ON APPEAL FROM THE TORONTO ADMIRALTY DISTRICT

1928

Mar. 5.
April 11.

EASTERN STEAMSHIP COMPANY LIMITED,
(DEFENDANT) APPELLANT AND RESPONDENT;

AND

CANADA ATLANTIC TRANSIT COMPANY,
(PLAINTIFF) RESPONDENT AND APPELLANT.

Shipping—Collision—Navigating with caution—Fog—Speed—Lookout—Change of course—Appeal—Evidence

Held (by the Trial Judge), that the absence of the master from the bridge in a dense fog, when fog signals are heard around, and the lack of a properly stationed lookout when the vessel is under way in a fog is *prima facie* negligent navigation.

2. That the rule relating to travelling in a fog overrides and controls rule 21, when a case arises in which these two rules come into conflict.

3. That the Maritime Conventions Act, 1911, not being in force in the Great Lakes, or above Lachine Canal, the Court is not called upon to minutely analyze every circumstance relating to the proportion of fault in the case, if in broad outline both ships are found to be to blame, as each must bear half the damage.

4. That the general rule is, apart from statutory provisions, that a statement previously made by a witness, whether on oath or not, has no evidential value in the case, unless it is acknowledged at the trial by the witness as being a true statement, whereas if he repudiates it, it can form no part of the testimony in the case; but that rule of evidence does not prevent the judge or jury from drawing, from other facts of the case, including the circumstances in relation to the origin and making of the statement, as well as the mode and reason for its denial, an inference consonant therewith.

Held (by the Trial Judge and on Appeal) that in a fog when one vessel cannot see another which is approaching from a point apparently not more than four points from right ahead, and is unaware of the actual course of that other, changing direction is not "navigating with caution."

2. That speed in a fog which disables a vessel from avoiding another after it is seen should be deemed to be an excessive speed.

Held, On appeal (affirming the judgment appealed from) that where an appeal is taken from a local Judge in Admiralty to the Exchequer Court, presided over by a single judge, the latter should not interfere with the holding of the trial Judge on questions purely of fact, unless he comes to the conclusion that such findings are clearly erroneous. It is generally the duty of an appellate Judge to leave undisturbed a decision of which he does not clearly disapprove.

2. When vessels are travelling in dense fog and especially when hearing their respective fog signals not more than four points from right ahead, a speed of more than "bare steerageway" is excessive.

3. Where, from the fog signals, a vessel places an approaching vessel not more than four points from right ahead, on her starboard and where

1928

EASTERN STEAMSHIP CO., LTD. v. CANADA ATLANTIC TRANSIT CO.

said vessel has given the one blast signal (I am directing my course to starboard) twice. if she is keeping her course and speed, and deems the signal injudicious, it is her duty to give the danger signal and to reduce her speed to bare steerageway, and if necessary even to stop and reverse.

Appeals by both plaintiff and defendant, separate and distinct appeals, from the judgment of the Honourable Mr. Justice Hodgins, Local Judge in Admiralty for the Toronto Admiralty District, which found both vessels to blame for a collision between the plaintiff's steamer *Dalwarnic* and defendant's steamer *Grammer*.

The appeals were heard before the Honourable Mr. Justice Audette, on the 5th day of March, 1928, at Ottawa.

Francis King, K.C., and *J. P. Pratt* for the *Dalwarnic*.
S. C. Wood, K.C., and *G. S. Jarvis* for the *Grammer*.

The facts are stated in the reasons for judgment of the Honourable Mr. Justice Audette and Mr. Justice Hodgins, which follow.

AUDETTE J., now (April 11, 1928), delivered judgment.

This is an appeal from a judgment, of the Local Judge of the Toronto Admiralty District, pronounced on the 10th January, 1928, in an action arising out of a collision in a dense fog, on the 31st day of May, 1926, at 5.30 a.m., between the plaintiff's steamer *Dalwarnic* and the defendant's steamer *Grammer*. The *Dalwarnic* suffered injuries and the plaintiff sues for the damage done to that vessel while the defendant counterclaims for the loss and damage suffered by the *Grammer* which was sunk.

The details of the accident are clearly set out in the reasons for judgment of the learned trial judge and I feel therefore relieved from the necessity of repeating them here on appeal (1).

After reading the evidence and hearing counsel for all parties upon these issues, I am forcibly led to the same conclusion as that arrived at by the trial judge.

Moreover, sitting as a single judge, in an Admiralty Appeal from the judgment of a trial judge, while I might

(1) *Note:* The Reasons for Judgment of Hodgins L.J.A. are printed below.

differ in matters of law and practice, yet as regards pure questions of fact, I would not be disposed to interfere with the judge below unless I came to the conclusion that his finding was clearly erroneous. It is generally the duty of an appellate judge to leave undisturbed a decision of which he does not clearly disapprove.

Lord Langdale, in *Ward* v. *Painter* (1), said upon this point:

> A solemn decision of a competent judge is by no means to be disregarded, and I ought not to overrule it without being clearly satisfied in my own mind that the decision is erroneous.

See also *The Queen* v. *Armour* (2); *Montreal Gas Co.* v. *St. Laurent* (3); *Weller* v. *McDonald-McMillan Co.* (4); *McGreevy* v. *The Queen* (5); *Arpin* v. *The Queen* (6). Coutlee's Dig. S.C.R. 93.

