

1964

\*Feb. 24,  
25, 26  
Apr. 28

IMPERIAL OIL LIMITED (*Plaintiff*) . . . APPELLANT;

AND

M/S *WILLOWBRANCH* (*Defendant*) . . . RESPONDENT.

## ON APPEAL FROM THE EXCHEQUER COURT OF CANADA

*Shipping—Collision between two tankers in approach to Halifax harbour—  
Negligence of parties—Dense fog—Alteration of course—Excessive  
speed—Improper radar look-out—Narrow channel rule.*

The plaintiff's tanker *Imperial Halifax* outbound from Halifax collided in a dense fog with the defendant's tanker *Willowbranch* inbound, in the approach to Halifax harbour. Both vessels were equipped with radar sets. The *Imperial Halifax* maintained full speed until entering a fog bank at which time the echo of an approaching ship 3° on the starboard bow and about one and a half miles ahead was noticed on the radar. Her engines were then reduced to half speed and about one-half minute later to slow. When the ships were about a mile apart and the angle of the approaching ship appeared to have broadened to 4° on the starboard bow, the Master of the *Imperial Halifax* assumed that the two ships would pass starboard to starboard if each maintained her course. He therefore continued his course until a ship's whistle was heard on the starboard bow. The radar indicated to him that the approaching ship was on a course that would cross that of the *Imperial Halifax* from starboard to port. He then stopped engines and altered course 4° to port. Within one minute of that order the approaching vessel was heard directly ahead and the engines were reversed. The *Imperial Halifax* was going at about four knots when the collision took place.

After observing on the radar a ship at 10° on the port bow and one directly ahead and about two and a half miles away, the *Willowbranch*, which was then at half speed, altered her course four times to starboard by gradual degrees. All these alterations were made within four to four and a half minutes before the collision and their effect was to bring the *Willowbranch* directly across the bow of the *Imperial Halifax*. Although the whistle of the latter ship was first heard about two minutes before the collision and a second whistle was heard before they met, no action was taken to stop the engines of the *Willowbranch*. When the approaching vessel came into view about 300 feet away the engines were reversed and the *Willowbranch* was practically stopped at the time of the collision.

The trial judge held the *Imperial Halifax* one-third to blame and the *Willowbranch* two-thirds to blame. On appeal to the Exchequer Court, the fault was divided in exactly the reverse proportions. The plaintiff appealed to this Court. The defendant contended that the narrow channel rule or alternatively the meeting end-on rule applied and justified her four alterations of course to starboard in order to pass port to port. The *Imperial Halifax* contended that the area was open sea and that it was the duty of the *Willowbranch* to maintain her course without alteration so that the ships would pass starboard to starboard.

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\*PRESENT: Cartwright, Martland, Judson, Ritchie and Spence JJ.

*Held:* The appeal should be allowed.

The parties were equally responsible for the collision. The evidence did not justify the finding that the area was a narrow channel. It was a general rule that in fog, when by one vessel the course of another within a danger zone was not yet ascertained, without sufficient indication to justify action, no change of course should be made. The plaintiff was negligent in not reducing speed earlier. The defendant was guilty of an act of negligence by changing course before he had ascertained the course of the incoming ship. The position of difficulty would not have arisen if the radar sets had been tended with care and intelligence by the operators. Different degrees of fault not having been established, the liability should be shared equally by both parties.

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APPEAL from a judgment of Thurlow J. of the Exchequer Court of Canada<sup>1</sup>, allowing an appeal from a judgment of Pottier D.J.A. Appeal allowed.

*Donald McInnis, Q.C.*, and *John Dickey, Q.C.*, for the plaintiff, appellant.

*Donald Kerr* and *R. N. Pugsley*, for the defendant, respondent.

The judgment of the Court was delivered by

ITCHIE J.:—This is an appeal from a judgment of Mr. Justice Thurlow of the Exchequer Court of Canada<sup>1</sup> allowing an appeal from a judgment of Mr. Justice Pottier, District Judge in Admiralty for the Admiralty District of Nova Scotia, whereby the latter judge had found the *M.S. Willowbranch* chiefly to blame for a collision between that ship and the *Imperial Halifax*, two radar-equipped motor driven oil tankers which collided in the dense fog in the approaches to Halifax Harbour at 8.23 or 8.23½ a.m. on July 16, 1959, when the sea was calm, the wind light and the tide ebbing at about one-quarter knot.

