1966

*Nov. 7, 8, 9
Nov. 25

THE SHIP *PACIFIC WIND* (*Defendant*) APPELLANT;

AND

ERIK JOHNSON, FOREST JAMES FERGUSON, GILBERT GEORGE, JEROME BOND and JAMES E. RIELLY (*Plaintiffs*) ..... RESPONDENTS.

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA, BRITISH COLUMBIA ADMIRALTY DISTRICT

Shipping—Collision between two ships—Narrow channel—Both ships negligent—Impossibility to establish degrees of fault—Application of s. 648(2) of the Canada Shipping Act, R.S.C. 1952, c. 29.

The trial judge apportioned the liability equally between the defendant and the plaintiffs in respect of damages alleged to have been sustained by the plaintiffs as a result of a collision in the coastal waters of British Columbia between the plaintiffs' fishing vessel *Unimak* and the defendant's tanker *Pacific Wind*. The collision occurred in mid-channel in a stretch of water known as Graham Reach, where, it is agreed, it constitutes a narrow channel within the meaning of the rules. The *Unimak*, which was proceeding in a southerly direction, was not steering by compass but was merely following the western shore line until it was thought to be too close whereupon an abrupt alteration was made to port. As to the *Pacific Wind*, it was proceeding in a northerly direction, on a course which was bringing the vessel to mid-channel. The collision ensued in spite of the fact that an order was given to alter the course of the *Pacific Wind* to starboard. No appeal was taken from the finding that the negligence of the *Unimak* had contributed to the collision. However, the *Pacific Wind* appealed to this Court from the trial judge's finding that it was equally negligent.

Held: The appeal should be dismissed.

There was no reason to disturb the finding of negligence against the *Pacific Wind*. It could not be said that in making the apportionment which he did the trial judge was in any way acting on a wrong ground of law or conclusion of fact. The *Pacific Wind's* negligence was such as to make it impossible to establish different degrees of fault between the vessels, within the meaning of s. 648(2) of the *Canada Shipping Act*.

Navigation—Collision entre deux bateaux—Chenal étroit—Négligence des deux bateaux—Impossibilité d'établir le degré de faute de chacun—Application de l'art. 648(2) de la Loi sur la Marine marchande du Canada, S.R.C. 1952, c. 29.

---

*PRESENT: Cartwright, Abbott, Martland, Ritchie and Spence JJ.

Le juge au procès a réparti la responsabilité également entre le défendeur et les demandeurs quant aux dommages qui auraient été subis par les demandeurs à la suite d'une collision dans les eaux côtières de la Colombie-Britannique entre le bateau de pêche *Unimak* appartenant aux demandeurs et le pétrolier *Pacific Wind* appartenant au défendeur. La collision a eu lieu au milieu du chenal dans une étendue d'eau connue sous le nom de Graham Reach. Les parties sont d'accord que cet endroit constitue un chenal étroit dans le sens des règles. L'*Unimak,* qui se dirigeait vers le sud, ne navigait pas au compas mais se contentait de longer la côte ouest. Un ordre soudain de changer de route vers la gauche fut donné lorsqu'il fut réalisé qu'on était peut-être trop près de la côte. Quant au *Pacific Wind,* il se dirigeait vers le nord et suivait une route qui devait éventuellement l'amener vers le milieu du chenal. La collision se produisit malgré le fait qu'un ordre de changer la route du *Pacific Wind* vers la droite ait été donné. Aucun appel ne fut interjeté à l'encontre du verdict que la négligence du *Unimak* avait contribué à la collision. Par contre, le *Pacific Wind* en appela devant cette Cour du verdict qu'il avait été négligent en proportion égale.

Arrêt: L'appel doit être rejeté.

Il n'existe aucune raison pour changer le verdict de négligence porté contre le *Pacific Wind.* On ne peut pas dire que le juge au procès a agi en vertu d'un motif de droit erroné ou d'une conclusion de fait erronée lorsqu'il a réparti la responsabilité également. La négligence du *Pacific Wind* était telle qu'il était impossible d'établir le différent degré de faute entre les deux bateaux, dans le sens de l'art. 648(2) de la *Loi sur la Marine marchande du Canada.*

APPEL d'un jugement du Juge Gibson de la Cour de l'Échiquier du Canada, siégeant dans le district d'Amirauté de la Colombie-Britannique. Appel rejeté.