The Supreme Court of Canada also held that when a disputed fact involving nautical questions (as raised in this case) with respect to what action should have been taken immediately before the accident, is raised on appeal the decree of the court below should not be reversed merely upon a balance of testimony. *The Picton* (7).

Moreover, it cannot be overlooked that the learned trial judge had an opportunity of hearing and seeing the witnesses and testing their credit by their demeanour under examination. *Rickman* v. *Thierry* (8). And in the present case, there is more: there is a finding by the trial judge with respect to five witnesses, whom he has seen in the witness box, to the effect that he cannot accept what was sworn to by them at the trial when it conflicts with any other evidence, and qualifying their course of action in relation to this case as highly discreditable. I indeed quite appreciate that the signing of the statements referred to at trial takes away any reliability to be placed upon their evidence. All of which must influence in confirming, apart from the fact that there is ample evidence for the trial judge to have arrived at his conclusion set forth in the judgment appealed from. I accept his finding of fact and more especially with respect to the speed of both vessels,

(1) (1839) 2 Beav. 85.
(2) (1899) 31 S.C.R. 499.
(3) (1896) 26 S.C.R. 176.
(4) (1910) 43 S.C.R. 85.
(5) (1886) 14 S.C.R. 735.
(6) (1886) 14 S.C.R. 736.
(7) (1879) 4 S.C.R. 648.
(8) (1896) 14 R.P.C. 105.

1928

EASTERN STEAMSHIP CO., LTD. v. CANADA ATLANTIC TRANSIT CO.

Audette J.

which is a controlling element in the circumstances of the case. There is evidence upon which the judgment appealed from could be maintained and an Appellate Court will not disturb such judgment. *Re Arnold Estate* (1). The engineer of the *Grammer* says at page 367, they never got dead slow on the night of the accident and the *Dalwarnic* stopped her speed and reversed only when the accident was inevitable.

I have, however, formed a distinct and personal opinion that both vessels, in dense fog and thick weather, were at fault in travelling as they were, at more than *moderate* speed, and more specially when hearing their respective fog signals not more than four points from the right bow ahead, to exceed a speed of bare *steerageway* as required by Rule 19. Both vessels were travelling at a speed which is excessive of that assigned by the Rules under the circumstances.

When the respective fog signals were given and when both vessels somewhat realized, as the evidence discloses that the sound of such signals was bearing on their respective starboard bow, there was no occasion in such a fog and position for the *Grammer* to cross the bow of the *Dalwarnic*, as she did, after changing her course twice to starboard, as indicated by the one blast signals.

There is no justification when two steamers are approaching one another in a dense fog, without sufficient indication to justify action, for either to alter their course. The *Bywell Castle* (2). Rule 19 provides that in such case you reduce your speed to bare steerageway. In each particular case, one must look to the circumstances, and in the present case each vessel should have kept her course and reduced her speed to bare steerageway or reversed and stopped. When these vessels heard the fog signal of each other that was the time to stop and proceed to navigate with caution. The *Grammer* was wrong in thus porting her helm and keeping her speed and the *Dalwarnic* was also at fault in keeping her speed under the circumstances instead of reducing it at the time of the fog signal to steerageway. *The Vindomora* (3).

(1) (1918) 44 D.L.R. 12. (2) (1879 4 P.D. 219.
(3) (1891) A.C. 1 at p. 4.

The most reasonable finding in *The Counsellor* (1), that as a general rule a steam vessel ought not to be going so fast in a fog that those in charge of her cannot pull up within the distance that they can see should find application to the circumstances of the present case, and had it been followed no collision would have happened as it is abundantly shewn. See also *The Ceto* (2); *The Ship Clackamas* v. *Owners of Schooner Cap d'Or* (3). A steamer in a fog should be able to stop within the limits of observation; and a speed such that another vessel cannot be avoided after being seen is excessive. *Smith* v. *McKenzie* (4) and cases therein cited.

There was fault in the *Dalwarnic* not answering this one blast signal repeated twice as she was keeping her course and speed. She acquiesced in a wrong course. If she deemed this one blast signal injudicious she should have protested by sounding the danger signal, reducing her speed to bare steerageway, and if necessary have then stopped and reversed—instead of stopping and reversing only when the collision was inevitable. Had she protested instead of acquiescing, both vessels would have passed safely green to green under these special circumstances, as provided by Rules 37, 38 and 22, and the accident would have been avoided.

The situation not being unlike the one provided by the "third situation" in Rule 38; that is, by their fog signal they ascertained they were practically travelling green to green. Keeping their course without making any change they were passing to starboard of each other, which is *rulable* in this situation,—and the *Grammer,* in this special circumstance, instead of giving one blast twice, announcing she was to cross the bow of the *Dalwarnic* to starboard, should have given a signal of two blasts instead,—or maintained her course, passing green to green. See Rules 37 and 38.

Had the *Dalwarnic,* as above mentioned, not approved by her silence of the *Grammer's* course, as indicated by her signals, or had she failed to understand her course and intention, she should have blown the "Danger Signal" (Rule 22); but approaching one another at any other rate of

(1) (1913) P. 70.
(2) (1889) 14 A.C. 670 at pp. 688, 693 and 695.
(3) (1926) S.C.R. 331
(4) (1917) 17 Ex. C.R. 493 at p. 498.

