ON APPEAL FROM THE BRITISH COLUMBIA ADMIRALTY DISTRICT

1924
Nov. 29.

THE CANADIAN PACIFIC RAILWAY COMPANY (PLAINTIFF) .... APPELLANT;

AGAINST

THE SHIP *CAMOSUN*, HER CARGO AND FREIGHT (DEFENDANT) .... RESPONDENT.

Shipping—Collision—Narrow channel—Doubt—"End on or nearly end on"—"Right ahead"—Regulations 18 and 25.

Held: That the width alone of a channel or the fact that it has lateral extensions in the nature of bays, are not conclusive and need not necessarily be regarded as of importance in the determination of what is a "narrow channel" within the meaning of regulation 25.

2. That, moreover, as the statute did not attempt to define "narrow channel," whether any particular channel was or was not such, must be determined in a practical way, having in mind every relevant element obtaining in the particular case.

3. That an important point to consider is whether the configuration of the shore lines and the existence of headlands and other considerations so control and predetermine the movements of ships thereon as to make it a narrow channel. In case of any doubt it should, in the interests of navigation, be resolved in favour of the "narrow channel" construction.

4. The respective ships in this case were proceeding the one West by South ¾ South and the other North 70° East.

Held: That the words "end on or nearly end on" should have a signification as wide as "right ahead" in article 2; and that the ships herein, in any event, were "end on" within the spirit of the rule, when the above mentioned courses were adopted, or shortly afterwards.

APPEAL from the decision of the Local Judge in Admiralty, British Columbia Admiralty District.

September 24th, 1924.

Appeal now heard before the Honourable Mr. Justice Maclean, President of the Court at Vancouver.

J. C. McMullen and *M. M. Greaves* for appellant.
E. C. Mayers and *J. L. G. Abbott* for respondent.

The facts are stated in the reasons for judgment.

THE PRESIDENT, now this 29th November, 1924, delivered judgment.

This is an appeal from a judgment of Martin L.J.A., British Columbia, dismissing an action for damages arising out of a collision, brought by the owners of the ship

Princess Beatrice, against the ship *Camosun*, and allowing the counter-claim of the defendant ship.

The trial judge in his reasons for judgment very precisely and accurately summarises the main facts as presented in the evidence, and this was the view of counsel engaged in the appeal. It is not necessary therefore that I should restate such facts, except in so far as it may be requisite to make clear my own conclusions in the matter.

The *Princess Beatrice*, a freight and passenger ship, was bound from Vancouver for a port in Northern British Columbia, and en route was obliged to pass through the waters of Fraser Reach, before arriving in McKay Reach, where the collision occurred. The official chart would indicate that Fraser Reach is a narrow channel within the regulations for preventing collisions. This could hardly be questioned. On the other hand, the *Camosun*, also a freight and passenger ship, was proceeding in just the opposite direction, and was bound from a port in Northern British Columbia to Vancouver, and before coming into McKay Reach was obliged to pass through Grenville Channel, which is also clearly a narrow channel. I might here say that McKay Reach is the water separating Gribbel Island from Princess Royal Island, and is the principal connecting water between Fraser Reach and Grenville Reach. This water is irregular in shape, being altogether about seven or eight miles in length and the shore line on either side is mountainous. At Kingcombe Point where the *Princess Beatrice* entered it, it is approximately two miles in width, that is from Kingcombe Point, to Point Pilot on Gribbel Island. Towards the other end of this water, at Trivett Point, McKay Reach is about one mile in width, that is from Trivett Point directly across to Gribbell Island; beyond this it widens out again. Between Kingcombe Point and Trivett Point, McKay Reach is widened in the centre on both sides by bays, particularly on the southern side, the greatest width at this point being from three and a half to four miles. Disregarding these bays, and considering only the water within lines projected from the headlands mentioned, the width of McKay Reach varies from about one mile opposite Trivett Point, to about two miles opposite Kingcombe Point.