APPEAL from a judgment of Gibson J. of the Exchequer Court of Canada, sitting in the British Columbia Admiralty District. Appeal dismissed.

J. I. Bird, Q.C., and *W. O. Forbes,* for the defendant, appellant.

D. B. Smith and *T. P. Cameron,* for the plaintiffs, respondents.

The judgment of the Court was delivered by

RITCHIE J.:—This is an appeal from a judgment rendered by Mr. Justice Gibson of the Exchequer Court of Canada, sitting with two nautical assessors in the British Columbia

1966

THE SHIP *Pacific Wind* v. JOHNSON *et al.*

Ritchie J.

Admiralty District, whereby he apportioned liability equally between the appellant and the respondents in respect of damage alleged to have been sustained by the respondents as the result of a collision which occurred in the coastal waters of British Columbia at 5:15 a.m. on a clear November morning between the fishing vessel *Unimak* and the tanker *Pacific Wind*. The learned trial judge found that the two ships collided in about mid-channel in a stretch of water known as Graham Reach at a point therein about 8 cables north of its juncture with another stretch of water called Tolmie Channel which runs into it from the south. The learned trial judge fixed the approximate point of collision as being about 3 cables south of Quarrie Point on the western shore of Graham Reach where the Department of Transport has installed a flashing green light as an aid to navigation. All these matters appear with greater clarity by reference to the Department of Mines and Technical Surveys Chart No. 3758 entitled "Sarah Island to Swanson Bay" and it is agreed between the parties that at the point where the collision took place Graham Reach constitutes a "narrow channel" within the meaning of Rule 25A of the Regulations for the Prevention of Collisions at Sea.

As the events developed which finally culminated in the collision, the *Unimak*, a fishing vessel about 58 feet in length, with a gross tonnage of 57.23 tons, was proceeding in a southerly direction in Graham Reach at about 8 knots loaded with a catch of fish on her way from her fishing grounds to Vancouver, whereas the *Pacific Wind*, an oil tanker about 230 feet in length with a gross tonnage of 1560.56 tons, was proceeding down Tolmie Channel in a northerly direction at between 10 and 11 knots on a voyage from Shellburn to Kitimat, B.C., loaded with a full cargo of fuel oil. Both vessels were equipped with radar but it is apparent that the *Unimak* was making no effective use of this aid although radar 'fixes' taken aboard the *Pacific Wind* enabled the mate to determine the position of the *Unimak* when she was six miles away and at that time was showing her green light. As *Pacific Wind* proceeded down Tolmie Channel she held her course to 342 degrees magnetic and maintained her speed while the *Unimak* proceeding up Graham Reach was not steering by any compass course at all but was merely following the western shore line until

it was thought to be too close whereupon an abrupt alteration was made to port and the vessel ran on its new course for about five minutes.

The learned trial judge has reviewed the contradictory evidence at some length and I do not propose to retrace the steps which he has taken with obvious care and with the expert assistance of the assessors who sat with him. I think it sufficient to say that he found that the crew in charge of the *Unimak* at all relevant times was incompetent, failed to keep an adequate lookout, took no adequate precautions to avoid collision when it became imminent and navigated just prior to the time of the collision in or about the center of the channel. This is a clear finding of negligence which contributed to the collision and subsequent damage and no appeal has been taken from it so that in my opinion the only question to be determined on this appeal is whether the *Pacific Wind* was also negligent and if so whether its negligence was such as to make it impossible to establish different degrees of fault between the vessels.

It is important to observe that if the course of 342 magnetic steered by the *Pacific Wind* had been maintained after entering Graham Reach from Tolmie Channel it would have brought the vessel well over to the west of mid-channel by the time it reached Quarrie Point. There is no doubt that an order to alter the course to starboard so as to bring the vessel to the eastward had been given very shortly before *Pacific Wind* entered Graham Reach but the learned trial judge found the evidence to be inconclusive "as to precisely when the first order was given to manoeuver the vessel *Pacific Wind* to starboard" and the fact of the matter is that she was in or about mid-channel at the time of collision so that, in my opinion, whenever the order was given it was not soon enough.

