BRITISH COLUMBIA ADMIRALTY DISTRICT

1929
April 15-17.
May 22.

FRED OLSON AND COMPANY..........PLAINTIFF;

v.

THE *PRINCESS ADELAIDE*...........DEFENDANT;

AND

THE CANADIAN PACIFIC RAILWAY COMPANY .... PLAINTIFF;

v.

THE *HAMPHOLM* ....DEFENDANT.

Shipping—Collision—Article 18 of Regulations—Fog—Canada Shipping Act—Maritime Convention Act (R.S.C., Ch. 126)

A collision occurred at 11.14 a.m. on December 19, 1928, in Burrard Inlet, Vancouver Harbour, B.C., between the *H.* inward bound and the *P. A.* outward bound. The weather was calm but with a dense fog and the tide at last of flood. The *P. A.* was running at 12 knots an hour on a course of S.W. ¾ S., which she held till the collision was imminent. She stopped her engine half a minute before collision upon hearing the fog whistles from a tug to port, and again from a ship to starboard, which turned out to be the *H.*, which was first seen emerging from the fog about 300 feet away, between 2 and 3 points on her starboard bow. She thereupon put her helm hard astarboard with full speed ahead, and the stem of the *H.* cut into her on the starboard side, a little forward of amidship. She was still swinging at moment of impact, with a speed of 11 knots. The *H.* passed Pt. Atkinson at 10.05 on a course of E. by N. at a speed of 4 knots, but shortly after decided not to try to enter the narrows, but to proceed cautiously by "slow ahead" and "stop" alternatively to usual anchorage in English Bay, altering her course at 10.25 to E.N.E. decreasing speed to 3, then 2 knots, and owing to signals of other vessels, again at 10.50 changed to E.S.E. giving proper signals. On this course, as early as 11.12 a.m. she heard the *P. A.'s* signals about 5 to 6 points on her port bow, upon which she stopped her engine and blew her whistle. This was answered by the *P. A.*, and after exchange of 3 or 4 whistles, the *P. A.* emerged about 3 or 500 feet

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away heading for the *H.*, or at least, across her bow. The *H.* reversed full speed, put her helm hard a-port, but too late to avert the impact. The *H.* knew she was crossing the main stream of traffic.

Held,—That, on the facts, both vessels were to blame, but that as there was a great distinction between the conduct of the two vessels, the *P. A.* having deliberately violated the Regulations in a gross degree, and the *H.* having erred in the manner of endeavouring to carry them out, they were not equally to blame, and the "degree of fault" was fixed at $\frac{2}{3}$ and $\frac{1}{3}$ respectively.

2. That as to the costs in these cases of unequal apportionment, the Court has an "unfettered discretion" over them, and the Court condemned the *P. A.* to pay $\frac{2}{3}$ of the cost in both actions and the *H.* $\frac{1}{3}$ thereof. [*The Young Sid* (1929) 45 T.L.R. 389 (C.A.) referred to.]

3. That in fog, article 16 not only requires a ship's engines to be stopped when the "circumstances admit" of it, but also to "then navigate with caution until danger of collision is over," and that such navigation includes the prompt reversal of her engines to take her way off to a standstill or get her way on astern as may be necessary, and such manoeuvres come with the "precautions" prescribed in general for the "ordinary practice of seamen," etc., in Article 29.

ACTIONS by the owners of the ships in question to recover damages occasioned by collision between the said vessels.

The action was tried before the Honourable Mr. Justice Martin at Vancouver.

Martin Griffin, K.C., and *Sydney Smith* for the ship *Hampholm.*

J. E. McMullen and *M. M. Greaves* for the *Princess Adelaide.*

The facts are stated in the reasons for judgment.

MARTIN L.J.A., now (May 22, 1929), delivered judgment.

This is an action by the owners of the Norwegian freighter SS. *Hampholm* (length 395, beam 52, gross tonnage 4,480, registered 2615, Anton Markussen, Master), against the high-powered passenger SS. *Princes Adelaide* (Hunter, Master) for damages caused by a collision between those vessels in Burrard Inlet (English Bay) about three miles S.W. of the entrance to the First Narrows (Prospect Bluff) on the 19th December, 1928, at about 11.14 a.m. There is also a cross-action by the *Princess Adelaide* against the *Hampholm* for damages arising out of the said collision and by consent both actions are tried together.

