

QUEBEC ADMIRALTY DISTRICT.

1917

April 4.

W. C. SMITH, ET AL.,

PLAINTIFFS,

AGAINST

DONALD C. MACKENZIE, ET AL.,

DEFENDANTS.

Collision—Fog—Rule of road—Speed—Look-out.

Where in a fog or thick weather a steamer proceeds at an excessive speed, without a sufficient look-out, and fails to keep out of the way of a schooner keeping properly within her course, she is in violation of arts. 16 and 20 of the Rules of the Road and liable for a collision with the latter vessel.

ACTION to recover damages resulting from a collision.

Tried before the Honourable Mr. Justice MacLennan, Deputy Local Judge of the Quebec Admiralty District, March 6, 1917.

Hector McInnes, K.C., for plaintiffs.

A. R. Holden, K.C., for defendants.

MACLENNAN, Dep. L. J. (April 4, 1917) delivered judgment.

This is an action *in personam* by the owners and crew of the fishing schooner "Lucille M. Schnare" against the master, first officer and look-out of the steamship "Wartenfels" for damages from a collision between these vessels, on 18th June, 1916, resulting in the loss of the schooner and one member of the crew.

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The schooner was bound from St. Lawrence, Newfoundland, on a fishing trip to the Grand Banks, having on board a crew of 19, stores, bait and fishing tackle and the personal effects of the crew, and was proceeding on a course S.E. by E.½E. magnetic, when at 7.50 p.m., during daylight, she was struck by the steamship "Wartenfels" on the port side ranging aft between the foremast and mainmast. The wind was a light westerly breeze on the schooner's starboard quarter with fog of varying density. The schooner had all her sails up except topsails and was proceeding at a speed of about 3 to 4 knots per hour and had a mechanical fog horn at the bow which was sounded in accordance with the regulations. The master of the schooner had been on deck all day attending to the navigation, and with him was a man who was steering and two men keeping look-out forward, one of the latter operating the fog horn, when they heard a steamer's whistle 4 or 5 points on the port bow. The master heard about 4 blasts of the whistle and by watching he saw the compass bearing did not appreciably change, and on the last blast the steamship "Wartenfels" came into sight through the fog at a distance of 200 or 300 yards off the port bow, according to the evidence of the master and the look-out Beck, who was operating the fog horn. The other look-out, Arthur Schnare, also saw the steamer at a distance which he estimates at 800 or 900 feet. Another member of the crew, Stedman Corkum, was in his berth below, heard two blasts from the steamer, came up and saw the steamer at a distance of twice its own length, which would be about 800 feet. The schooner kept her course and speed, as her master relied upon the steamer keeping out of the way. The

schooner's length was 124 feet, drawing about 13 feet aft and 6 or 7 feet forward, and had on board about 30 tons ballast besides stores and provisions. The stem of the steamer struck the port side of the schooner between the main hatch and mainmast and the schooner went down in 15 minutes.

The "Wartenfels" was a German captured steel ship owned by the Crown and in the service of the Admiralty, 396 feet over all, with a gross tonnage of 4,511 tons, quadruple engines, single screw, drawing 14 feet forward and 18 feet aft, had 3 officers, 5 engineers and a crew of 79 which had been shipped in Bombay. She was on a voyage from London, and, at the time of the collision, was on a course S. 70 W. and about 5 or 6 miles south of Cape Race. The full speed of the steamer was 11 knots, and from 4 p.m., to the time of the collision at 7.50 p.m., had proceeded at varying speed owing to the fog conditions. The navigation was attended to by the master, the first officer and the quartermaster, who was steering on the bridge, and by one look-out forward on the forecastle head. The master left the bridge to go to his room 6 minutes before the collision when she was going at half-speed, and when about to leave his room to return to the bridge he heard the fog horn of the schooner about 30 seconds before the collision. The first officer, who was on the bridge, heard the schooner's fog horn, saw the schooner at the same moment, and says that he at once gave the order "Hard aport", and ordered the engines "full speed astern", and that the orders hard aport and full speed astern and the collision were simultaneous. The look-out did not hear the schooner's fog horn until the collision. The second officer, who was off duty, went from the fore part

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of the bridge deck into the bathroom, where he heard the schooner's fog horn, and in the space of a minute the collision occurred. The quartermaster was at the wheel steering; he says the fog was thick and he did not hear the fog horn. He was examined through an interpreter, and the following extracts from his evidence are relevant:

“Q. Did he get any orders from the first officer when the schooner was seen?—A. Hard aport.

“Q. What time did the collision take place after he got that order ‘Hard aport’?—A. About a minute of two, as soon as the first officer gave the order ‘Hard aport’ he did it, and the vessels collided.

“Q. Could he see the schooner?—A. No, sir, it was too thick.”

And further on he testified as follows:

“Q. Did he change his course just before the collision?—A. S. 70 W. about 7 o'clock.

“Q. Did he change his helm just before the collision?—A. No, sir.

“Q. Did he get an order to port his helm just before the collision?—A. He was going on the same course.

“Q. Did not get any order to port the helm?—A. The first officer gave him ‘Hard aport’, and after two minutes they touched the schooner.