1928

EASTERN STEAMSHIP CO., LTD. v. CANADA ATLANTIC TRANSIT CO.

Audette J.

speed than steerageway thereby keeping full control of her own vessel is negligence under the circumstances. When the *Dalwarnic* stopped and reversed, it was too late, she had been travelling at too great a speed to retain control, and the accident had then become inevitable through her own fault and also, among others, in accepting the wrong manoeuvres of the *Grammer*.

If the Rules of the Road had been properly adhered to by both vessels there would have been no collision. It is unnecessary to further analyze the course of these vessels. What I have already said leads me inevitably to the conclusion that both vessels were at fault. Had they sought a collision by prearrangement they could not have devised a better course. They seemed rather to have been standing off upon rights wrongly assumed, than to have been actuated in doing what would avoid an accident. Indeed the Rules of the Road are not made only with the view of preventing collision, but also for preventing risks of collision. They should be adhered to with reasonable intelligence, and by the desire to avoid any risk of collision. Safety first. Both vessels were at fault.

Both appeals are dismissed with costs.

Reasons for judgment of Hodgins L.J.A., on the first trial.

HODGINS L.J.A., (February 17th, 1927), delivered judgment.

This action arises out of a collision which occurred in a dense fog on the 31st day of May, 1925, at 5.30 A.M. between plaintiff's steamer *Dalwarnic* and the defendant's steamer *Grammer*. The *Dalwarnic* received injuries and the plaintiffs sue for damage to that vessel, while the defendants counterclaim for the loss and damage to the *Grammer* which was sunk.

The outlines of the event are found in the preliminary acts which in case of fog are unusually important.

There was no wind and no sea and the vessels were about 9 miles north of and 3 miles west of 30 Mile Point on the south shore of Lake Ontario. The course and speed of the *Dalwarnic* when the *Grammer* was first seen are given as "S. 88 W. and almost stopped." That of the *Grammer* is "S. 53 E., dead slow, between 1½ and 2 knots." The dis-

tance and bearing of the *Grammer* from the *Dalwarnic* at the same point of time "About 150 feet well on the starboard bow" with red and mast head light showing, and that of the *Dalwarnic* from the *Grammer* as "About 300 feet off the port bow" and no lights were seen. The stem of the *Dalwarnic* and the port side of the *Grammer* between hatches 6 and 7 were in contact.

The plaintiffs preliminary act then describes the measures taken by her to avoid the collision thus:

> The *Dalwarnic* was being navigated with caution and her engines were checked to slow when the fog signals of the *Nisbet Grammer* were first heard, at 5.20 a.m. They were later stopped and then reversed at full steam; and the *Dalwarnic* was stopped or going astern when struck by the *Nisbet Grammer*. The *Dalwarnic* also blew proper fog signals.

It states the negligence attributed to the *Grammer* thus:

* * * *.

The measures taken by the *Grammer* to avoid the collision are stated in her preliminary act as follows:—

> The *Nisbet Grammer* had been checked to dead slow to pass another ship and was moving through the water at from one and a half to two knots when at about 5.30 a.m. the fog signals of a ship, which proved to be the *Dalwarnic*, were located apparently dead ahead. After an exchange of fog signals the *Nisbet Grammer* blew one blast passing signal and altered her course two points to starboard. The *Dalwarnic* did not reply to the passing signal but the two ships exchanged about five or six more fog signals and the *Dalwarnic* appeared to be drawing to port of the *Nisbet Grammer*. At about 5.27 a.m. the *Nisbet Grammer* blew another passing signal of one blast and altered her course two points more to starboard. The *Dalwarnic* did not reply to this passing signal except by a fog signal, and almost immediately thereafter appeared through the fog about three hundred feet off the *Nisbet Grammer's* port bow apparently heading so as to strike the *Nisbet Grammer* about midships. The engines of the *Nisbet Grammer* were immediately put full speed ahead, and her helm put hard starboard, so as to swing her stern away from the *Dalwarnic*, but the *Dalwarnic* struck the *Nisbet Grammer* with great force on the port side between hatches 6 and 7, inflicting such damage below the water line that the *Nisbet Grammer* filled and sunk. Immediately after the collision the engines of the *Nisbet Grammer* were stopped.

The vessels were steel, and canal size, the *Grammer* (length 263 feet) being lightly constructed, it is said, and each was loaded, the *Dalwarnic* with 1,300 tons of steel and the *Grammer* with 83,000 bushels of grain. The *Dalwarnic* (1,428 net tons and 256 feet 8 inches long) was proceeding from Kingston to Port Dalhousie and the *Grammer* from Port Dalhousie to Kingston. The latter ship had a freeboard amidships and forward of from 5 to 6 feet only.

1928

EASTERN STEAMSHIP CO., LTD. v. CANADA ATLANTIC TRANSIT CO.

Hodgins L.J.A.

