1948
June 16
Sept. 21

BETWEEN:

DOMINION SHIPPING COMPANY, (DEFENDANT) .... APPELLANT

AND

CELESTE ADMANTA D'ENTREMONT et al., (PLAINTIFFS) .... RESPONDENT

Shipping—Appeal from District Judge in Admiralty—Collision at sea and and in a dense fog—Area frequented by a fleet of scallop ships—International Regulations of the Road for preventing collisions at sea—Signals required by Articles 9(h) and 15(e) of said Regulations for vessel engaged in scallop dragging and for vessel under way and unable to manoeuvre—Failure by respondent to sound proper signal—Burden on appellant to establish the failure contributed to collision—Burden not discharged—Inference from evidence properly drawn by trial judge—Appeal dismissed.

The *Rockwood Park,* owned by appellant, at 5.17 a.m., on May 29, 1947, encountered dense fog in an area (George's Bank) which its master knew was frequented at that season by a fleet of scallop ships, one of which being then the motor vessel *Lora Grace Peter,* owned by the first-named respondent, and commenced and continued to sound one pronounced blast every two minutes. The *Rockwood Park's* speed was 8½ knots up to the time the *Lora Grace Peter* was sighted and for a considerable period prior thereto. The latter vessel was engaged in scallop dragging and its master had been sounding the whistle from 6 o'clock every two minutes, one prolonged and two short blasts which are the signals required by Article 15(*e*) of the International Regulations of the Road for preventing collisions at sea for a vessel under way and unable to manoeuvre, whereas the signals that should have been blown on an operation of scallop fishing or dragging and under the conditions existing were those provided by Article 9(*h*) of the said regulations, i.e., a blast at intervals of not more than one minute.

There was no evidence as to the interval between the last signal of the *Lora Grace Peter* and the "alarm" signal given by the latter vessel when the *Rockwood Park* was sighted. Collision occurred almost immediately after.

Held: That the onus was on the appellant to establish that the failure of the *Lora Grace Peter* to sound the proper signal did contribute to the collision and that that burden was not discharged. *S.S. Heranger* v. *S.S. Diamond* (1939) A.C. 94 followed.

2. That the learned trial judge has drawn the proper inference from the evidence. *S.S. Haugland* v. *S.S. Karamea* (1922) 1 A.C. 68 discussed.

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APPEAL from the judgment of the District Judge in Admiralty for the Nova Scotia Admiralty District allowing plaintiff's action for damages resulting from a collision at sea.

The appeal was heard before the Honourable Mr. Justice O'Connor at Halifax, N.S.

F. D. Smith, K.C. for appellant.

C. B. Smith, K.C. and *R. L. Stanfield* for respondents.

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

O'CONNOR J. now (September 21, 1948) delivered the following judgment:

This is an appeal by the defendant from the judgment of the learned trial Judge of the Nova Scotia Admiralty District, whereby in an action for damages by a collision between the steamship *Rockwood Park* owned by the appellant and the motor vessel *Lora Grace Peter* owned by the first-named respondent, he pronounced in favour of the claim of the respondents.

The facts are not in dispute. The *Rockwood Park* at 5.17 a.m., on the 29th May, 1947, encountered what was described by all witnesses as "a dense fog" and commenced and continued to sound the regulation signal—one pronounced blast every two minutes. The learned trial Judge found that the *Rockwood Park's* speed was 8¼ knots up to the time the *Lora Grace Peter* was sighted and for a considerable period prior thereto. And that the *Rockwood Park* maintained this speed in a dense fog in an area (George's Bank) which the Master of the *Rockwood Park* well knew was frequented at that season by a fleet of scallop ships.

The *Lora Grace Peter* was engaged in scallop dragging which is described by the learned trial Judge as, "a machine is put overboard which scrapes the bottom and picks up the scallop. The drag is of course attached to a cable; in the instant case its length was about 125 fathoms and

made of steel". The Master of the *Lora Grace Peter* had been sounding the whistle from 6 o'clock every two minutes, one prolonged and two short "while towing the drag".

The Master of the *Lora Grace Peter* said that, "the Chief sang out that he heard a whistle that he didn't think was near", and "first, when he sang out that he heard a whistle I grabbed my whistle and blew but she was coming so fast I had to leave and run and the ship ran us in the port bow * * *" The crew cut the life boat lashings but had no time to launch them before the collision, and the crew had just time to jump to the *Rockwood Park* and scramble aboard. There was no evidence as to the interval between the last signal of the *Lora Grace Peter* and the "alarm" signal given by the *Lora Grace Peter* when the *Rockwood Park* was sighted.