“Q. What order did he get?—A. The first officer gave him ‘Hard aport’ and the ship touched the other vessel.

“Q. What was the two minutes you were talking about?—A. He did not say it, sir, as soon as he

“got the order ‘Hard aport’, he thinks it was two minutes before the collision.

“Q. After he got the order ‘Hard aport’ he thinks it was two minutes until the collision?—A. Yes, sir.

“Q. Did he see the schooner?—A. No, sir.

“Q. Any time at all?—A. See nothing, sir.”

The gunner of the steamer was on watch right aft, and he swears he heard a long blast from the schooner’s fog horn when they struck. At the time of the collision the weather was fine and the sea smooth. The master of the schooner thought the steamer was going about 7 miles an hour from the foam that appeared on her bow. Corkum also saw the white foam, and the look-out, Arthur Schnare, says she had considerable foam on her bow rolled up.

The evidence on behalf of the steamer shows that she was proceeding at varying speed during the 3 or 4 hours preceding the collision, and I consider that a reasonable appreciation of all the evidence on this point shows that the steamer had a speed at the time of the collision of 6 knots an hour. There had been fog of varying density for some hours; some of the witnesses say that the fog was dense at the time of the collision. 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 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

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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; *The Campania*,¹ *The Oceanic*,² *The Counsellor*,³ *The Umbria*.⁴

Whatever number of knots per hour the steamer was making it was unable, after its first officer saw the schooner, to pull up and avoid the collision.

I, therefore, find that the steamer was going too fast, and not at the moderate speed required in a fog by article 16 of the Rules of the Road.

By articles 20 and 21 of the Rules of the Road the schooner had the right-of-way and was bound to keep her course and speed, and the steamer was obliged to keep out of her way. The evidence shows that the schooner did keep her course and speed, no alteration whatever having been made from the time that the fog signal of the steamer was first heard until the collision. The steamer was seen, according to the evidence of those on board the schooner, at a distance of 200 to 300 yards, and Captain Schnare says a minute or a minute and a half before the collision. If the look-out on the steamer had been sufficient and vigilant the schooner would have been seen at the very time the steamer came in view of those on board the schooner. The first officer was the only person on the steamer, according to the evidence, who saw the schooner before the collision, and when he saw her he says he gave the order "Hard aport". The quartermaster swore that one or two minutes elapsed between that order and the

¹ [1901] P. 289.

² 9 Asp. M. C. 378.

³ [1913] P. 70.

⁴ 166 U.S. 404.

collision. At the trial I had the advice and assistance of Captain Archibald Reid as nautical assessor, and he advised me that if the helm of the steamer had been put hard aport one minute before the collision or when she was 200 yards away, her bow would have gone to starboard and would easily have cleared the schooner. No explanation has been given why the order of the first officer "Hard aport", one or two minutes before the collision, was not carried out, as if it had been promptly and properly executed the steamer would have gone astern of the schooner. The steamer was bound to keep out of the way of the schooner and the burden rests upon her to show a sufficient reason for not doing so.

I, therefore, find that article 20 of the Rules was violated.

The plaintiffs have submitted that the steamer's look-out was incompetent and insufficient. The look-out was Fakir Hoosein, a Lascar, who gave his evidence through an interpreter; he was forward on the forecastle head and, according to his evidence, heard the horn and saw the schooner for the first time at the moment of the collision. The master of the steamer had left the bridge for 6 minutes; just as he was returning the collision took place. During this interval the only man on the bridge was the first officer, who walked across it constantly, and from time to time pulled the whistle cord and looked at the compass. The position of look-out is one requiring great fidelity, attention and care and should not be entrusted to an incompetent person. The greatest vigilance is required in fog or thick weather and one look-out which may be sufficient on a clear day is not sufficient in thick weather or in a place where other vessels may be met. The collision

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occurred on the route of ships coming in and going out past Cape Race, and during the course of the afternoon the fog signal of several ships was heard both on the steamer and schooner. In addition it was a place where fishing vessels were liable to be met. I asked my assessor if, having regard to the fog conditions, one look-out on the fore-castle was sufficient, and he advised me it was not, that there should also have been a look-out in the crow's nest, and in the absence of the master from the bridge he should have left someone there with the first officer, and that it is usual in a fog to have, in addition to the other look-outs, someone on each end of the bridge to look and listen. I am satisfied that the look-out on the bow could have seen the schooner and heard its fog horn before the collision if he had been competent and attentive to his duty.

Dr. Lushington, in *The George*,¹ said: "What is a "proper look-out? Two things are necessary to "constitute it: first, that, according to the state of "the weather, the wind and the darkness at the "time, there be a sufficient number of persons sta- "tioned for the purpose. Secondly, assuming that "there is a sufficient number so stationed, that those "persons know and perform their duty; for it does "not follow, that, because persons are appointed to "a duty, they, therefore, discharge it. Upon the "present occasion, the question as to whether a good "look-out was actually kept will turn upon the ques- "tion, whether the 'Nora Creina' ought to have been "visible at a longer distance or not. If you are of "opinion that the night was not so dark as to pre- "vent persons seeing the 'Nora Creina' in good time "to prevent the accident, then there was not a good

¹ 9 Jurist 671.