Mr. Justice Pottier would have apportioned the blame for the collision two-thirds of the *Willowbranch* and one-third to *Imperial Halifax*. Mr. Justice Thurlow, however, divided the fault in exactly the reverse proportions.

There appears to be direct conflict between the parties as to many of the details relating to the movements, courses and speeds of the two ships at the time of the collision and for a period of approximately twenty minutes which preceded it, but apart from one major difference, to which reference will hereafter be made, the trial judge and the

<sup>1</sup> [1964] Ex. C.R. 255.

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judge sitting in appeal are in substantial agreement as to what happened, and where they agree I do not hesitate to accept the version which they have adopted.

The movements of the two ships can most conveniently be considered separately and after reading the reasons for judgment in light of the evidence and listening to exhaustive argument from the counsel concerned, it appears to me that the essential factors contributing to the collision can be summarized as follows:

The appellant's motor ship, *Imperial Halifax*, of 3,734 gross tons, 357 feet length overall and 48 feet in width, left Imperoyal on the east side of Halifax Harbour at 7.51 a.m., outbound for Charlottetown, P.E.I., and proceeding seaward in clear weather and without a pilot on a course of 163° True, she had attained her full speed of 12 knots by about 8.13 when the master first observed a bank of fog one and a half miles away. Two minutes later the course was altered to 159° True so as to veer to the eastward and thus avoid a group of American naval vessels which appeared to be taking the westerly route out of the harbour. When the course was so altered the order "standby engines" was rung on the telegraph, and sounding of the fog whistle at one-minute intervals was commenced. Full speed was, however, maintained until entering the fog bank about four minutes later, at which time the echo of an approaching ship was first seen on the radar, whereupon engines were reduced to "half speed" and about one half minute later to "slow". The Captain estimated the approaching ship to be approximately one and a half miles ahead and without plotting its course he further estimated that it was bearing 3° on the starboard bow. When the ships were about a mile apart and the angle of the approaching ship appeared to have broadened to 4° on the starboard bow, the Captain of the *Imperial Halifax* assumed that the two ships could pass starboard to starboard if each maintained its course, and he therefore continued on a course of 159° True until a ship's whistle was heard on the starboard bow when he stopped engines and altered course 4° to port. He states that at this time the radar indicated to him that the approaching ship was on a course that would have crossed that of the *Imperial Halifax* from starboard to port. I agree with Mr. Justice Thurlow that the 4° alteration to port was too late to have any bearing on the collision, as within one minute of that

order the approaching vessel was heard directly ahead and engines were reversed. In the result, *Imperial Halifax* was going at about four knots when the collision took place and was heading 155° True.

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The *Willowbranch*, on the other hand, which is 259 feet in length, 43.9 feet in breadth and of 2,153 gross tons, was entering the harbour enroute from Montreal and having taken on her pilot at 8.00, the course was set at 330° True, but on the pilot advising that the American warships were proceeding out of the harbour probably to the westward of Neverfail Buoy, the course was altered to 340° and at the same time the engines were put to "full ahead". Shortly afterwards the course was further altered to 345° True, but "full ahead" was maintained on the engines for about ten minutes when the Captain decided to reduce to "half speed". The course was again altered to 340° True shortly before the echo of an approaching ship was first seen on the radar. Various accounts are given by the officers and the pilot as to exactly what was seen, but it can be gathered from the pilot's evidence that there was one ship at 10° on the port bow and one directly ahead. The latter ship was estimated to be about two and one-half miles away, and when it had been under observation for approximately two or three minutes, the course of the *Willowbranch* was again altered to 345° True and later to 350° in the hope of putting her to the eastward out of the path of the oncoming ship. Shortly afterwards it appearing that this ship was approaching at a high speed and that the angle of her approach on the port bow was not broadening, the course was altered to 355° True and still later to 360° True. It appears from the evidence that the alterations in course from 340° to 345° to 350° to 355° to 360° were all made within four to four and a half minutes before the collision, and the effect of these changes was to bring the *Willowbranch* directly across the bow of the *Imperial Halifax*. The whistle of *Imperial Halifax* was first heard on the *Willowbranch* about two minutes before the collision and a second whistle was heard before they met. No action was taken to stop the engines of the *Willowbranch* on hearing these whistles, but when the approaching vessel came into view about 300 feet away, the order "hard astarboard" and "full astern" was given and *Willowbranch* was practically stopped at the time of collision.