It will be observed that the *Grammer* while in the fog and unable to see the *Dalwarnic,* made 2 turns of 2 points each to starboard, and came out with the *Dalwarnic* 300 feet away on her port bow. She then went full speed ahead with a hard starboard helm to swing to port, but failed to clear the *Dalwarnic.* It was contended that the *Grammer's* preliminary act showed she was to blame in making 2 turns to starboard while the vessels were unable to see each other in the fog or accurately to ascertain the heading, as this was not navigating with caution, and that passing signals in a fog are likely to mislead and cause danger and should not be used.

I think the first of these propositions is fairly obvious, and the argument in support of it sound. It has much authority here and elsewhere. Most of the decisions establishing it are to be found in the *Kamouraska Shipping Co.* v. *SS. Farah Head* (1), a judgment by the late Mr. Justice Maclennan, a case not dissimilar to this in several particulars. Apart from that there is evidence that the speed of the *Grammer* was not in accordance with Rule 19 of the Great Lakes Rules. See also Pilot Rule No. 14 of U.S.A. The Master of the *Grammer* was not on the bridge at the time of the collision, but was in his berth, the mate in charge not having called him until after the vessels had met.

It remains to be considered whether these factors or any of them caused or contributed to the collision.

[The learned judge here analyzed the evidence given by those on both ships, and continued.]

Admittedly, then, when she first heard the *Grammer,* the *Dalwarnic* was going 7 knots or at the best at least 5.7 miles per hour when she was checked to slow—not dead slow. The Master of the *Dalwarnic* admits that if each vessel was going slow (2 m.) and each approaching the other, it might take 5 minutes to draw together. As a matter of fact at 2 miles per hour, each vessel in five minutes would go over 800 feet, so that the distance traversed in that time would be some 1,600 feet or over a quarter of a mile. But when from 100 to 150 or even 300 feet apart it would take less than a minute for them to come together

(1) (1924) Ex. C.R. 37.

and with the accelerated speed of the *Grammer* even this short time did not elapse.

Taking the state of facts already given, as I do chiefly from the evidence of the Mate in charge, I think the *Grammer* must be found at fault in three respects, in that she altered her course in the fog before she had a view or definite knowledge of the *Dalwarnic's* position or heading, that she did not reduce her speed to bare steerage way, pursuant to Rule 19 but continued at too great a speed in a dense fog.

I also think she must be held blameworthy in that her Master was not on the bridge. Whatever the reason, his proper position was there, and the mate deliberately broke a custom which he and the Master knew to exist. Had he been in command the accident would probably have been avoided or at all events the defendant ship could not have been blamed for omitting a precaution so universally commended and adopted.

I find the *Dalwarnic* also to blame for proceeding at too great a speed through the fog and for some time before the collision and for neglecting to station a lookout at or near the bow of the vessel.

The fog in which these two vessels met was a dense one and had been so for some time, and there were other ships about—in fact they were in a well travelled track. The fog and their surroundings imposed on them an imperative obligation to conform to the rule which both Canada and the U.S. require to be followed in foggy weather by their lake navigators. Both vessels had been travelling through the fog at a rate of speed which was the reverse of safe, one at 5.7 miles and the other at 9 reduced at 5.10 to $4\frac{1}{2}$.

One was without a lookout and in both cases the men in charge and others were in the pilot house and no one was stationed out in the open to listen for fog signals. It is of course possible to hear them in a pilot house with the windows down but a position clear of all enclosures is much more likely to be of use under fog conditions than within walls.

If each of these vessels had at 5.20 a.m. when their whistles were audible to one another, been going at dead slow or 1 knot, just bare steerageway, they would have had twice the time to estimate their relative positions and to reverse with effect when they came into view. It is of

1928

EASTERN STEAMSHIP CO., LTD. v. CANADA ATLANTIC TRANSIT CO.

Hodgins L.J.A.

great importance that ships in a fog in busy waters should realize that undue speed may at any time bring them into serious difficulty, and that the absence of fog signals does not always make it safe to proceed at slow speed, which, at two miles an hour, gives a distance of 176 feet per minute. They may be confronted, as these ships were, with a condition quite easily handled but for the rapidity with which they found themselves moving over the water. This chance was taken by both vessels, as was that of proceeding without a proper lookout, or a lookout properly situated, and on one side there was the unnecessary and dangerous manoeuvre of changing course twice with the result that the vessels, instead of drawing together on courses crossing some distance behind the *Grammer*, became ships crossing each other's course. This is negligence or bad navigation. See *Canadian Pacific Railway Co.* v. *The Storstad* (1).

It was argued that passing signals such as the *Grammer* gave were not proper in a fog notwithstanding that Rule 21 begins with the words "In all weather." But a crossing case may occur complicated by fog or a fog case may develop a crossing case. So that it is impossible to say that passing signals are to be ignored. They indicate that a vessel is proceeding to starboard or port and once it becomes apparent by a momentary rift in the fog or in some other way what the course of the ship giving the signal is, they may become vitally important. I do not think this case calls for more to be said than that where a ship hears only the fog signals of another she can only get a vague and uncertain idea of her position, and none whatever as to whether she is coming, going, crossing or where her movements will bring her. Here the *Grammer* assumed to act upon her idea that the *Dalwarnic* was coming on a course which would bring the vessels port to port and thought to give herself more distance, with the result, that having mistaken the course or angle of the ship's bearing she precipitated a collision to which her own undue speed and that of the *Dalwarnic* contributed. In *China Navigation Co.* v. *Commissioners, etc. (The Chin Kiang)* (2), the Privy Council has said,—

(1) (1915) 17 Ex. C.R. 160. (2) (1908) A.C. 251 at p. 259.

