
KINGCOME NAVIGATION COM- }
 PANY LIMITED (*Defendant*) .. }

APPELLANT;

1965
 *June 3, 4
 Oct. 14

AND

GEORGE PERDIA (*Plaintiff*) RESPONDENT.

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

Shipping—Collision of ships in dense fog—Narrow channel—Liability.

The tug-boat *Ivanhoe*, owned by the defendant company, collided, as she was leaving Vancouver Harbour in a dense fog, with the inbound fishing vessel *Western Spray*, of which the plaintiff was the owner and master. The collision occurred as the ships were passing through a narrow channel. The trial judge, sitting with two assessors, fixed the liability of the *Ivanhoe* at 85 per cent and that of the *Western Spray* at 15 per cent. The defendant company appealed to this Court.

Held: The appeal should be dismissed.

The apportionment of liability should not be varied. The fault of the *Western Spray* in being too close to the mid-channel, as found by the trial judge and against which finding the plaintiff did not appeal, was in no way comparable to that of the *Ivanhoe*. The latter ship was operating in a dense fog at a speed which prevented her from slowing down or altering course effectively within the area of the prevailing visibility; she was not keeping to her proper side of mid-channel; had no look-out and was depending upon a radar which was not properly tended.

*PRESENT: Abbott, Martland, Judson, Ritchie and Hall JJ.

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Navigation—Collision de bateaux—Brouillard épais—Chenal étroit—Responsabilité.

En sortant du port de Vancouver sous un brouillard épais, le bateau-remorqueur *Ivanhoe*, propriété de la compagnie défenderesse, entra en collision avec le bateau de pêche *Western Spray* qui se dirigeait vers le port et dont le demandeur était le propriétaire et capitaine. La collision eut lieu alors que les bateaux naviguaient dans un chenal étroit. Le juge au procès, siégeant avec deux assesseurs, a établi la responsabilité du *Ivanhoe* à 85 pour-cent et celle du *Western Spray* à 15 pour-cent. La compagnie défenderesse en appela devant cette Cour.

Arrêt: L'appel doit être rejeté.

Le partage de la responsabilité ne devrait pas être modifié. La faute du *Western Spray* de s'être tenu trop près du milieu du chenal, faute retenue par le juge au procès et contre laquelle conclusion le demandeur n'a pas appelé, n'était aucunement comparable à celle du *Ivanhoe*. Ce dernier bateau était conduit sous un brouillard épais à une vitesse qui l'empêchait de ralentir ou de changer sa course effectivement dans la zone où la visibilité était prédominante; il n'était pas de son propre côté du milieu du chenal; il n'avait aucune vigie et se fiait à un radar qui n'était pas correctement opéré.

APPEL d'un jugement du Juge Norris, du District d'Amirauté de la Colombie-Britannique. Appel rejeté.

APPEAL from a judgment of Norris D.J.A., for the District of British Columbia. Appeal dismissed.

D. McK. Brown, Q.C., for the defendant, appellant.

J. I. Bird, Q.C., for the plaintiff, respondent.

The judgment of the Court was delivered by

ITCHIE J.:—This is an appeal from a judgment of Mr. Justice Norris, District Judge in Admiralty of the Admiralty District of British Columbia, sitting with two assessors, whereby he found the tugboat *Ivanhoe* to be chiefly to blame for a collision which occurred at 10 a.m. on September 20, 1962, when she was leaving Vancouver Harbour in dense fog and ran into the inbound fishing vessel *Western Spray* in Burrard Inlet just outside the First Narrows Bridge. There was no wind, the sea was flat and the learned trial judge has found that the tide was running between 2 and 3 knots against the *Ivanhoe*.

The *Ivanhoe*, owned by the appellant company, is a power tug of 185.98 gross tons with an approximate length

of 110 to 115 feet overall; she was manned by a crew of 7 and fitted with all the usual navigational aids including radio-telephone, magnetic compass and radar. The *Western Spray*, of which the respondent was the owner and master at the time of the collision, is a power-driven fishing vessel of 55.16 gross tons with an approximate length of 66 feet overall. She was manned by a crew of 6 and fitted with magnetic compass, radio-telephone and depth recorder but no radar.

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There does not appear to be any dispute as to the fact that Burrard Inlet constitutes a narrow channel within the meaning of Rule 25(a) of the International Regulations for Preventing Collisions at Sea, (hereinafter referred to as the Regulations), which reads as follows:

Rule 25(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.