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Pottier D.J.A. expressed the opinion, with which I am in full accord, that the course of prudence on the part of those in charge of both vessels would have been to stop after sighting each other on the radar so that each could determine the course of the other before coming to close quarters, but he found the *Willowbranch* chiefly to blame on the ground that her course was altered to starboard by gradual degrees in fog without the course of the *Imperial Halifax* having first been determined, and that she was thus placed directly in the path of the approaching vessel when they came in sight of each other through the fog, by which time it was too late to avoid the collision.

In assessing the degree of fault to be attributed to the *Imperial Halifax*, Pottier D.J.A. proceeded on the assumption that this ship had run into thick fog at 8.15 and had then put her engines at "half speed", whereas it is now agreed that she did not run into the fog until about 8.19 and that she was travelling at full speed until that time. In view of the fact that Thurlow J. found the grossly excessive speed of the *Imperial Halifax* while in fog to be one of the chief elements of her fault, it will be seen that the discrepancy is a significant one.

By virtue of the provisions of s. 645(1) of *The Canada Shipping Act*, the Governor-in-Council is empowered to make rules and regulations for the prevention of collisions at sea, and by s. 647 such regulations, subject to any local rules or by-laws, are required to be obeyed by all masters of vessels and a fine is provided "not exceeding \$200 for failure, without reasonable cause, to comply with such regulations".

By P.C. 1953-1287, The International Regulations for Preventing Collisions at Sea (hereinafter referred to as The Regulations) are made applicable to the waters here in question, and the conduct of ships in fog is governed by Rule 16 of those Regulations, sub-para. (a) of which reads as follows:

16(a) Every vessel, or seaplane when taxi-ing on the water, shall, in fog, mist, falling snow, heavy rainstorms or any other condition similarly restricting visibility, go at a moderate speed, having careful regard to the existing circumstances and conditions.

In my opinion, entirely apart from the provisions of Rule 16, the Captain of the *Imperial Halifax* should, as a

matter of seamanship, have reduced his speed on first sighting the bank of fog a mile and a half away. I agree with the following excerpt from Marsden's Work, *The Law of Collisions at Sea*, 11th ed., page 770:

Apart from the regulations, the law requires a ship to be navigated in or near a fog at a moderate speed; the regulations make no alteration in the law in this respect.

Vessels approaching a bank of fog or snow, which they are about to enter, should, as a matter of seamanship, go at a moderate speed. Failure to comply with this duty does not, however, amount to a breach of rule 16; but if, in the result, her speed when she enters the fog is not moderate she may then be in breach . . .

The appellant's counsel discounted the speed of the *Imperial Halifax* as a factor contributing to the collision saying that although it may have had some bearing on the extent of the damage which was done to the respective ships, it was not shown to have been in any sense a cause of their coming together. It appears to me that the requirement of Rule 16(a) is not designed merely for the purpose of lessening the violence of collisions between ships, but rather that its primary purpose is to prevent collisions altogether by providing that each ship shall go at such a speed as to afford the maximum time for the taking of avoiding action when another suddenly comes into view at a short distance. I can see no answer in the present case to the contention that if the *Imperial Halifax* had started reducing speed four minutes sooner than she did (i.e., when she first sighted the fog), her ability to stop before the collision occurred would have been proportionately increased.

I agree with Mr. Justice Thurlow that the speed of the *Imperial Halifax* on entering fog, taken together with her master's failure to sooner identify the approaching vessel on radar and his error in judgment when he did see it in deciding to take the chance of passing at such close quarters in fog, are factors which substantially contributed to the collision, and I agree also that Pottier D.J.A.'s error as to the time when speed was first reduced affected his judgment as to the degree of fault to be attributed to the *Imperial Halifax*. I have, however, reached the conclusion, for the reasons hereinafter set forth, that the *Willowbranch* was equally at fault.