It was notorious that it was a matter of the very greatest difficulty to make out the direction and the distance of a whistle heard in a fog, and that it was almost impossible to rely with certainty on being able to determine the precise bearing and distance of a fog signal when it was heard, . . .

Both vessels being in the fog, and unseen by the other, the rule I have referred to would apply. The speed before the *Dalwarnic* heard the *Grammer* was too fast (5.7 m.) at which to proceed in a dense fog as was that of the *Grammer,* and slow speed (2 m.) after the vessels were conscious of each other, was not, under the circumstances, navigating in accordance with Rule 19, which requires that a steam vessel bearing, apparently not more than 4 points from right ahead, shall at once reduce her speed to bare steerage way and navigate with caution until the vessels shall have passed each other.

Sir M. Begbie, C.J. L.J.A., in *The Zambesi* (1), discusses this question in this way:

It is true, every vessel—steamer or not—has a right to keep herself safe; she cannot be safe unless under command; she cannot be under command unless she has steerage way; and therefore, it is certain that even the statute permits, and, indeed, compels, a steamer to make some progress through the water. The rate of progress, therefore, alone is in question. Now, as the assessors point out, the *Zambesi* had for three-quarters of an hour, on that very night deemed it quite safe, as far as here own navigation was concerned, to go dead slow. And if she had been going at that rate when the loom of the *Dutar* was first seen, I should have pronounced her free from blame. But she was at that time going half speed. This was an unnecessary rate for her own safety, and she must, unfortunately, stand to the consequences of having exceeded it.

In the *Glackamas* v. *Cap d'Or* (2), Newcombe, J., speaks of a rule which he says has frequently been enunciated and is well established by authority—namely that speed such that another vessel cannot be avoided after being seen is excessive. The distance between the two ships here was, according to the *Grammer's* evidence, some 300 feet, and according to that of the *Dalwarnic* 100 feet to 150 feet. At slow speed (2 m.) the distance travelled in a minute is 176 feet and as one is approaching the other they would come together when each had travelled 88 feet. Avoidance of disaster under the circumstances existing in this case after changing the course of the *Grammer* while in ignorance of the exact position and direction of the *Dalwarnic* was was almost if not quite impossible.

There is in this case the fact that on the courses sworn to by each ship which were approaching each other when

(1) (1891) 3 Ex. C.R. 67 at p. 69. (2) (1926) S.C.R. 331.

1928

EASTERN STEAMSHIP CO., LTD. v. CANADA ATLANTIC TRANSIT CO.

Hodgins L.J.A.

their mutual signals first became audible, they would have in all likelihood passed clear, and that by the successive changes to starboard made by the *Grammer* that vessel was brought right into the path of the *Dalwarnic*.

I regret that the Maritime Conventions Act, 1911, is not in force here because I feel that the largest share of the blame for the collision must rest on the *Grammer* owing to her changes of course in the fog.

But while that is so, it is equally true that both vessels were proceeding at too great a rate of speed under the circumstances, and that before and particularly when the passing signals were heard the Master of the *Dalwarnic* realized that another ship was ahead and crossing his course. Had the *Dalwarnic* and the *Grammer* been proceeding with bare steerageway as was their duty and the Mate of the *Grammer* had then reversed, he could, he says, have stopped in his own length. This chance that he neglected could only have been useful if the *Dalwarnic* had been proceeding similarly and if as her Master says that he could have got from slow to full stop in 52 seconds judging by his test, there might have been no collision. As it was, both ships on emerging into each other's view were travelling too fast to overcome their momentum and avoid coming together.

The disregard by both vessels of the provisions of Rule 19 is an essential element in the question of blame and in my judgment contributed in each case to the disaster,, though in the case of the *Dalwarnic* no other fault (except as to her lookout) can be attributed to her after 5.20 a.m. either in her dealing with the passing signals or in doing what she did to avoid contact though prevented from succeeding by her then momentum.

I cannot bring myself to the conclusion that either vessel when in view of the other could have avoided the accident by a different handling of the situation. The *Grammer* tried full speed ahead and a swinging course to clear and the other ship a movement astern.

The one aggravated the rate of speed and probably produced the serious injury she suffered while the *Dalwarnic* was at slow speed making substantial progress forward and so met the other's blow with more resistance than would have occurred had she been barely moving.

Of the cases to which the learned Judge in the Supreme Court of Canada makes reference, I may quote two. *The Oceanic* (1), and the *Counsellor* (2). In the former Lord Halsbury says (in reference to the English rule which requires a stop and then cautious progress):

> 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 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 commonsense thing would be to stop until the direction was ascertained, and also whether it was possible to avoid the serious danger which might arise.