The *Camosun* after entering McKay Reach, on the course North 53 East, from Cumming Point, passed Trivett Point about one-half mile off, at almost exactly the same moment of time as the *Princess Beatrice* was off Kingcombe Point Light, where she, the *Camosun,* was put on a course of N. 70 E., and so as to clear Kingcombe Point Light by about three and a half cables. The *Princess Beatrice* rounded Kingcombe Point Light about one-half mile off, and then steadied on a course W. by S. ¾ S.

So at practically the same moment of time, we have the *Princess Beatrice* off Kingcombe Point half a mile abeam the lighthouse, on a course W. by S. ¾ S. and the *Camosun* about a half mile off Trivett Point on a course N. 70 E., about three and a half to four miles apart, each steaming about twelve knots, or a conjoint speed of about twenty-four knots. It was a fine night with good visibility, the sea was smooth and there was no wind and comparatively no tide. Each ship had the other's mast light in view when about four miles distant from each other.

To put it briefly from this point of time, until just a few minutes before the collision occurred, the witnesses for the *Princess Beatrice* say the ships were sailing red to red on parallel courses, while the witnesses for the *Camosun* as confidently assert they were sailing green to green. From there on, the story as told by the *Princess Beatrice* is, that when about a mile apart, and the *Camosun* three-quarters of a point on her port bow, she ported a half point for precautionary purposes, and while swinging on this half point and when the ships were about one cable length apart, the *Camosun* blew two whistles indicating she was going to port, and immediately the *Princess Beatrice* blew one whistle indicating she was swinging to starboard. The *Camosun* alleges that the *Princess Beatrice* departed from her course on the starboard side of the *Camosun,* swinging across the course of the latter, which then gave two blasts of her whistle and starboarded. The collision occurred within a few minutes afterwards. I do not propose discussing the reasons given by each ship for their several manoeuvres at this time.

The learned trial judge evidently had great difficulty in reaching his conclusion, and upon the evidence it could not

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be otherwise. At the beginning of his reasons for judgment he states:

"To account for a collision in conditions so favourable to safe navigation, it is obvious that something very unusual must have happened, but what that something really was has not appeared despite the large amount of evidence adduced."

Then after a statement of the facts, he concludes that the account of the witnesses of the *Camosun* must be accepted as the true one, and finds that ship free from blame.

I propose at the moment, a consideration of the issue, apart from the finding of the trial judge altogether, to enquire if the same may not be properly resolved upon another or other grounds, and whether or not, negligence or violation of the sailing regulations by either or both ships, antecedent to the crucial moments preceding the impact, are the determining factors in ascertaining or distributing the true liability of one or both of the ships.

In the first place is McKay Reach a narrow channel, as contemplated by regulation 25? There is no attempt at a statutory definition of "a narrow channel," which probably is not unwise, and in fact is hardly possible in general terms. Accordingly, it must be settled in a practical way, having in mind the safety of ships, and every other relevant element obtaining in a particular case. McKay Reach widens out, between Kingcombe and Trivett Points very considerably as I have already pointed out, but I do not think these lateral extensions of McKay Reach in the form of bays, should necessarily be regarded as of importance, in determining whether or not it is a narrow channel within the regulations. For some purposes, possibly it may be an important fact. The important point I rather think is whether the configuration of the shore lines of McKay Reach, the existence of the headlands mentioned, and other considerations, so control and predetermine the movements of ships thereon as to make it a narrow channel. The width of a channel alone is not in my opinion conclusive in determining what is a "narrow channel," and obviously ought not to be. The fact that Fraser Reach and Grenville Reach are both narrow channels, as are also other channels or waters communicating with McKay Reach, is I think quite

