

QUEBEC ADMIRALTY DISTRICT

1936

Dec. 9 & 10

1937
Nov. 10.

BETWEEN:

PORT COLBORNE & ST. LAWRENCE NAVIGATION CO. LTD. AND THE MASTER, OFFICERS, MEMBERS OF THE CREW AND PASSENGERS OF THE SS. <i>BENMAPLE</i>	}	PLAINTIFFS;
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AND

THE SHIP *LAFAYETTE*DEFENDANT;

AND

LEONARD LABATTE, JOHN L. DICKEY ET AL	}	INTERVENANTS.
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Shipping—Collision in dense fog—Article 16 of the International Rules of the Road—Negligence in not proceeding at moderate speed—Failure to stop and ascertain position of the ships.

A collision took place in a dense fog in the St. Lawrence river between the ships *Benmaple* and *Lafayette*. The Court found that the *Benmaple* was chiefly to blame but that the *Lafayette's* speed was not moderate under the circumstances.

Held: That under such a set of facts as existed the *Lafayette* should have stopped her engines until the position of the *Benmaple* had been ascertained with certainty.

ACTION by plaintiffs claiming damages from the defendant alleged due them as a result of a collision of the SS. *Benmaple* with defendant in the St. Lawrence river.

The action was tried before the Honourable Mr. Justice Philippe Demers, D.J.A., Quebec Admiralty District, at Montreal.

R. C. Holden, K.C. for plaintiffs.

L. Beauregard, K.C. and *Georges Lawrence* for defendants.

H. H. Harris for intervenants.

The facts and questions of law raised are stated in the the following judgment:

DEMERS, D.J.A., now (November 10, 1937) delivered the following judgment:

Plaintiffs by their amended statement of claim say that the plaintiff, Port Colborne & St. Lawrence Navigation Co. Limited, was the owner of the steamship *Benmaple* at the time of the occurrences herein mentioned, the additional

plaintiffs were the Master, Officers and members of the crew of the *Benmaple* and four passengers who were on board her. Shortly before 4.55 a.m., daylight saving time, on the 31st August, 1936, the *Benmaple*, a steel screw steamer of 1,729 tons gross and 1,074 tons net register, 250.1 feet in length and 43 feet beam, and carrying a crew of 19 hands all told, was on a voyage from Montreal, in the Province of Quebec, to Sydney and Halifax, in the Province of Nova Scotia, laden with a cargo of flour and feed and some general cargo, and was proceeding down the channel of the river St. Lawrence between Red Island Lightship and Bicquette Island; the wind was S.W., light, and the weather was a thick fog, and the tide was ebb, running with the *Benmaple*. The *Benmaple* was carrying the regulation navigating lights, which were burning brightly, and was proceeding at a slow rate of speed, and was sounding fog signals of one prolonged blast on her whistle at regulation intervals, and a good lookout was being kept on board her. In these circumstances those on the *Benmaple* suddenly heard very close to the *Benmaple* and apparently ahead or a little on her starboard bow a signal of one prolonged blast from a ship which proved to be the motor vessel *Lafayette*, and at the same time the bow of the *Lafayette* loomed up in the fog, bearing down on the *Benmaple* at great speed. The engines of the *Benmaple* were put full speed astern, but it was impossible for her to avoid the collision, and the stem of the *Lafayette* struck the *Benmaple*, cutting through her bows into the cargo hold, and causing such serious damage that shortly afterwards the *Benmaple* sank and was lost with her cargo and everything else on board. The collision and loss were caused solely by the fault and negligence of the *Lafayette* and those on board her, as herein alleged. The *Lafayette* was navigated at an excessive and improper speed through the dense fog; those on the *Lafayette* negligently failed to keep a proper lookout; the *Lafayette* failed to sound proper signals for fog in accordance with the regulations; the *Lafayette* after hearing forward of her beam the fog signal of the *Benmaple*, the position of which was not ascertained, did not navigate with caution until danger of collision was over; the *Lafayette* failed to take in due time, or at all, proper steps to avoid the collision; the