In the latter case, Bargrave Deane, J., states the rule thus:

> I think a very fair rule to make is this, and it is one which has been suggested to me by one of the Elder Brethren: You ought not to go so fast in a fog that you cannot pull up within the distance that you can see. If you cannot see more than 400 feet you ought to be going at such a speed that you can pull up. If you are going in a fog at such a speed that you cannot pull up in time if anything requires you to pull up, you are going too fast. If you cannot retain steerage way at such a speed, then you should manage by alternately stopping and putting the engines ahead.

The rule has been enforced in cases later than those referred to. *In Tarrasa* v. *Channel Trader* (3), Hill, J. says:

> Then, I think each is to blame for speed. I take the case of the *Channel Trader* first. She ran into fog at a speed of between eight or nine knots. The fog was so dense that from the bridge they could hardly see the man on the lookout 100 feet away. In such circumstances, it is vital that the ship, being under an obligation to travel at a moderate speed in fog, should at once do anything that can be done to comply with that obligation. At least the engines should be stopped to let the way off. That was not done. It is said that the engines were rung to dead slow by a double ring. There is no indication of that in the engineer's log; it only records "slow." But, even assuming it were so, that in such a fog and in such a locality, was not doing that which should be done.

In Canada the rule has been enforced in more than one case. Maclennan, L.J.A. in *Smith* v. *Mackenzie* (4), said

> By article 16 of the Rules of the Road the steamer was obliged to go at a moderate speed, having regard to the existing circumstances and conditions. The meaning of this rule has been very frequently considered by the Courts and I think it is absolutely settled by the Court of Appeal

(1) (1903) 88 L.T.R. 303.
(2) (1913) P. 70.
(3) (1922) 13 Ll. L.R. 307.
(4) (1917) 17 Ex. C.R. 493 at p. 497.

1928

EASTERN STEAMSHIP CO., LTD. v. CANADA ATLANTIC TRANSIT CO.

Hodgins L.J.A.

and by the House of Lords, that you ought not to go so fast in a fog that you cannot pull up within the distance that you can see, and if you are going in a fog at such speed that you cannot pull up in time if anything require you to pull up you are going too fast. A steamer should be able to stop within the limit of observation and, as a general rule, speed such that another vessel cannot be avoided after being seen is excessive.

As early as 1892 it was laid down in the *Heather Belle* (1), that

> The word "moderate" in art. 13 is a relative term, and its construction must depend upon the circumstances of the particular case. The object of this article is not merely that vessels should go at a speed which will lessen the violence of a collision, but also that they should go at a speed which will give as much time as possible for avoiding a collision when another ship suddenly comes into view at a short distance. It is a general principle that speed such that another vessel cannot be avoided after she is seen is unlawful.

The nature of the damage was much emphasized on both sides as indicating the direction of the blow and the speed of the vessels. I have examined with care and attention the photographs and diagrams and considered as well the examination of the so called experts on the subject and I am satisfied that no real deduction can be made from the appearance of the actual damage in the absence of satisfactory evidence as to the nature, character and extent of the injury to the *Grammer*. It is rather odd that in two other cases similar damage occurred where the stem was also folded back and in neither of those cases was an experienced Judge able to use it as the decisive factor as to speed though treating it as some evidence on that point, *Wimborne* v. *Cheniston* (2), the *Robert Keoppen* (3). In those cases both vessels were in evidence on this point. But in the *Empress of Ireland* inquiry the same sort of injury occurred (p. 530/1 of Record of Enquiry) and those pages indicate the difficulty felt by the Commission and Counsel in formulating any reasonable theory based simply on the condition of one vessel's stem after striking, or being struck by another moving vessel, which had itself disappeared and could not be examined or compared.* * * *

The Court is not called on to deal with every circumstance in the case if in broad outline both ships are found to be to blame, because as I have stated, the rule under the Maritime Conventions Act is not in force on the Great Lakes and the exact proportion of blame which often de-

(1) (1892) 3 Ex. C.R. 40.
(2) (1921) 9 Ll. L.L. Rep. 496.
(3) (1926) 24 Ll. L.L. Rep. 289.

mands minute analysis, does not necessarily need to be established. The Court, however, cannot ignore the sequence of each event, which may lead to absolving one or other altogether, if the collision could have been avoided by some action which might have been taken by one of them. I do not see anything in this case giving rise to any such suggestion. * * *

There were some 7 diagrams produced on behalf of the defendants during the argument and used as illustrating Mr. Wood's argument. To avoid misunderstanding I may say that they are no part of the evidence in the case, and as I view the evidence at the trial, are in some important respects inaccurate.

I refuse Mr. Wood's application to amend the statement of defence as follows:

Para. 3—delete the words "apparently heading so as to strike the *Nisbet Grammer* about amidships" and substitute the words, "swinging to port under a starboard helm."

Delete the words "did not alter her course or speed" and substitute "continued to swing to port."

I do so because, while in Admiralty Jurisdiction amendments are generously allowed, this amendment is a serious departure from the allegation in the preliminary act and does not represent, in my view, the effect of the evidence given at the trial.

My judgment is that I must find both ships to blame for the collision and I direct that it be referred to the Local Registrar of this Court in Toronto to ascertain the damages on both sides. Each party will pay his own costs of action and counterclaim. Further directions and the costs of the reference will be reserved until after the Registrar has made his report.