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At the time of collision the weather was calm but with a dense fog and the tide at the last of the flood. According to the admission of the *Princess Adelaide's* master she was running through the fog after she left the Narrows at a speed of twelve knots on a course which her Master says was S.W. $\frac{3}{4}$ and he marked it on the Admiralty Chart, Ex. 1, and he also says, and there is no sound reason to doubt that statement, that he did not change that course till the collision became imminent. He had stopped his engine about half a minute before the collision upon hearing the fog whistles from a tug to port and then, again, from a ship to starboard that turned out to be the *Hampholm,* which he first saw emerging from the fog at a distance of about 300 feet, between 2 and 3 points on his starboard bow, and tried to clear her by putting his helm hard-a-starboard with full speed ahead but it was too late to avoid the collision, the stem of the *Hampholm* cutting into the *Adelaide* on her starboard side, a little forward of amidships, as shown by the position of the models on Ex. 4, which is admitted by both parties to be substantially correct. At the moment of impact the *Adelaide* was still swinging with a speed of at about 11 knots at least to avoid the *Hampholm,* which still had, I am satisfied, upon the conflicting evidence on the point, a slight amount of way on her when she sighted the *Adelaide* but not exceeding $1\frac{1}{2}$ knots; her preliminary act admits she had "steerage way only."

At the conclusion of the evidence, but not before, counsel for the *Princess Adelaide* admitted that she had committed (as was obvious from the start) a breach of Article 16 of the Collision Regulations, which has frequently been considered and expounded in this Court, *e.g.,* in *Pallen* v. *The Iroquois* (1), and *The Tartar* v. *The Charmer* (2), and *The Belridge* v. *Empress of Japan* (3); it was indeed, in all respects what is called a "gross breach" of said Article without any extenuating circumstances. *The Clackamas* v. *The Cape D'Or* (4).

It is submitted, however, that the *Hampholm* was also to a substantial degree in default in that she did not sooner reverse her engines so as to come to a standstill, and that under the circumstances of no wind there, sea current, or

(1) (1913) 18 B.C.R. 76.
(2) (1907) Mayer's Ad. Prac. 536.
(3) (1917) 3 W.W.R. 961.
(4) (1926) S.C.R. 331, at p. 336.

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channel there was nothing to prevent her from so doing in safety, and that if she had done so the collision would have been avoided or its results minimized to an inappreciable degree. This submission is based on the assumption that the *Hampholm* became in ample time fully aware of the unascertained and dangerous position of the *Adelaide,* within Art. 16 but neglected "to navigate with caution until danger of collision (was) over."

By 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 *Hampholm,* inward bound, to the Narrows, at 10.05 had passed and seen Point Atkinson, half a mile off, on a course E. by N. at a speed of about 4 knots but shortly afterwards in view of the density of the fog had decided not to attempt to enter the Narrows but to proceed cautiously, by "slow ahead" and "stop" alternatively, to the usual anchorage in the southerly part of English Bay, which was in general the proper action to take in the circumstances, and to do so she altered her course at 10.25 to E.N.E. and continued on it at a decreasing alternate speed down to about 3 and 2 knots and finally owing to the signals of other vessels, again changed her course, at 10.50 to E.S.E. giving the proper signals and taking soundings.

While on that course, and at least as early as 11.12, she heard the signal of another vessel (which turned out to be the *Adelaide*) about 5-6 points on the port bow, upon which she stopped her engines and blew her whistle to which the *Adelaide* replied, and after another exchange of whistles, and when the *Adelaide* was whistling for the third time (if not the fourth, as the *Hampholm's* Master gives it), she almost immediately emerged from the fog, at a distance of about 3-500 feet, and apparently heading almost directly for the *Hampholm,* or at least across her bow, upon which the *Hampholm* reversed her engines full speed and put her helm hard-aport but too late to avert the impact, as already noted. The Master of the *Hampholm* says he was struck by the *Adelaide* less than "half a minute" after sighting her.

The real point pressed is that on the *Hampholm's* own statement of facts she knew at least two minutes before

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the collision that she was in a position of danger from an " unascertained " out-going ship continuing to approach on the same S.W. course (5-6 points on her port bow) without broadening, and such being the case it is submitted that the requirements of " navigating with caution " under said Art. 16, and taking " any precaution which may be required by the ordinary practice of seamen or by the special circumstances of the case " under Art. 29, were not observed by merely stopping her engines but that she should have promptly taken her way off entirely, as aforesaid.