a practical reason why such an intervening and connecting water, if possessing at all the physical elements of a narrow channel, should be so construed. I cannot but conclude after careful reflection, that McKay Reach is a narrow channel, as also are most of the waters between the islands in these parts. They are all for the most part natural narrow channels, they are so designated on the chart and there would appear to be no distinction between "channel" and "reach," and I cannot but feel that such waters, including McKay Reach, must be so regarded by mariners. An occasional widening of any communicating water, like McKay Reach, between recognized narrow channels like Fraser Reach and Grenville Channel, should not throw that water into another category by mere reason of this widening, and particularly when that fact does not enter into serious consideration in the actual navigation and movements of ships in such a water, by reason of other causes. Should there be any doubt about it, that doubt should be resolved in favour of the "narrow channel" construction, in the interests of safe navigation, and the safety of property and life.

As I have already observed, ships entering McKay Reach northward bound, proceed from what is undoubtedly a narrow channel, Fraser Reach, and where regulation 25 must be observed. This properly obliges an up-going ship, such as the *Princess Beatrice* in this case, in leaving Fraser Reach from her starboard side of that water, to round Kingcombe Point at a safe distance, in case another ship were rounding this point at the same time, downwards bound, the latter being obliged to take her starboard side of Fraser Reach. Again the *Princess Beatrice* after rounding Kingcombe Point Light must make for a point off Trivett Point from whence she makes her course for Point Cumming, and to do this she cannot well proceed to a point too far north, for she then could not make her course to Point Cumming. Likewise the *Camosun* after leaving Grenville Channel sails a course from Point Cumming to Trivett Point, from whence she would fix her course for Kingcombe Point Light. The masters of both ships agree that each were on their usual courses in McKay Reach, on the night of the collision, that is to say, the courses of each on

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other occasions would vary but little from that upon the night in question. This all indicates they were sailing within comparatively restricted waters compelled by the physical factors I have mentioned, and whatever the width of McKay Reach, the ships in question I think were navigating within what for practical purposes must be regarded as a narrow channel. I am of the opinion that McKay Reach is a narrow channel, and that regulation 25 was intended to apply thereto.

In *The Ship Cuba* v. *McMillan* (1), a water with a mean width of about a mile and a quarter was held to be a narrow channel. See also *The Santanderino* (2). In *The Rhondda* (3), the Straits of Messina, a passage nearly two miles wide, was held to be a narrow channel.

I am of the opinion therefore that both ships should have observed regulation 25 and each should have made it clear to the other in ample time, by decisive porting, and by use of the whistle, which is always available and effective for steamers in circumstances of this nature, at the appropriate and practical time or times. There was no reasonable excuse for assuming any risk of collision as there was ample room for each to safely navigate port to port. The *Camosun* was steering for a lighted point and could have early gone to starboard sufficiently to insure safety, and had she even gone off her course she would not have been assuming, in the circumstances, any risk. The *Princess Beatrice* could have early made it undisputably clear to the *Camosun* that she intended passing port to port, and there was ample space to permit of this being done. If both ships had applied regulation 25 which was intended to be literally followed, when safe and practical, as it here clearly was, the collision could have been avoided. I think therefore that upon this ground both ships are equally to blame.

In the next place did art. 18 of the regulations apply to the situation. The ships were sailing opposite to each other between the same ports, and had each to pass the same points of land, Kingcombe Point, Trivett Point and Cumming Point, and at which points, each established new courses, and these physical facts and this necessity obliged

(1) [1896] 26 S.C.R. 651 at p. 657.
(2) [1893] 3 Ex. C.R. 378.
(3) [1883] 8 A.C. 549.