* * * *

[Both parties having appealed from this judgment to the Exchequer Court, the case was upon motion of plaintiff, sent back for new trial. The facts as elicited at the new trial are set out in the reasons for judgment which follows:]

HODGINS L.J.A., now (January 10, 1928), delivered judgment.

On the 13th, 14th and 15th December, 1926, and the 13th and 14th of January, 1927, I tried this action giving judg-

1928

EASTERN STEAMSHIP CO., LTD. v. CANADA ATLANTIC TRANSIT CO.

Hodgins L.J.A.

ment on the 17th of February, 1927, finding both the ships involved to blame. An appeal was taken to the learned President of this Court, coupled with an application for a new trial based on affidavits and statements attached thereto showing that members of the crew of the *Grammer* who testified before me had considerably varied their stories, as evidenced by the written statements. The motion for a new trial was granted and the appeal was not further proceeded with. No reasons were given for ordering a new hearing, beyond the fact that if a new trial were refused injustice might be done, so that the case comes again before me without any specific directions. Fortunately both parties were willing to use the evidence given at the former trial if supplemented as they might be advised. Had the defendants declined to give evidence at all on the new trial it might have been difficult for me to have given any judgment affecting their ship, for if the defendants' witnesses, who had recalled their former testimony, were to repudiate these later statements and were discredited by me, it would have left the case in a very difficult position with regard to a judgment against the defendant ship. As however, the former evidence was put in on both sides by consent and further testimony added, it is upon the whole of the evidence, both at the former trial and at this trial, that I give my present judgment.

At this trial five members of the crew of the *Grammer,* Kenneth Lang, the lookout, W. H. Sheppard, the wheelsman, Claude Deline the 2nd Engineer, Clarence Chaif, fireman, and Ernest Lowler, oiler, were put into the box by the defence for cross-examination by plaintiffs counsel and each and every one repudiated his statement in writing which had given rise to the new trial. They are not boys, their ages being given (except that of Sheppard) as 21, 24, 25 and 23 years, respectively, and they seemed to be quite intelligent and able to take care of themselves. Sheppard appears to be much of the same age as the others. The excuses for signing these statements, which affect vital parts of the evidence, were of the flimsiest possible character and betrayed an absolute indifference to truth and to the situation in which they had placed themselves. The reason, given by each and all, was, to quote the words of Deline, the second engineer, that two detectives bothered morning, noon and

night, until the statement was signed, and that it was signed so as to escape from them. All seemed to have agreed on this excuse. It is somewhat singular that the portions of each statement denounced as untrue were the vital parts and those as to which at the former trial, they had otherwise testified, so that the repudiation evidently had been carefully framed with a view of preventing any prosecution for perjury in connection with statements of fact made at the former trial. Each one professed to have given correct evidence on that occasion and that the statements as to the speed of the vessel and other material matters were incorrect, except where clearly unimportant.

It also appeared that these statements, although the witnesses stated that they were betrayed into making them through the constant endeavours of the two detectives, were nevertheless made later under circumstances of the utmost deliberation. They do not rest solely upon the signature of each of these five witnesses made in presence of the detectives, but were reiterated and recopied with full knowledge and plenty of time, in the offices of well known members of the Bar, Mr. A. B. Cunningham, K.C., of Kingston, in one case, Mr. Gideon Grant, K.C., in another, Mr. Arnold Wainwright, K.C., of Montreal, and Mr. Braid, of Windsor, in others. Under these circumstances it is not a matter of surprise that I am not able to accept what was sworn to by them at the former trial where it conflicts with any other evidence or where I am convinced from other testimony that the conclusion of fact should be contrary to what they had stated. I do discredit their evidence given at the former trial to that extent. The contents of these statements to which I have referred, are, of course, not evidence. Attention was called to this by Mr. Justice Newcombe in a recent case tried by me of *Ontario Gravel Freighting Co.* v. *Matthews SS. Co.* (1). What he pointed out was, of course, perfectly obvious. It has long been the law, that a statement of a witness previously made, whether on oath or not, has no evidential value unless acknowledged as true at the trial on the oath of the maker of the statement. If he repudiates it, it forms no part of the testimony in the case. But that rule of evi-

(1) (1927) S.C.R. 92.

1928

EASTERN STEAMSHIP CO., LTD. v. CANADA ATLANTIC TRANSIT CO.

Hodgins L.J.A.

dence does not prevent the judge or jury trying the case from drawing from the other facts of the case, including the circumstances in relation to the origin, the making and the mode and reason for the denying, of the statement, an inference consonant therewith. The case of *Rex* v. *John Williams* (1), a conviction for murder, is an illustration of this and, in view of the words of the learned judge in his charge, is apparently based upon the grounds I have stated. The witness there had previously testified to facts and circumstances as having happened on a certain day, which made them immediately relevant to the crime for which the prisoner was being tried. At the trial she repudiated that date and substituted another. The earlier date therefore was not one supported by any evidence, and the learned trial judge in charging the jury, charged them:

"Now she says that was not on the 9th, but was on the 8th. The question is which of those stories is true for this part of the case;" and "You have the two stories which she told, and the question is which of the two is true."