“look-out. If, on the other hand, you shall be of opinion that it was so dark that it was impossible, by any ordinary care and caution, to have discovered this vessel, so as to prevent the accident, then no one will be to blame.”

In the case of *The Germania*,¹ the Privy Council held that there ought to be two look-outs at the bowsprit, and the Master of the Rolls, delivering the judgment for the Judicial Committee, said: “Their lordships are informed by the naval assessors who assist them that it is the usual practice in King’s ships to have never less than two look-outs at the bowsprit, and their lordships are not satisfied with the sufficiency of the reason alleged for having only one of these look-outs in the present case. The evidence of the chief officer is to this effect. The first report was from the look-out man, who reported ship right ahead, the officer of the watch saw something ahead, and ported the helm directly. He says that the time was about a minute from the time when he first saw her to the time when the collision took place.”

*Marsden’s Collisions at Sea*²: “The look-out must be vigilant and sufficient according to the exigencies of the case. The denser the fog and the worse the weather the greater the cause for vigilance. A ship cannot be heard to say that a look-out was of no use because the weather was so thick that another ship could not be seen until actually in collision.” In “*The Mellona*,” Dr. Lushington said: “It is no excuse to urge that from the intensity of the darkness no vigilance, however great, could have enabled ‘*The Mellona*’ to have descried

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¹ 21 L.T. 44.

² 6th Ed., p. 472.

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“ ‘The George’ in time to avoid collision. In propor-
“ tion to the greatness of the necessity, the greater
“ ought to have been the care and vigilance employ-
“ ed.

“ In ordinary cases one or more hands should be
“ specially stationed on the look-out by day as well
“ as at night. They should not be engaged upon any
“ other duty, and they should be stationed in the
“ bows, or in that part of the ship from which other
“ vessels can best be seen.”

The great importance of a look-out is also refer-
red to in the case of *The Batavier*.¹ In the *Cape Bre-
ton and Richelieu & Ontario Navigation Co.*,² the
offending ship was held liable for failure to main-
tain a proper look-out, and the decision of the Su-
preme Court in that case was subsequently confirmed
in the Privy Council.³ A vessel without a sufficient
look-out has the burden cast upon her of proving
that such fact did not contribute to the collision;
Magdalen Islands Steamship Co. v. The Ship Diana.⁴
In *The Curran*⁵ the court found there had been a
defective look-out on the part of one of the vessels
because those on board failed to hear fog signals
sounded by the other vessel.

I am, therefore, compelled to find that the evi-
dence and circumstances of the case show that there
was a failure to keep proper look-out on the steamer
which directly contributed to the collision.

I have asked my assessor to advise me, if after
the steamer came into sight there were any circum-
stances which required the schooner, under article

¹ 9 Moore's P. C. 286, 301, 14 E.R. 305.

² 86 Can. S.C.R. 564.

³ 76 L.J.P.C. 14, [1907] A.C. 112.

⁴ 11 Can. Ex. 40, 57.

⁵ [1910] P. 184.

27 of the Rules of the Road, to depart from the rule requiring her to keep her course and speed, and he has advised me there were none and that it was imperative on the schooner to keep her course and speed, and that if she had changed her course she would have broken the rule. In my opinion, his advice on these points was proper and correct. A slight change in the helm of the steamer would have taken her out of the way and avoided the collision. The master of the schooner had a right to expect that the steamer would perform the necessary manœuvre, and he swears that "he thought the bow would sheer". I think he was justified in coming to that conclusion.

In the case of a collision between "The Turret Age", which held its course, and the "Lloyd S. Porter", which should have given way, the Privy Council observed:¹ "The 'Turret Age' is encountered by a "vessel which, if it is performing the manœuvres "that it ought to perform, will keep clear of them. "They proceed, and their Lordships think that they "had a right to proceed, upon the fair belief that the "vessel which they saw was going to perform the "proper manœuvres for the purpose of avoiding any "difficulty or danger."

A case in which the facts were very similar to these in the present action was *The Nacoochee*,² before the Supreme Court of the United States in 1900. In that case there was a moderate breeze and a thick fog, and a fishing schooner was under all plain sail making about 4 knots, when the steamer "Nacoochee" was suddenly sighted on the port side at a distance of 400 to 500 feet. The schooner kept its

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course and the steamer, which was making 6 to 7 knots, struck her on the port quarter. The Court held that the schooner was not sailing too fast, that she was not in fault for keeping her course, and that the steamer was solely responsible for the collision.

I find that the master, first officer and look-out of the "Wartenfels" are to blame and that the collision was occasioned by their failure to observe articles 16, 20 and 29 of the Rules of the Road.

There is no blame imputable to the master or the crew of the schooner.

The plaintiffs are entitled to judgment against the defendants, with costs, and there will be a reference to the Registrar to assess the damages.

Judgment for plaintiffs.

Solicitor for plaintiffs: *Hector McInnis, K.C.*

Solicitors for defendants: *Meredith, Holden, Hague, Shaughnessy & Heward.*