This rule, like the other "Steering and Sailing Rules", is required to be obeyed in accordance with the preliminary paragraphs of Part C of the Regulations, the first of which provides that:

1. 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.

In the circumstances of the present case, it was the duty of the *Ivanhoe* to keep to the north side of the channel and of the *Western Spray* to keep to the south. Mr. Justice Norris was unable to determine the exact point of collision, but it is clear from his reasons for judgment that he found it to have taken place to the south of mid channel. In this regard he says:

On the whole of the acceptable evidence, while the point of collision cannot be fixed exactly, Perdia had navigated his vessel so as to get his vessel into the First Narrows Channel. I find that as a matter of wise precaution he should have kept more to the south of the channel in view of fog conditions, but I do not find on the evidence that he was in the north half of the channel.

I agree with this assessment of the situation.

Both the ships' masters claim to have been sounding the necessary fog signals, but neither heard nor detected the presence of the other until their stems were seen emerging

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from the fog by their respective crews, by which time they were approaching end on end at a distance of about fifty feet apart and the collision was virtually inevitable.

The true cause of this collision is not to be found in the actions of the tug and the fishing vessel after they had sighted each other. In seeking to attribute fault in such cases it is in my opinion necessary to examine the conduct of both vessels as they approached the area of collision in an effort to determine whether either of them could have foreseen the approaching danger and, by the exercise of reasonable care, have prevented the confrontation at close quarters from ever occurring at all.

The engineer of the *Ivanhoe*, whose evidence was believed by the learned trial judge, testified that after backing out from the ferry dock to proceed seaward her speed was set at "half ahead", amounting to $4\frac{1}{2}$ to 5 knots, which was maintained until the time of collision and that, with the heavy engine running at that speed, the master's order of "full astern" given upon sighting the *Western Spray* did not become effective to take any "way" off the tug before the impact. The master also ordered the helm "hard to starboard" and as to the effect of this order he says:

Q. Did your vessel respond to the helm change prior to the collision?

A. Just, just, because she's a big, heavy ship.

Q. She responds slowly, does she?

A. Slowly.

In this regard the helmsman stated under cross-examination:

Q. Can you recall seeing the *Western Spray* prior to the collision?

A. Recall seeing her?

Q. Yes, or any part of it before the collision?

A. I remember the Captain telling me that we were going to hit, and hard to starboard, and I spun the wheel and by the time I looked up we were there.

I take it from this evidence that the tug had not fully responded to the helm order before the ships came together.

From the time of leaving the dock until the collision, the *Ivanhoe's* master appears to have been navigating by radar, although he was also able to check his position from calls received by radio-telephone from the officer on duty in the radar-equipped station on the First Narrows Bridge. No lookouts were posted.

When the *Ivanhoe's* radar set was tested more than a month after the collision, the "echoes" were found to be weak but the evidence of the ship's master, who was the only person to use the set on the day in question is that "it worked perfectly". The evidence of the radar expert called on behalf of the appellant satisfies me that the steel work on the First Narrows Bridge did not offer any real interference with radar reception and I think it to be more probable than not that the explanation of the master's failure to detect any echo of the *Western Spray*, which had been almost directly in front of him for some time, is that he was not observing his set with the care which the circumstances required or that he was not operating it properly although he would, in my view, have been equally to blame for placing reliance on a radar containing a weakness which he had failed to detect.

The *Western Spray*, shortly before reaching the immediate area of the collision, had reduced her speed to 3 knots through the water. She was lighter and more easily maneuverable than the *Ivanhoe* and her engine was controlled by a throttle in the wheel house. The master says that upon sighting the *Ivanhoe* he put his engines "full astern" and that while he was running back to the galley so as to get away from the impending impact, he saw that his ship had already started moving in reverse. I agree with the learned trial judge that it is probable that before the actual impact, the reversing of the engine had already had the effect of moving the bow of the *Western Spray* to port which accounts for the fact that it was the starboard side of the vessel which was struck by the stem of the *Ivanhoe* and, notwithstanding the evidence of the helmsman and the master of the *Ivanhoe*, I am satisfied that there was little or no forward movement to the *Western Spray* at the time of the collision.

The master of the *Western Spray*, having no radar, had posted four lookouts, two in the bow and two above the wheel house and he was judging his position in the harbour by the sound signals which were coming from the First Narrows beacon on the north shore and the Prospect Point light on the south. The sounding of these signals was being reported to him by the lookouts in the bow, one of whom was stationed in the stem of the vessel and the other within hearing distance of the wheel house. According to her

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master, *Western Spray* was in approximately mid channel on a course of 70 degrees magnetic, and I agree with the learned trial judge that she was too close to the center line although, as has been said, she was not in the north half of the channel.