The First Officer in charge of the watch of the *Rockwood Park* was on the bridge and there was a lookout with him. His evidence was that—"the lookout said he thought he heard a whistle and at the time, the same time he was saying it, this vessel appeared on my starboard bow, going across our bow". And that then when he saw the *Lora Grace Peter* first he judged it was "perhaps 100 feet" away in a direct line from the bow of the *Rockwood Park*.

The learned trial Judge found—First:—

> I find that under the existing circumstances and conditions the *Rockwood Park* was not proceeding at a moderate speed, but was proceeding in direct violation of the first part of Article 16 of the International Regulations for preventing collisions at sea, which by virtue of the Canada Shipping Act have the force of statute law in this jurisdiction.

Second:—That the signals given by the *Lora Grace Peter* were three blasts every two minutes, one prolonged blast followed by two short blasts which is the signal required by Article 15, subsection (*e*) for a vessel "under way" and unable to manoeuvre, whereas the signals that should have been blown on an operation of this kind (scallop fishing or dragging) and under the conditions existing were those mentioned in Article 9, subsection (*i*). The learned trial Judge referred to and quoted the English rule Article 9, subsection (*i*). Counsel agreed that the relevant rule was

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Article 9(*h*) and the appeal proceeded on that basis. The differences between Article 9(*i*) and 9(*h*) are minor. Articles 9(*h*) and 15(*e*) respectively, are as follows:—

Article 9(*h*) In fog, mist, falling snow, or heavy rain storms, drift vessels attached to their nets, and vessels when dredging, or when line-fishing with their lines out, shall, if of 20 tons gross tonnage or upwards, respectively, at intervals of not more than one minute, make a blast; if steam vessels, with the whistle or siren, and if sailing vessels, with the fog-horn; each blast to be followed by ringing the bell. Fishing vessels and boats of less than 20 tons gross tonnage shall not be obliged to give the above-mentioned signals; but if they do not, they shall make some other efficient sound signal at intervals of not more than one minute.

Article 15(*e*). A vessel when towing, a vessel employed in laying or in picking up a telegraph cable, and a vessel under way, which is unable to get out of the way of an approaching vessel through being not under command, or unable to manoeuvre as required by these Rules, shall, instead of the signals prescribed in paragraphs (*a*) and (*c*) of this Article, at intervals of not more than 2 minutes, sound three blasts in succession, viz., one prolonged blast, followed by two short blasts. A vessel towed may give this signal and she shall not give any other.

The third finding of the learned trial Judge was:—

However, while non-compliance with this Article may be designated as a fault, I am of opinion that it did not contribute in the remotest way to the collision.

And further, my opinion is and I find that the efficient and real and sole cause of the collision and consequent damage was the immoderate speed of the *Rockwood Park*, which was not careful, having regard to the existing circumstances and conditions prevailing.

The learned trial Judge held that the damage and loss was caused solely by fault of the *Rockwood Park* and directed that if counsel were unable to agree on the amount of the damages that he would later assess the damages covering the value of the ship and the scallops and the personal belongings of the Master and crew.

The appellant does not appeal from the finding of the learned trial Judge that the speed of the *Rockwood Park* was immoderate.

But the appellant does appeal the finding that the failure of the *Lora Grace Peter* to give the signals required by Article 9(*h*) did not contribute to the collision.

The Admiralty Law in England from 1870 to 1911 imposed upon a vessel that had infringed a regulation which was prima facie applicable to the case, the burden of proving not only that such infringement did not contribute but that it could not by possibility, have contributed to the collision.

The Maritime Conventions Act, 1911, 1 and 2, Geo. 5, chap. 57, repealed Section 419(4) of the Merchant Shipping Act, 1894. The effect of this repeal is stated by *Marsden's Collisions at Sea*, 9th Ed., p. 65, to be:—

The effect of the Act is to abolish an arbitrary rule by which any infringement, which by possibility might have contributed to the collision, rendered a vessel to blame and to "leave the Court to follow what is a reasoning judgment and to say, 'Did this want of obeying the regulations in any way contribute to the collision?' not 'Might it possibly have done so?'" *Per* Bargrave Dean, J., *The Enterprise*, (1912) P. 207, 211.

The question, however, of whether the burden was upon the infringing vessel to establish that the breach of her statutory duty did not contribute to the collision, or whether the burden was upon the party setting up a case of negligence to establish that such breach contributed to the collision, remained in doubt. *Marsden's* (*supra*) was published in 1934, and at page 67 he states his opinion:—

It is submitted that the rule laid down in *The Fenham* (1870), L.R. 3 P.C. 212, is good law to-day, and that the burden is upon the infringing vessel to establish that the breach of her statutory duty did not contribute to the collision.

This statement was approved in *Hochelaga* v. *Dreyfus and SS. Leopold* (1).