According to the Master of the *Hampholm* when his ship was on her final course, immediately preceding the collision, she was going so slowly that he could have brought her to a standstill within 30 feet, but he gives no satisfactory, if any, explanation why he did not, after hearing the *Adelaide's* second whistle at least, which indicated her continued approach in the same direction of " risk ", then reverse his engine and take her way off as he had done shortly before in safely working past another vessel to port, also coming out from the Narrows, which he could not see. Both the pilot and the Master admit they knew they were crossing the main stream of traffic through the Narrows in going to the said southerly anchorage and expected to meet vessels, and hence the situation was obviously one requiring the exercise of much caution as is always the case when a ship is on the final approach to the narrow entrance of a great sea port such as the one in question.

Art. 16 not only requires a ship's engines to be stopped when the " circumstances admit " of it (as they did unquestionably here) but after that is done the Article goes on to require her to " then navigate with caution until danger of collision is over," and that such navigation includes the prompt reversal of her engines to take her way off to a standstill, or get her way on astern, as may be necessary, is beyond question, and such manoeuvres come with the " precautions " prescribed in general for the " ordinary practice of seamen, etc.," in said Art. 29, which expression is defined by Sec. 894 of the Canada Shipping Act, Cap. 186, R.S.C., 195, and:—

means and includes the ordinary practice of skilful and careful persons engaged in navigating the waters of Canada.

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And it was decided by our National Supreme Court that "all these regulations must be read together as one Code"—*The Arranmore* v. *Rudolph* (1).

The cases are two numerous to cite, both under the present Articles and the former ones, 13 and 18 (which contain no essential difference in their practical requirements of good seamanship) in which it has been held that the question of whether approaching vessels in a fog should not merely stop their engines but also their way, or reverse their engines, is something to be decided under the circumstances of each case, but without going back unnecessarily far the following decisions may, *e.g.*, be usefully referred to:—*Smith* v. *St. Lawrence Tow-Boat Co.* (2); *The Ceto* (3); *The Dordogne* (4); *The Heather Belle* (5); *The Knarwater* (6); *The Cathay* (7); *The Oceanic* (8); *The Britannia* (9); *The Aras* (10); ("practically stopped in the water," p. 33); *The King* (11); (excluding also the application of Art. 19 in fog); *United States Shipping Board* v. *Laird Line Ltd.* (12); *The Clara Camus* (13); *The Union* (14), in which last Bateson J., said:—

> In my view the meaning of the rule is that the engines must be stopped and the way run off the ship. Perhaps then you may go on again if you have heard nothing else but the one whistle from the other ship, although, if nothing more has been heard at all, I doubt very much if you are justified in going on until you do, or can be reasonably sure that there is no risk. At any rate, the proper course is to bring the ship as nearly as possible to a standstill before going on.

The Clackamas case, supra, has also valuable observations on the point, and it was very recently considered in *Eastern S.S. Co.* v. *Canada Atlantic Transit Co.* (15), a case in this Court from its Toronto District.

It would not be profitable to discuss these decisions but it should be noted that the leading one of the House of Lords in *The Ceto, supra,* is usefully considered and explained by the Court of Appeal in *The Knarwater, supra,* in applying the rule laid down by *The Ceto* and the importance of the "indication" as to the "broadening" of the

(1) (1906) 38 S.C.R. 176, at p. 185.
(2) (1873) L.R. 5 P.C. 308.
(3) (1889) 14 A.C. 670 (H.L.)
(4) (1884) 10 P. 6.
(5) (1892) 3 Ex. C.R. 40.
(6) (1894) The Rep. 784.
(7) (1899) 9 Asp. 35.
(8) (1903) 88 L.T.R. 303.
(9) (1905) P. 98.
(10) (1907) P. 28.
(11) (1911) 27 T.L.R. 524.
(12) (1924) A.C. 286.
(13) (1926) 17 Asp. 171.
(14) (1928) P. 175.
(15) (1928) Ex. C.R. 129 at p. 132.

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whistles of the approaching vessel is unanimously emphasized; Lord Esher said, p. 788:—

> If the second whistle was not broader on the bow, all that it indicated to him was that the vessels were coming nearer to each other, which made it more necessary that he should stop his vessel. It is only if he proves that the whistle was in fact broader that he will be enabled to erect his case at all. Did he prove that it broadened? . . . There is no evidence that it did broaden, that the course of the other vessel was such as to make it broaden. . . . He has failed to prove to any of us that the second whistle was broader than the first. If he has failed to prove that then the foundation of his justification or excuse is gone. That he "thought so" is not enough.

