt, however, that this precaution should certainly have been taken after the *Fanad Head* heard the second blast at about 4:17, and about 3½ points on the port bow. His non attention to this rule was perhaps due to two assumptions which he made, first that the sound of the horn he heard at 4:10 a.m. was the actual hearing of the vessel blowing the same, and second in assuming that at 4:17 a.m. the horn was from the same vessel and that she had changed her course to a northeasterly direction and was clear. This judgment was formed on insufficient and unsound basis and is a fault attributable to him and therefore negligence and the negligence that caused the collision.

I quote from the *Nippon Yusen Kaisha* (1) on the question of inferences made in such circumstances:

In order that the 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 safely proceed without risk of collision. An *inference* as to the vessel's position, based upon the direction from which the fog signal 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 above article. Implicit obedience to the regulations upon which navigators are entitled to rely is of great importance.

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Lord McMillan made the following statement:

The position of the *Toyooka Marie* was not in their Lordships opinion ascertained within the meaning of the regulations. It was *inferred* not *ascertained* and as it turned out, the inference was wrong.

The observations of Sir Gorell Barnes in the case of *In Re Aras* (1) are well worth repeating—

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.

It should be observed that the *Fanad Head* was not in an “enclosed” position or “enclosed” in a convoy. She was clear and free of ships both ahead and on her port with only one ship astern and there was no danger by taking the usual precautionary measures, with proper notice to the ship behind, of creating “imminent danger to her consorts in the convoy”. He knew of the danger ahead from the time he took the independent action of throwing on his lights and giving the convoy signals.

I have had a very able and experienced seaman as nautical assessor, who rendered me much needed aid, and I have his concurrence on all findings which come within the ambit of his advice.

There will be judgment for the owners of the *Flora Alberta*.

Judgment accordingly.