them each, and to the knowledge of each, to sail over comparatively fine courses with reference to one another, in going to and from Vancouver while passing through McKay Reach, particularly between Kingcombe Point and Trivett Point. When the *Princess Beatrice* and the *Camosun* steadied on their respective courses W. by S. three-quarters S. and N. 70 E. they each could easily approximate the distance between each ship. They no doubt knew each other's speed, and about the time within which they should pass each other. Whichever story is true as to the lights shewing to each other, there was no good reason for doubt or confusion at the proper time, as to where each ship should be. The respective courses of W. by S. three-quarters S. and N. 70 E. are identically opposite courses for all practical purposes, particularly on a short course, and if the distance each passed off Kingcombe Point and Trivett Point be correct, and there would appear no good reason for not accepting the evidence upon this point. Conflicting testimony cannot well disturb the mathematical fact established by these admitted courses. "End on or nearly end on" ought to have a signification as wide as "right ahead" in art. 2, otherwise vessels on parallel courses in such a position that each vessel can see both the side lights of the other, might yet not be under the rule owing to each being a little on the other's starboard bow. The ships I think were doubtless "end on" within the spirit of the rule, when these courses were adopted, and it was then or shortly afterwards, when each ship should have concluded to observe this regulation. This regulation applies to steamships only, and when proceeding end on or nearly so, and I would think without doubt should apply in this case, and had each seriously endeavoured in time to observe the rule and avoid the risk of collision, they had ample time and space to get into their proper waters as required by this regulation, and thus avoid the risk of collision.

What constitutes risk of collision is discussed by Marsden, 8th ed. p. 302 and 303, and he there quotes Dr. Lushington to the effect that a chance of collision is not to be scanned by a point or two, and that if there was a reasonable chance of collision that is sufficient, that ships should

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not be allowed to enter into nice calculations in determining measures as to whether risk can be accepted, when long before the collision measures might be taken which would render risk impossible. Again, discussing when the regulation was to apply, this author at pages 300 and 301 quotes Brett M.R. in *The Beryl* (1) as follows:—

"They are all applicable at a time when the risk of collision can be avoided, not that they are applicable when the risk of collision is already fixed and determined."

I am of the opinion that each ship knowing the other's objective, approximate speed, position and course, and knowing as I think the evidence inferentially establishes, that it was customary here to pass port to port, each should have, immediately upon taking the courses mentioned that would carry them respectively between Kingcombe Point and Trivett Point, observed regulation 18, or as expressed in *The America* (2) both should have "seasonably adopted" this precaution. Precautions required by law, to be taken when there is risk of collision, must be taken in time to be effective against such risk. In any event, in view of their respective courses, which is not questioned, the ships should have made known to each other by the whistle and otherwise, in ample time their intention to observe this regulation then applicable to each. The obligation to observe this rule was all the greater, as McKay Reach, in my opinion is a narrow channel.

I hardly think it is necessary to discuss the finding of the trial judge, in view of the opinion I have expressed as to the applicability of regulations 18 and 25. I think that there is but one fair and safe inference from the evidence, namely that the ships were sailing end on, in narrow waters, and neither ship took sufficient care in time to fix its position in relation to the other with such accuracy as the regulations and prudent seamanship required. It seems to me a reasonable and probable conclusion that neither ship gave serious consideration to the regulations, or with care and deliberation attempted to declare their positions and intentions, and considering all the circumstances I think that nothing but carelessness caused the collision, and this care-

(1) [1884] 9 P.D. 137.

(2) [1875] 92 U.S.R. (2 Otto), p. 432.

lessness is imputable to each in not avoiding the risk of collision, which each might very easily have done and in good time, and as required by the regulations I have discussed. In this respect I think that both were guilty of a neglect of duty, and that if either had used reasonable care and skill, the collision would have been avoided. If the ships had suddenly found themselves close together, so that there was difficulty in complying with the regulations, the case would then perhaps have to be decided upon other grounds. The negligence on the part of both ships were acts concurrent in time, identical in character and equal in degree of fault. The negligence of both ships in point of time began much earlier than immediately before the *Camosun* blew the two whistles.

Accordingly, and with very great respect, I find both ships to blame, and in equal degree, and to that extent the appeal is allowed. The appellant will have its costs of appeal, each party to bear their own costs of trial.

The case will be remitted to the court of first instance to be there dealt with, as the rights of the parties under this judgment may appear to the said court.

Judgment accordingly.