In reducing the fault attributable to the *Willowbranch* from two-thirds to one-third, Thurlow J. adopted the view

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that immediately before and at the time of the collision, these ships were proceeding along the course of a "narrow channel" within the meaning of Rule 25(a) of the Collision Regulations which reads as follows:

(a) In a narrow channel every power-driven vessel when proceeding along the course of the channel shall, when it is safe and practicable, keep to that side of the fairway or mid-channel which lies on the starboard side of such vessel.

In this regard, Mr. Justice Thurlow said:

... the locality in which the collision occurred is a narrow channel within the meaning of Rule 25 and adopting this view of the nature of the locality I am of the opinion, again relying to a considerable extent on Captain Bird's advice, that in the particular circumstances it was not wrong for the *Willowbranch* on detecting the approach of the *Imperial Halifax* directly ahead to alter to starboard in an effort to get to her side of the mid-channel or fairway.

The test to be employed in determining whether or not an area is a "narrow channel" within the meaning of Rule 25(a) is discussed by Wilmer J. in *Anna Salen*<sup>1</sup>, where he says:

As I understand it the question whether article 25 of the Collision Regulations applies in relation to a given piece of water is one to be determined on the evidence given in the particular case, the Court being assisted by the knowledge and experience of the Elder Brethren.

And again in *The Sedgepool*<sup>2</sup>, where he says:

As I understand the law, one of the determining factors in deciding whether a given area is or is not within the "narrow channel" rule is the way in which seamen in fact regard it and behave in it.

In reaching his conclusion in this regard, Thurlow J. undoubtedly relied in great degree, as he was entitled to do, on the advice of the nautical assessor sitting with him on appeal, but the advice of the learned assessor who sat at the trial did not lead Pottier D.J.A. to the same conclusion, and there does not appear to be any case deciding that the area of this collision is within a "narrow channel". Under the circumstances the matter appears to me to be one to be decided upon the evidence.

Apart from the fact that the Captain of the *Willowbranch* referred to the easterly route into Halifax Harbour as "the eastern channel in the approach to the harbour" and his pilot and first officer both referred to the area of the collision

<sup>1</sup> [1954] 1 Lloyd's Rep. 474 at 487. <sup>2</sup> [1956] 2 Lloyd's Rep. 668 at 678.

as a channel, there is no direct evidence whatever in the record which could, in my view, be said to establish that seamen make a practice of treating the area here in question as a "narrow channel" within the meaning of Rule 25(a). It is true the Captain of the *Imperial Halifax* uses the word "channel", but he expressly states that he did not regard these waters as a place to which Rule 25 applied.

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On such evidence I am not prepared to make any finding that the area described by the learned judge in appeal is a "narrow channel", but this should, of course, not be construed as precluding the making of such a finding in another case if evidence can be adduced to support such a conclusion.

Thurlow J., however, also expressed the view that even treating the narrow channel rule as inapplicable, it was nevertheless not "wrong for the *Willowbranch* to alter to starboard to take herself out of the way in case the oncoming ship should be passing to the east". In so finding, Mr. Justice Thurlow took into consideration the fact that the *Willowbranch* had a ship dead ahead of her proceeding at a high rate of speed and had no means of knowing whether that ship was going to attempt to pass to the east or to the west.

In this regard, counsel for the *Willowbranch* sought to invoke the provisions of Rule 18 of the Regulations, the opening sentence of which reads as follows:

Rule 18: When two power-driven vessels are meeting end on, or nearly end on, so as to involve risk of collision, each shall alter her course to starboard, so that each may pass on the port side of the other.

It is, I think, important to remember that Rules 17 to 27 inclusive are contained in part C of the Regulations which is entitled "Steering and Sailing Rules", and which contains the following preliminary paragraph:

In obeying and construing these Rules, any action taken should be positive, in ample time, and with due regard to the observance of good seamanship.

I agree with Thurlow J. that the action of the *Willowbranch* in altering course as she did was neither sufficiently positive nor in time, and it appears also that alteration of course in fog when the position of an approaching ship has not been ascertained is anything but good seamanship. As was said by Rand J. *The Dagmar Salen v. The Chinook*<sup>1</sup>:

<sup>1</sup> [1951] S.C.R. 608 at 612, 4 D.L.R. 1.



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It is a general rule as old as navigation that in fog, when by one vessel the course of another within a danger zone is not yet ascertained, without sufficient indication to justify action, no change of course should be made: *Vindomore v. Haswell*, 1891 A.C. 1; and in *The "Wear"*, 164 E.R. 419, Hill J. used this language:

It has been said over and over again in this court that when in a fog you sight a ship whose direction or course you do not know the worst thing you can do is to take helm action.