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engines of the *Lafayette* were improperly handled; the *Lafayette* improperly altered her course to starboard; when the *Lafayette* directed her course to starboard she improperly failed to give a signal of one short blast to indicate that she was doing so; the *Lafayette* failed to exercise the precautions required by the ordinary practice of seamen or by the special circumstances of the case; if those on the *Lafayette* had exercised reasonable care and caution and had navigated her in a proper and seamanlike manner and with due regard to the existing circumstances, no collision would have occurred; the *Lafayette* failed to comply with Articles 15, 16, 27, 28 and 29 of the International Rules of the Road. The plaintiffs claim:

- (a) A declaration that they are entitled to the damage proceeded for.
- (b) The condemnation of the defendant, the ship *Lafayette*, and her bail in such damage and in costs.
- (c) A reference to the District Registrar, assisted by merchants, to assess the amount of such damage.
- (d) Such further and other relief as the nature of the case may require.

By her amended statement of defence, defendant avers that she is ignorant of the allegations contained in paragraphs 1 and 2 of plaintiffs' amended statement of claim; she denies the allegations contained in paragraphs 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16 and 17 of plaintiffs' amended statement of claim except in so far as they are in accordance with this, the defendant's amended statement of defence. Shortly before 5 a.m., daylight saving time, on the 31st August, 1936, the ship defendant, which is a motor steel passenger vessel of a registered tonnage of fourteen thousand, four hundred and thirty tons (14,430), owned by Cie Generale Trans-Atlantique, was proceeding on a voyage from Boston, Mass., to Quebec, properly manned, equipped and carrying a large list of passengers, and was proceeding up the river St. Lawrence between Bicquette Island and Red Island Lightship, in charge of a duly qualified and certificated pilot; there was practically no wind, the tide was ebbing and the current was about two knots against the *Lafayette*, but there was fog, and for that reason there was a double lookout kept on the forecastle head and two on each side of the bridge, and there were besides on the bridge the pilot, the master, the officer on watch, a security officer and the wheelsman. The *Lafayette* was carrying the regulation navigating lights,

which were burning brightly, and was sounding fog signals of one prolonged blast on her whistle at regulation intervals. At 4.52 a.m. one of the lookouts forward reported having heard a whistle signal apparently ahead, but a little on the port bow. The engines of the *Lafayette* were immediately stopped and all those on the bridge kept a sharp lookout for further whistle signals. After a few minutes, not having heard any further signals the engines of the *Lafayette* were ordered slow speed ahead, but shortly after those in charge of the *Lafayette*, hearing the fog signal of a vessel which had been overtaken before, and which was approaching astern, and not hearing any other whistle signal ahead, ordered the engines of the *Lafayette* half speed ahead. But shortly afterwards, however, the white masthead light of a vessel, which afterwards proved to be the *Benmaple*, suddenly appeared on the port bow of the *Lafayette* and almost immediately thereafter the green light was also observed.

Immediately upon seeing the white masthead light of the *Benmaple*, the engines of the *Lafayette* were stopped, the helm ordered hard astarboard, the starboard engines full speed astern and then the port engines full speed astern, and, although the *Lafayette* obeyed her helm immediately, the *Benmaple* kept bearing down on the *Lafayette* at great speed and struck the *Lafayette* on her port bow at a short distance from her stem, doing considerable damage, the *Lafayette* having, prior to the impact, been brought to a standstill in the water.

Immediately after the collision, one of the boats of the *Lafayette* was lowered down into the water in charge of a duly competent officer and was dispatched to inquire whether any assistance were needed by the *Benmaple*, or those on board her, and shortly afterwards a motor boat was again lowered and sent in charge of a competent officer to give any assistance which might be required, and at 6.04, the first boat came back with seven persons from the *Benmaple*, and at 7.49, the motor boat came back with the captain and members of the crew of the *Benmaple*, and the master of the *Lafayette* was informed that the *Benmaple* had sunk, and at 8.05 the *Lafayette* proceeded with her voyage.

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No blame in respect of the said collision is attributable to the *Lafayette*, or to any persons on board her, who did all that possibly could be done to avoid or minimize the said collision.