The actions of *Pacific Wind* are to be judged in light of the International Regulations for Preventing Collisions at Sea, Rule 25A of which reads as follows:

> 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.

This rule, like the other "Steering and Sailing Rules" is required to be obeyed in accordance with the preliminary

1966

THE SHIP *Pacific Wind* v. JOHNSON *et al.*

Ritchie J.

paragraphs of Part C of the Regulations, the first of which provides that:

> 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.

(The italics are my own).

It is to be remembered that *Pacific Wind* had first been alerted to the presence of an approaching vessel, which was then showing a green light, at a distance of 6 miles and it seems to me that it should have been possible to take steps to ensure that the *Pacific Wind* was well in its own waters in time for the two vessels to pass safely notwithstanding the erratic and unpredictable manner in which the *Unimak* was being navigated.

The learned trial judge also found that the failure of *Pacific Wind* to reduce speed earlier than she did was a factor which contributed to the collision and I see no reason to disturb his finding.

Section 648 of the *Canada Shipping Act,* R.S.C. 1952, c. 29, reads, in part, as follows:

> 648. (1) Where, by the fault of two or more vessels, damage or loss is caused to one or more of those vessels, to their cargoes or freight, or to any property on board, the liability to make good the damage or loss shall be in proportion to the degree in which each vessel was in fault.
>
> (2) Where, having regard to all the circumstances of the case, it is not possible to establish different degrees of fault, the liability shall be apportioned equally.

In the present case, after having seen and heard the evidence of those who were aboard the respective vessels at the time of the collision and having had the advantage of the advice of two nautical assessors, the learned trial judge found it impossible to establish different degrees of fault, and although Mr. Bird, in his very able argument on behalf of the appellant, cast some doubt on the learned trial judge's findings as to credibility, I am nevertheless satisfied that this is not a case where a court of appeal should interfere with his conclusions.

The difficult problem of measuring the degrees of fault in the navigation of two ships is one which, as Lord Buckmaster said in the House of Lords in *SS. Kitano Maru v. SS. Otranto*[1]:

> ...is primarily a matter for the judge at the trial, and unless there is some error in law or fact in his judgment it ought not to be disturbed.

[1] [1931] A.C. 194 at 204.

The matter was put with perhaps greater force by Lord Justice Scrutton in *The Luso*[1], where he said at page 165 with respect to a finding at trial which had established different degrees of fault between two vessels:

> ...before the Court of Appeal ought to interfere with that finding they must be able to put their finger on something and say that the learned Judge has been wrong on some particular point and that that particular point is so substantial that if he had taken what we say is the right view of it he must have altered the proportion of damage.

Both these last quoted cases are referred to with approval in this Court by Davis J. in *S.S. Benmaple v. Ship Lafayette*[2], where he applied the same principle; saying of the trial judge in that case:

> ...we are not satisfied that in making the apportionment he did he was in any degree acting either on any wrong ground of law or conclusion of fact.

The decision of Lord Sumner in *S.S. Hontestroom v. S.S. Sagaporack*[3], which was cited with approval by Martland J. in *Prudential Trust Co. Ltd. v. Forseth*[4], is to the same effect.

Notwithstanding the doubts suggested by Mr. Bird as to the accuracy of the reconstruction by the learned trial judge of certain of the movements of the two vessels immediately before and at the time of the accident, I am not satisfied that in making the apportionment which he did he was in any way acting on a wrong ground of law or conclusion of fact and I would accordingly dismiss this appeal with costs.

Appeal dismissed with costs.

Solicitors for the defendant, appellant: Campney, Owen & Murphy, Vancouver.

Solicitors for the plaintiffs, respondents: Bull, Housser & Tupper, Vancouver.

[1] (1934), 49 Ll. L.R. 163.
[2] [1941] S.C.R. 66 at 75, 1 D.L.R. 161.
[3] [1927] A.C. 37 at 47.
[4] [1960] S.C.R. 210 at 216, 30 W.W.R. 241, 21 D.L.R. (2d) 587.