In the Court of Criminal Appeal, the learned Lord Chief Justice dealt with the charge in this way:

With regard to everything except the date she said the same before the jury as she did before the magistrates. To say that the judge, in the words that have been criticised, told the jury to decide simply whether the girl was telling the truth at the police court as to the date of the occurrences to which she spoke, is to put into the words used by the judge a meaning which the jury could not have put upon them, and is an unjust reading of the passage.

The decision of the Court is stated in the head note thus:

When a witness on a trial has varied the date of an event from that in his deposition, it is correct to direct the jury that it is clear that the event happened on one of the given dates, and that though they are not at liberty to assume the truth of the statements in the deposition without further evidence, yet they are entitled on the whole of the evidence at the trial to decide between the two dates.

I might, indeed, at the last trial, have drawn the conclusion, because of the two sudden changes of course to starboard in the fog and the speed at which the *Grammer* was seen to be going in making the rapid turn during which she collided with the *Dalwarnic*, that the *Grammer* had been in fact proceeding at a fast rate, and not at a slow one, through the fog, and that she had no need to accelerate on sighting the other vessel. If I did so now I would be drawing a conclusion entirely in accord with the statements on that

(1) (1913) 8 Cr. App. Cases. 133.

point, which were expressly withdrawn before me and which, therefore, are not evidence in the case. One might be fairly satisfied in his own mind that the truth was contained in the statements, and the untruth in the evidence given before and at the present hearing by these five witnesses, but that belief cannot be rested upon the contents of the statements themselves. The rate of the speed, however, is a fact, and an important and relevant one which must be dealt with and found, and the rule goes no further than I have stated. But I am not obliged in this case, to rest my judgment upon this reasoning, for I was and am still of opinion that whether the speed during the time in the fog preceding the collision was fast or slow, it was more than was allowable under the circumstances detailed in my former judgment.

[The learned Judge then discusses the evidence given at the second trial and its value as argued by counsel, and continues:—]

It would be difficult to absolve a ship from blame whose Master, in a fog and after hearing a passing signal from a quarter which made him realize that he was crossing a vessel's course, deferred his stop and reverse until he had heard a second passing signal instead of getting down to his lowest speed at once. The distance of the *Grammer* from the bow of the *Dalwarnic* on emerging from the fog is given by the Master of the latter as about 150 feet, or from the course of the *Grammer* and the stem of the *Dalwarnic,* some 80 feet, while the time from the reverse to the collision is said to be about 1 minute.

Some new evidence was given at the present trial but in considering it in connection with what was before me at the former hearing, I see no reason to change the judgment I then pronounced. * * *

[The learned judge then comments upon the expert evidence tendered at this trial, as follows:—]

The chart prepared by Captain Sollery was based entirely on what I think are false premises. He professed to disagree with the view expressed by the Privy Council which I quoted in my former judgment, and seemed to think that it was as easy to lay down the course of a ship from a bearing of a whistle heard in a fog as it would be from a

1928

EASTERN STEAMSHIP CO., LTD. v. CANADA ATLANTIC TRANSIT CO.

Hodgins L.J.A.

lighthouse in view in broad daylight. I do not, however, think that he really expected that his chart would be received as anything more than an endeavour to express what might be the result on the basis of the information given to him and on the assumption that it was exactly accurate and comprised all the facts. Exhibit 41, he says, was prepared from the evidence of Cuthbert alone, but he admitted later that he had corrected that evidence by statements made to him both in writing and verbally by Mr. Jarvis, one of the solicitors for the defendants. He did not attempt to correct or check them by reference to any other evidence given in the case. Exhibit 42 was prepared wholly from Robson's evidence (the Mate of the *Grammer*) and likewise without any reference to any one else's testimony.

This is not a proper basis on which to ask a Court to follow and accept what appears upon the chart. I regard it as obviously impossible to trace accurately the course of an invisible ship from the bearings of signals heard in a fog when her heading is not known and that no certainty can be placed upon the precise bearing and distance of a fog signal when it is so heard.

These charts may impress others or may be of more advantage to them than they are to me, but I fail to derive much useful knowledge from them.

An application was made to me before and at the last trial for leave to amend by setting up that the *Dalwarnic* had shifted her course to port before or just at the time when the ships became visible one to the other. I refused before the trial to grant the amendment, reserving the question till the hearing. At the trial no evidence came out which directly supported any such amendment, and no one, not even the mate of the *Grammer,* Robson, ventured more than a surmise on the point. As the proposed amendment is therefore not sustained by any trustworthy testimony I decline to make the amendment which is contrary both to the preliminary act and the pleadings.

I find upon all of the evidence both at the former and present trials and for the reasons given formerly and in this judgment that both ships were to blame for the collision, and I refer it to the Local Registrar at Toronto to ascertain the damages on both sides.

1928

EASTERN STEAMSHIP CO., LTD. v. CANADA ATLANTIC TRANSIT CO.

Hodgins L.J.A.

Further directions and the costs of the reference will be reserved until after the Registrar has made his report. Each party will pay his own costs of the action and counter-claim, including the former trial and this trial.

I feel it my duty to direct that a copy of this judgment be sent to the Minister of Marine and Fisheries. One of the five witnesses has a second engineer's certificate and the other four, if they remain in a seafaring life may apply for certificates, and as I think their course of action in relation to this case is highly discreditable to them, the facts connected therewith should be known to the Department.

Judgment accordingly.