I am accordingly of opinion that the actions of the *Willowbranch* in altering course as she did cannot be justified as a compliance with Rule 18 of the Regulations.

In my opinion, however, the fault of these two ships is not to be assessed only in terms of their respective actions at close quarters, and I adopt the language used by Wilmer J. in *The Billings Victory*<sup>1</sup>, where he said:

It appears to me that the most important thing to give effect to in considering degrees of blame is the question which of the two vessels created the position of difficulty.

In this regard, I am of opinion that the overriding negligence common to both ships in the present case lay in the use made of their respective radar equipment, and I am satisfied that "the position of difficulty" would not have arisen at all if the radar sets with which both ships were equipped had been tended with the degree of care to which Rand J. referred in *The Dagmar v. The Chinook*, *supra*, at page 612 where he said:

If radar is to furnish a new sight through fog the report which it brings must be interpreted by active and constant intelligence on the part of the operator.

Rule 16(b) of the Regulations provides that:

16(b) A power-driven vessel hearing, apparently forward of her beam, the fog-signal of a vessel the position of which is not ascertained, shall, so far as the circumstances of the case admit, stop her engines, and then navigate with caution until danger of collision is over.

The considerations giving rise to this rule appear to me to apply with added force when a ship is equipped with radar and thereby has available a means of detecting an approaching ship at a greater distance and with greater accuracy than any fog signals could afford. The ships involved in this collision detected each other forward of their respective beams before hearing each other's fog signals

<sup>1</sup> [1949] *Lloyds Rep.* 877 at 883.

or sighting each other visually, and they were thus in a position to take early and substantial action to avoid coming to close quarters. In lieu of taking such action, the proper course for both would have been to stop engines and not to proceed again until each had established the position of the other so that both could proceed without risk of collision.

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As I have indicated, I take the view that the *Imperial Halifax* should have seen the echo of the *Willowbranch* sooner, but the greater negligence consisted in the Captain, after he had detected the presence of the approaching ship by radar, proceeding on the assumption that the ships would pass starboard to starboard without first having plotted the course of the ship ahead. It seems probable that the ships would indeed have passed if *Willowbranch* had not altered course, but under all the circumstances, Captain Kent's decision to proceed, based on his own unverified estimate, exposed both ships unnecessarily to the risk of collision.

The negligence of the *Willowbranch* was of the same character. The echo of the *Imperial Halifax* was detected on the radar two and a half miles away and yet, despite this warning, the course of the approaching ship was never plotted. On the contrary, the *Willowbranch* appears to have adopted a series of courses which resulted in the ship edging her way directly into the path of the *Imperial Halifax*. If the radar information had been "interpreted by active and constant intelligence on the part of the operator". I find it difficult to believe that this action would have been taken.

Under all the circumstances, I have reached the conclusion that the two ships were equally to blame for this collision. In so doing I am conscious of the fact that where each of the courts below has assessed the fault between the parties in different proportions, the cases are rare in which this Court will undertake to allocate the responsibility without adopting one or other of such assessments. In the present case, however, I find that in holding *Imperial Halifax* less than one-half to blame, Pottier D.J.A. was mistaken as to the time when that ship started to reduce speed, and that in reducing the degree of fault attributable to the *Willowbranch* to less than one-half, Thurlow J. took the view, with which I do not agree, that that ship was not wrong in altering course to starboard in fog and that her

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only fault in this regard lay in the fact that the alterations were not sufficiently bold or timely.

In the result, as I am unable to conclude that different degrees of fault have been established, it follows that liability should be borne equally between the two ships in accordance with the provisions of s. 648(2) of *The Canada Shipping Act*.

I would accordingly allow this appeal with costs in this Court and direct that the order of Pottier D.J.A., including his disposition of the costs, be varied so as to give effect to this decision. I see no reason for disturbing the disposition of the costs in the Exchequer Court as directed by Thurlow J.

*Appeal allowed with costs.*

*Solicitor for the plaintiff, appellant: D. McInnes, Halifax.*

*Solicitor for the defendant, respondent: D. E. Kerr, Halifax.*

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