The said collision was solely occasioned by, and solely the consequence of the improper and negligent navigation of the *Benmaple* and those on board her, in the following respects:

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(a) The *Benmaple* was proceeding in a fog and failed to give at intervals of not more than two minutes a prolonged blast, in violation of Article 15 of the International Rules of the Road.

(b) The *Benmaple* was not proceeding at a moderate speed, having careful regard to existing circumstances and conditions, but was navigating at an excessive and improper speed through fog.

(c) Those in charge of the *Benmaple* failed to stop her engines and navigate with caution until danger of collision was over after hearing the fog signal of the *Lafayette*, in violation of Article 16 of the International Rules of the Road.

(d) There was no pilot on board the *Benmaple* and her master was not on the bridge, although navigating through fog, in violation of all rules and customs of good seamanship.

(e) Those in charge of the *Benmaple* negligently failed to keep a proper lookout.

(f) The *Benmaple* was not in charge of competent officers and was not sufficiently manned and equipped.

(g) The *Benmaple* was improperly steered and neglected to keep clear of the *Lafayette*.

(h) The engines of the *Benmaple* were improperly handled and those in charge of her improperly neglected to ease her engines and improperly neglected to stop and reverse in due time.

(i) Those on board the *Benmaple* failed to exercise ordinary and reasonable care and prudence and to act in a seamanlike manner.

(j) Those in charge of the *Benmaple* failed to take in due time proper steps to try to avoid the collision.

(k) The *Benmaple* violated and failed to comply with Rules 15, 16, 18, 19, 22, 23, 27, 28 and 29 of the International Rules of the Road.

And by way of counter claim, the defendant owners of the *Lafayette* say that the collision caused damage to the *Lafayette*, and/or her owners, to the extent of the sum of seventy-five thousand dollars (\$75,000), and they claim:

(1) A declaration that plaintiffs are not entitled to the damage proceeded for.

(2) The condemnation of the plaintiffs in the damage caused to the *Lafayette* and her owners, and in the costs of this action.

(3) To have an account taken of such damage with the assistance of merchants.

(4) Such further and other relief as the nature of the case may require

This collision being admittedly not unavoidable, the Court is bound to examine the conduct of both ships.

I must say at first there was no doubt in my mind as to the responsibility of the *Benmaple* and that it was with more difficulty that I arrive at the conclusion that the *Lafayette* was also in fault in a lesser degree.

1. The *Benmaple* had no pilot. She was not bound by law to have one, but in such a case it must be compensated by officers conversant with all the difficulties of navigation. As a result, the *Benmaple* did not follow the usual course of ships going down the river.

2. The *Benmaple* was not sufficiently manned. Captain Johnson, in the opinion of my assessors and in my opinion, failed to meet his responsibilities. He could have retired for a moment, but he should not have taken off his clothes, in order to respond to a call. In this instance, he left Captain Lebrun in charge, and when he retired he had no intention of returning for some indefinite period. Captain Lebrun is a man of sixty-four years and is deaf. He had been on duty for seventeen hours, which is too much for a man of his age.

3. Those on board of the *Benmaple* were not keeping a proper lookout. The *Lafayette* was equipped with an exceptionally strong diaphone whistle which was placed forward of the funnel. The fog signals of the *Lafayette* were given at regular intervals and were always heard by the officer of the *Doghill* which was coming astern.

My assessors say, at this point, that the vagaries of sound in a fog are well-known facts, likewise are silent areas, but in this instance, the latter phenomenon was not present. The signals of the *Benmaple*, though less powerful, were heard by the *Lafayette*, and there is nothing to indicate, in their opinion, that sounds from the *Lafayette*, though far stronger, could not be heard inversely.

This negligence could be explained. The night was cold. On the *Lafayette* all were wearing overcoats. On the *Benmaple* nobody was wearing overcoats. It is explained that they were enclosed in the wheelhouse.

The fact that there was not a proper lookout is also evident. Those on board the *Benmaple* saw the *Lafayette* (the big boat) at a distance of fifty feet. Those on board the *Lafayette* saw the *Benmaple* (the small boat) at a distance of between five hundred and one thousand feet.

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The fact that the people on board the *Benmaple* contend that they did not see the *Lafayette* before, is an admission that their speed was excessive.