The main fault which counsel for the appellant attributed to the *Western Spray* was that although she had no radar, the master could have communicated by radio-telephone with the officer on duty on the First Narrows Bridge, and that if he had done so he would have been made aware of the presence of the *Ivanhoe* in time to take avoiding action.

It is true that the master of the *Western Spray* did not appear to understand how to communicate with the bridge station effectively by telephone and that because he called on the wrong radio band he could not get in touch with it. I think that he was negligent in this respect, but the only effective action for him to have taken if he had received the information which the bridge officer had to give him would have been to move further to the south of the Channel and the failure to do this is the fault which has been found against the *Western Spray* by Mr. Justice Norris who says:

... the master of the *Western Spray* was at fault in proceeding in the fog too close to the center of the Channel. In other respects he was not at fault.

The respondent does not appeal from this finding.

It appears to be desirable to comment on the evidence of the officer who was on duty on the bridge who testified very definitely that according to the picture seen by him on his radar screen, the two ships were proceeding on courses which should have enabled them to pass each other in safety when the *Western Spray* suddenly turned to port at an angle of about 70 degrees directly across the path of the *Ivanhoe*. This evidence would, of course, have concluded the matter in favour of the *Ivanhoe* if it had been accepted but Mr. Justice Norris clearly rejected it and concluded that the *Western Spray* made no such turn to port as that described by this witness. I am not prepared to depart from the assessment of this evidence made by the learned trial judge.

I find that in dense fog the *Ivanhoe* was operating at a speed which prevented her from slowing down or altering course effectively within the area of the prevailing visibility; she was not keeping to her proper side of mid channel, had no lookout and was depending upon a radar which was

not being properly tended. In this latter regard I adopt the view expressed by Mr. Justice Willmer in *The Anna Salen*¹, where he said:

These scientific installations, and particularly, radar, are potentially most valuable instruments for increasing safety at sea; but they only remain valuable if they are intelligently used, and if the officers responsible for working them work them and interpret them with intelligence. That is only another way, I think, of saying that a good look-out must be maintained. *A good look-out involves not only a visual look-out, and not only the use of ears, but it also involves the intelligent interpretation of the data received by way of these various scientific instruments.*

(The italics are my own.)

It appears to me that if the tug's radar had been constantly and intelligently observed by its master, he would have had warning of the presence of the *Western Spray* in time to take action as to both course and speed so that the two vessels would not have met as they did.

It was contended on behalf of the appellant that, taking into account the set of the tide against her, the speed at which the *Ivanhoe* was going was a moderate one within the meaning of Rule 16(a) of the Regulations which requires that in fog every vessel shall "go at a moderate speed having careful regard to existing circumstances and conditions".

The speed of the *Ivanhoe* could certainly not be characterized as immoderate under conditions of clear visibility but the governing consideration in the present case is that in the dense fog that speed was such that, to use the language employed by Mellish L.J.A. in *The Ship Clackamas v. The Schooner Cape d'Or*, approved in this Court² by Newcombe J., at page 336, the *Ivanhoe*

was unable to avoid a collision with the vessel from which she was bound to keep clear, and the risk of whose proximity she would reasonably be assumed to anticipate under existing conditions.

This was an immoderate speed having regard to "existing circumstances and conditions". The same considerations do not apply to the *Western Spray* a lighter vessel the reversal of whose engine had become effective before the collision.

Mr. Justice Norris fixed the liability of the *Ivanhoe* at 85 per cent and that of the *Western Spray* at 15 per cent. I would not vary this apportionment as I consider that the

¹ [1954] 1 Lloyd's Rep. 475 at 488.

² [1926] S.C.R. 331 at 336, 1 D.L.R. 384.

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fault of the *Western Spray* in being too close to mid channel was in no way comparable to that of the *Ivanhoe* in proceeding on her wrong side of the channel at a speed and on a course which could not be effectively altered within the prevailing limits of visibility and in relying upon a radar which was not being properly observed or intelligently interpreted.

I would accordingly dismiss this appeal with costs.

Appeal dismissed with costs.

Solicitors for the defendant, appellant: Russell & Du-Moulin, Vancouver.

Solicitors for the plaintiff, respondent: Campney, Owen & Murphy, Vancouver.