And Lord Justice Davey said, p. 790-1:—

> The rule which we have to apply to such a case as the present has been laid down for us in the judgment in *The Ceto* in the House of Lords, Lord Herschell says that "when a steamship is approaching another ves- in a dense fog she ought to stop, unless there be such indications as to convey to a seaman of reasonable skill that the two vessels are so approaching that they will pass well clear of one another."

After examining the evidence for the "indications" he proceeds:—

> It appears to me that we cannot act on the captain's suggestion, even though it is confirmed by his mate, that he thought the second whistle was a little broader. I think there must be some foundation for that, because of the impression which it left in the captain's mind, and if the evidence shows that it did present that appearance to the captain's mind, and still there was no foundation in fact for thinking that the second whistle was a little broader, we can only come to the conclusion that the statement made by the captain is incredible or else that he was a negligent observer. There being, in fact no indications which would justify a man in the impression that there was no danger of collision between the two vessels, we must hold that it was the captain's duty to have stopped, and if necessary, to have reversed his engines. Indeed, on that point we are not left in much doubt, because the captain, in cross-examination, said that if he was mistaken in thinking that the second whistle was not broader he would have stopped his engines at that second whistle. I think, therefore, that the burden of proof, being on *The Knarwater,* she has not satisfied it, and we must hold that she, as well as the other vessel, was to blame for the collision.

And Lord Justice Lopes to the same effect.

Applying all the foregoing to the facts of this case I can only reach the conclusion, after giving much thought to the matter (because it "involves considerations of general importance," as Lord Watson said in *The Ceto*) that the *Hampholm* did not "navigate with caution" after, at least, she heard the second whistle of the *Adelaide* and thereupon should have realized that as it showed no indication of broadening the danger was imminently increasing. The person in charge of the *Hampholm* was not placed in the

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"agony of collision" so that he had not even that inevitably short interval for "his mind to grasp the situation and to express itself in an order" (as was *said in the U.S. Shipping Board case, supra,* 290 in a space of three seconds) but he had at least one half a minute to give that proper order to reverse the engines which his mind should have been on the alert for, if necessary, after hearing the first whistle, and had that order been given there is no doubt that either the *Adelaide* would have swung clear or at the worst a scraping only would have resulted with little if not trifling damage. Such being the case it becomes necessary to apportion the liability for the damage "in proportion to the degree in which each vessel was in fault," as the Maritime Conventions Act declares, cap. 126, R.S.C., Sec. 2.

This is usually far from an easy matter to do satisfactorily, and Lord Shaw in the *Clara Camus, supra,* recently referred to it thus (p. 173):—

There may be a danger in these cases of error in refinement and ultra analyses in what is at best a highly difficult exercise, viz., the quantification of cause by the quantification of blame. It is clear, to my mind, that a mere enumeration of errors or faults goes no distance to satisfy the case, and forms no safe prescription of any rule of quantification. For many errors or mistakes on minor incidents or in minor particulars (although none of them could have been ruled out of the category of causes contributory to the result) may be completely outweighed in causal significant by a single broad and grave delinquency. One error of the latter kind may have done more to bring about the result than ten of the former.

And I refer also to the cases on the point cited and applied by me in this Court in *The Belridge* v. *The Empress of Japan, supra,* particularly the observations of Lord Sumner in *The Peter Benoit* (1), and dealing with the present case in their light and "having regard to all (its) circumstances" as the Act directs, I apportion the liability for "degrees of the fault" as two-thirds on the part of the *Princess Adelaide* and one-third on that of the *Hampholm;* there is a great distinction between the conduct of the two vessels, the former deliberately violated the Regulations in a gross degree and the latter erred in her manner of endeavouring to carry them out.

(1) (1915) 13 Asp. 203 (H.L.).

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As to the costs in these cases of unequal apportionment, it has just been held in *The Young Sid* (1), that I have an "unfettered discretion" over them, and in the exercise of it I award two-thirds of them in both actions to the *Hampholm* and one-third to the *Princess Adelaide*. There will be the usual reference to the Registrar with merchants to assess the damage.

Judgment accordingly.