4. It is admitted that the *Benmaple* was going half-speed; to this must be added three knots due to the ebb tide.

My assessors have estimated that the half-speed of the *Benmaple* was between five and a half and six knots, adding three knots for the ebb tide. They arrive at the conclusion that the speed of the *Benmaple* was, at least, eight and a half knots.

One must consider also that the *Benmaple* has a single propeller, and that a propeller is not as effective in a following tide as in a tide to be met.

5. I must now come to the question of signals. There is positive evidence by the *Benmaple* that they were regularly given. My assessors are of the opinion that they were not. They base their opinion on the fact that the *Lafayette* was stopped three minutes to listen and that all on board were very attentive and heard nothing; that the *Doghill* was coming astern but heard them, though the diaphone was on the funnel; and also very likely by the poor manner in which the *Benmaple* was conducted.

This, however, being a question of evidence, I consider I am not bound by their opinion and that I must follow the ordinary rules of evidence and that I cannot reject positive evidence on presumption. The doubt in my mind is not sufficient. Plaintiff, therefore, is entitled to the benefit of the doubt.

Now, let us come to the *Lafayette*. Nobody denies that the ship was well manned. Her officers were all on the alert. Her fog whistle was in operation with regularity. There were seven persons on the bridge exercising a vigil and there were two additional lookouts. The master and the staff were all at their posts.

The only serious reproach is that she violated Article 16 of the International Rules of the Road.

Let us say at first that she did not disregard the rule. If she had disregarded the rule and continued at full speed, very likely nothing would have happened.

She started to obey the rule. Hearing a signal, she stopped for three minutes, and nothing being heard, she

started to slow for two minutes and then she started half speed. She was so going for one or two minutes when she saw the *Benmaple* at a distance of between five hundred and one thousand feet. Her engines were stopped and reversed, and the ships collided.

The question then remains: Was half speed a reasonable speed?

My expert estimates the half speed against the ebb tide to be nine knots.

Considering her special and powerful equipment, that the *Lafayette* was practically stopped, though they admit that she might have some advance, they are inclined to think that, under the circumstances, the speed was moderate; but if we admit—as I consider I am bound to do—that a vessel, in such a fog, should stop and go ahead slowly and stop her engines from time to time (1), and that in such a case the engine should have been stopped until it could be ascertained with certainty what the position of the *Benmaple* was and what she was doing (2) I arrive at the conclusion that the *Lafayette* was wrong in going half speed before ascertaining that there was no danger from the other ship.

It is true that the crew of the *Lafayette* say that the ship was absolutely stopped when the collision occurred. but the logs of the *Lafayette* have been altered and this creates a presumption against the ship. I think she had some advance.

I must add also that, in the opinion of my assessors, if the *Benmaple* had seen the *Lafayette* at the same distance as the *Lafayette* saw the *Benmaple*, though the collision very likely would have occurred, it would also very likely have considerably minimized the damage, that is to say, they approve the last part of what witness Gilbert says:

Parce que je me reppelle même avoir fait cette reflexion au commandant après l'abordage: "Si le navire que nous avons rencontré avait fait le quart de ce que nous, nous pu faire, nous, nous ne nous serions certainement pas rencontrés"

Du moins les dommages auraient été beaucoup limités.

Considering all these circumstances, judgment should be entered condemning the *Lafayette* and her bail, to one-

- (1) *The Campania* (1900) 9 Asp. 151. (2) *China Navigation Co. Ltd. v. Commissioners of Lord High Admiral of the United Kingdom* (1908) A.C. 251.

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fourth of the damages, and the *Benmaple* to three-fourths of the damages; no costs on the action nor on the counter action.

As to the additional plaintiffs, their action against the *Lafayette* and her bail, for one-fourth of their damages; no costs.

As to the intervenants, Mr. and Mrs. Dickey, who are really additional plaintiffs, judgment should be entered against the *Lafayette* and her bail, but any amount coming to Mrs. Dickey should go to the Port Colborne & St. Lawrence Navigation Co. Limited which was subrogated to her rights; no costs.

All the damages on these different claims to be estimated by the Registrar, assisted by merchants.

Judgment accordingly.