The question was, however, determined by the decision in *S.S. Heranger* v. *S.S. Diamond* (2), Lord Wright said:—

Mr. Hayward has, however, contended that even if the *Heranger* was negligent, still that negligence is immaterial unless it is established by the respondents that it actually contributed to the collision. He contended that the statement of law contained in the judgment of the President in *The Aeneas* (1935) P. 128, 131, was erroneous. The President said: "I think the principle to be applied, when there is a breach of a rule which is definitely asserted to have contributed to a collision, is that it is for those who have been guilty of the breach of the rule to exonerate themselves, and to show affirmatively that their default did not contribute in any degree to the collision, actively, or to the resulting damage." This in my opinion is contrary to the principle stated by Lord Finlay that "only faults which contribute to the accident are to be taken into account for this purpose. The existence of fault on the part of one of the ships is no reason for apportionment unless it in part caused the damage": *The Karamea* (1922) 1 A.C. 68, 71. It is also contrary to the general principle of the law of negligence, according to which it is necessary for the plaintiff to show both breach of duty and consequent damage. Damage is, it is said, the gist of the action. This is too well established at common law to call for any citation of authority. But it is, as Lord Finlay points out, also the rule in Admiralty. Whatever the Admiralty law on this matter was before the Maritime Conventions Act, 1911, it is now, I think, clear that the onus is on the party setting up a case of

(1) (1930) 1 D.L.R. 529, 540. (2) (1939) A.C. 94 at 104.

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negligence to prove both the breach of duty and the damage. This, the ordinary rule in common law cases, is equally the rule in Admiralty. The party alleging negligence or contributory negligence must establish both the relevant elements. I thus find myself with all respect unable to agree with the view as to the onus of proof stated by the learned President in *The Aeneas* (1935) P. 128, 131. But though the burden is on the respondents to prove that the fault of the *Heranger* contributed to the accident and resulting damage, I think it is clear that they have discharged this burden.

It is clear from this that when there is a breach of a rule, it is not for those who have been guilty of the breach of the rule to exonerate themselves or to show affirmatively that their fault did not contribute in any degree to the collision. And only faults which contribute to the accident are to be taken into account and the onus is on the party setting up a case of negligence to prove both the breach of duty and the damage.

Counsel for the appellant did not contend that the decision in the *Heranger case* (*supra*) was wrong or that it is not applicable.

What the appellant contends, however, is that as the *Rockwood Park* was at a speed of 8¼ knots, she would proceed about 820 feet in a minute. And if the *Lora Grace Peter* had given the proper signal one minute before the alarm, the *Rockwood Park* would have had an additional 820 feet in which to manoeuvre and would have avoided the collision. And that there is no evidence as to the time which elapsed between the last so-called "signal" of one prolonged blast and two short blasts and the warning blast, and that the collision would not have occurred if the *Lora Grace Peter* had given the required signal at the proper time.

Counsel also contended that there is a presumption (of fact) that if the signal required had been given, it would have been heard and bases this contention on the statements made in *S.S. Haughland* v. *S.S. Karamea* (1) Viscount Finlay said at page 75:—

The *Haugland* broke the rule by not giving the signal. It is certainly possible that the signal, if it had been given, would have been heard. All that we have to the contrary is the statement of the officer who wrongfully failed to give the signal that he thought the *Karamea* was too far

(1) (1922) 1 A.C. 68.

away to hear. It would be extremely dangerous if any encouragement were given to neglect the duty of giving the signal by accepting without some definite evidence the plea of the officer in default that the signal would not have been heard. I think we ought to presume in the present case as against the *Haughland* that if she had done her duty by giving the signal in the present case it would have been heard. She was in the position of a wrongdoer, and no satisfactory grounds are shown for coming to the conclusion that giving the signal would have made no difference in the result.

Viscount Cave at page 77 said:—

The assessors advising the Court of Appeal saw no reason why at that distance the whistle (if an efficient one) should not have been heard; and the experts advising your Lordships on this appeal did not differ from that view. In the circumstances, it cannot be said to be proved that the whistle would not have been heard; and in the absence of such proof I think the presumption is against the ship which broke the rule. Upon this point I agree with the Court of Appeal and consider that the *Haughland* was responsible on this ground also.

And, therefore, the burden was on the respondents to establish that the failure to give the signal did not contribute to the collision, and that the respondents failed to discharge that burden.

Counsel for the respondents does not question the finding of the trial Judge that the *Lora Grace Peter* was not complying with Article 9(*h*) of the Regulations or that this was the appropriate Regulation. His contention, based on the decision in the *S.S. Heranger case,* (*supra*), is that the onus of establishing that the failure to give the proper sound signals contributed to the collision, is on the appellant and that the appellant failed to discharge that onus.

If the *Karamea case* (*supra*) is authority for the contention of the appellant that there is a presumption in all cases in which a required signal was not given, that if given, the signal would have been heard, then it is in conflict with the decision in the *Heranger case* (*supra*). Because the effect would be that those who had been guilty of a breach of the rule would have to, in the language of the President in *The Aeneas* (1),—"exonerate themselves, and to show affirmatively that their default did not contribute in any degree to the collision, actively, or to the resulting damage". And that statement was expressly overruled in the *Heranger case* (*supra*).

(1) (1935) P. 128, 131.

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But in my view the *Karamea case* (*supra*) is not and does not purport to be authority for this contention. Viscount Finlay makes it quite clear that he is presuming the signal would have been heard in that case and in that case only. In one sentence (page 75) he twice used the words, "in the present case"—

> I think we ought to presume in the present case as against the *Haughland* that if she had done her duty by giving the signal in the present case it would have been heard.

In that case the vessels were 2 or 3 miles apart and the lights of the vessels were visible to one another so the visibility must have been good and the weather clear. Under those circumstances the assessors and experts advised both Courts that they saw no reason why the whistle at that distance should not have been heard. There was no reason to assume that the whistle would not be heard. The only evidence to the contrary was the statement of the Chief Officer when asked why he did not give the signal—"Because it appeared to me that the *Karamea* was too far away; she would not hear it". And his opinion, in the existing circumstances, the Court refused to accept. The Court logically inferred from the facts existing in that case that the signal, if given, would have been heard.

The Court made no express finding that the signal, if given would have been heard, but Viscount Finlay said at page 75:—

> In the absence of a finding that the signal, if given, would have been heard I should have difficulty in agreeing with the Court of Appeal that the mere failure to give the signal would have made the *Haughland* contributory to the damage.

And he added—

> I think also that a finding that the signal, if given, would have been heard would be justifiable upon the evidence.

He said at page 73:—

> The *Haughland* was guilty of disobedience to the rule, but it does not follow that she is liable to contribute to the damages. If it appears that the signal, if given, could not have been heard by the other vessel, the failure to give the signal cannot have contributed to the damage, as the signal would have been useless.

The inference or presumption drawn from the evidence was in the result, therefore, a finding that the signal, if given, would have been heard.

The question is then, can the same presumption be made here? That is, can it be logically inferred from the evidence in this case that the signal, if given, would have been heard?

In this case there were 50 fishing vessels in the vicinity, and although their signals were heard at times by the *Lora Grace Peter,* there is no evidence that the *Rockwood Park* heard their signals.

The *Rockwood Park's* last signal was heard by only one man out of the whole crew on the *Lora Grace Peter,* and he said he "didn't think it was near". Yet the ships were then only a little more than 100 feet apart.

Almost instantly the Master of the *Lora Grace Peter* grabbed his whistle and blew, but that signal was only heard by one man out of the men on duty on or near the bridge, and he said he "*thought* he heard a whistle". And the evidence from the *Rockwood Park* was that the distance between the ships was then 100 feet.

It is difficult to understand why this was so, but as *Marsden* states at page 46,—" 'The vagaries of sound in a fog', it has been said by nautical men of experience, 'are of a most astonishing character.' "

On those facts here there can be no presumption that if the *Lora Grace Peter* had given a signal one minute before the alarm that it would have been heard by the *Rockwood Park.* On the contrary, the logical inference is that it would not have been heard.

The evidence does not, therefore, establish that the fault of the *Lora Grace Peter* contributed to the collision. As Viscount Finlay said at page 71, in referring to the *Peter Benoit case,* (1):—

> It was there laid down that only faults which contribute to the accident are to be taken into account for this purpose. The existence of fault on the part of one of the ships is no reason for apportionment unless it in part caused the damage.

Moreover the contention of the appellant is based on the assumption that the *Lora Grace Peter* did not signal one minute before the alarm. And if that warning had been given the *Rockwood Park* would have heard it and would have had 820 feet additional in which to manoeuvre. But

(1) 13 Asp. M.L.C. 203.

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there is no evidence as to the interval between the last signal of the *Lora Grace Peter* and the alarm sounded by her. It may have been sounded within five seconds or three seconds, or one minute before the alarm.

The difference in the signals under Articles 15(*e*) and 9(*h*) respectively, except as to the interval between signals, is not material. Both signals indicate a vessel unable to manoeuvre and were appropriate to the occasion, because they indicate what fog signals are intended to indicate, viz., that another ship is in the vicinity. They are not signals relating to vessels in sight of one another. In this case either signal, if heard, would have warned the *Rockwood Park* that the *Lora Grace Peter* was in the vicinity and unable to manoeuvre.

The onus was on the appellant (defendant) to establish that the failure of the *Lora Grace Peter* to sound the proper signal did contribute to the collision, and in my opinion that burden was not discharged.

In my opinion the learned trial Judge has drawn the proper inference from the evidence.

The appeal will be dismissed with costs.

Judgment Accordingly.