

1930
Feb. 4, 5, 6.
Apr. 10.

THE SS. "PRINCESS ADELAIDE" } APPELLANT;
(DEFENDANT)

AND

FRED OLSEN & COMPANY (OWNERS } RESPONDENT.
OF THE SS. "HAMPHOLM") (PLAINTIFF)

THE CANADIAN PACIFIC RAILWAY } APPELLANT;
CO. (OWNERS OF THE SS. "PRINCESS
ADELAIDE") (PLAINTIFF)

AND

THE SS. "HAMPHOLM" (DEFENDANT) ..RESPONDENT.

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA

*Shipping—Collision—Speed—Fog—Regulations for Preventing Collisions at
Sea, 16, 19, 21, 22, 23, 27, 29.*

The *P. A.*, a passenger steamer, left Vancouver, bound for Victoria in a dense fog. After passing the first narrows, she was running at a rate of twelve knots, on a course of S.W. $\frac{1}{4}$ S., which course she kept till the collision was imminent. She stopped her engines about a minute before the collision, upon hearing a signal from a tug to port, and one from a ship to starboard, the *H.*, and which she first saw emerging from the fog at a distance of about 300 feet, and between two and three points on her starboard. The *P. A.* then attempted to clear

*PRESENT:—Anglin C.J.C. and Newcombe, Lamont, Smith and Cannon JJ.

the *H.* by putting her helm hard astarboard with full speed ahead, but without success, the stem of the *H.* cutting into the *P. A.* on her starboard side, a little ahead of amidships; she was swinging with a speed of about eleven knots. The *H.*, inward bound, passed Point Atkinson at 10.05 a.m. on a course of E. by N. and at a speed of four knots, but seeing the density of the fog decided not to enter the narrows, but to proceed cautiously, by "slow ahead" and "stop" alternately, to a southerly part of English Bay, and altered her course at 10.25 to E.N.E. Later, at 10.50, hearing signals of other vessels, she changed her course E.S.E. giving proper signals. From 10 o'clock to 11.12 she was proceeding by "slow ahead" and "stop" at close intervals. At 11-12 the *H.* heard the signal from the *P. A.* about 5 or 6 points on her port bow. She stopped her engine, blew the whistle, to which the *P. A.* replied. There followed another exchange of whistles, and while the *P. A.* was whistling for the third time, she emerged from the fog, heading for the *H.* The *H.* then reversed her engine full speed and put her helm hard aport, but too late to avert collision. When they first saw each other the *P. A.* was running at ten knots, and the *H.* at one and a half knots. The collision occurred about half a minute after the two steamships first saw each other.

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Held (affirming the judgment of the Exchequer Court ([1930] Ex. C.R. 10)) that, on the facts, the navigation of the *H.* was free from blame. In the circumstances of the case, neither by the cases referred to nor by the practice of seamanship was the *H.* required to reverse before the *P. A.* became visible, as she could have come to a standstill within 30 feet. Upon the assumption that the *P. A.* was proceeding at moderate speed and obeying the injunctions of the pertinent collision regulations, the *H.*, while the vessels were out of sight of each other in the fog, had no occasion to reverse the mere steerageway which she carried, while, on the other hand, it was a matter of prudence and good practice that the ship should not be put out of command, the advantages of maintaining steerageway having frequently been recognized by the courts. The cause, which brought about the collision, was the excessive and reckless speed of the *P. A.* in proceeding in the dense fog which prevailed, and in a harbour where ships were so likely to be met, at the immoderate rate of twelve knots, when the visibility was only about 300 feet, and persisting in the maintenance of that speed, when she was aware that a steamship was approaching on her starboard bow, so as to involve risk of collision.

APPEALS from the judgment of the President of the Exchequer Court of Canada (1), allowing with costs an appeal of Fred Olsen & Company, owners of the SS. *Hampholm* (Respondent), and dismissing with costs a cross-appeal of the Canadian Pacific Railway Company (Appellant), owners of the SS. *Princess Adelaide*, from the judgment of the Honourable Mr. Justice Martin, Local Judge in Admiralty for the British Columbia Admiralty District, in cross-actions brought and tried together

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on the same evidence, for damage sustained by the respective vessels of the parties as a result of a collision between the said vessels in English Bay, adjacent to the harbour of Vancouver, on the 19th of December, 1928. The Local Judge in Admiralty found both vessels to blame, the *Princess Adelaide* for excessive speed, and the *Hampholm* because she should have reversed sooner; and he apportioned the damages to be borne two-thirds by the owners of the *Princess Adelaide* and one-third by the owners of the *Hampholm*. The owners of the *Hampholm* appealed to the Exchequer Court of Canada contending that the *Princess Adelaide* should have been held solely to blame. The owners of the *Princess Adelaide* cross-appealed, contending that it should have been found that the *Hampholm* did not stop her engines on first hearing the *Princess Adelaide*, and that a case for apportionment of damages according to degree of fault had not been made out, and that the damages should have been directed to be borne equally. The President of the Exchequer Court allowed the appeal of the owners of the *Hampholm* and dismissed the cross-appeal of the owners of the *Princess Adelaide* with costs.

J. E. McMullen for the appellants.

W. M. Griffin K.C. for the respondents.

The judgment of the court was delivered by

NEWCOMBE J.—These two steamships collided in English Bay, the outer harbour of Vancouver, on the forenoon of 19th December, 1928, at about 11.14½ o'clock by the *Hampholm's* time, or 11.16 by the *Princess Adelaide's* time, which appears to have been somewhat faster. There were cross actions to recover damages, and these were, by consent, consolidated and tried together at Vancouver, before the learned local judge of the Exchequer Court for the British Columbia Admiralty District, who found fault on both sides, and apportioned the liability according to his finding of the degree of fault, as provided by the *Maritime Conventions Act*, R.S.C., 1914, 1927, c. 126, viz:—two-thirds on the part of the *Princess Adelaide*, and one-third on the part of the *Hampholm*, saying:

* * * there is a great distinction between the conduct of the two vessels, the former (the *Princess Adelaide*) deliberately violated the Regula-

tions in a gross degree, and the latter (the *Hampholm*) erred in her manner of endeavouring to carry them out.

There was an appeal to the President of the Exchequer Court, and he, finding the *Princess Adelaide* alone to blame, exonerated the *Hampholm*, and remitted the case for the assessment and recovery of the damages sustained by the *Hampholm*.

The case now comes before this court upon appeal from the latter judgment. It was argued at unusual length, although it transpires that the material facts are not disputed in any important particular, and the controversy may, I think, be disposed of with full justice to the parties on the assumption that they are as found by the learned local judge.

On the morning in question, the *Hampholm*, a Norwegian steamship of 4,480 tons gross, 395 feet long, 52 feet beam and 10 knots speed, inward bound from the Orient to Vancouver, entered English Bay at 10.05 o'clock, passing Point Atkinson, which marks the entrance to the northward, about half a mile on her port hand. She evidently found it too thick to attempt the Narrows, and so proceeded cautiously, with the intention of anchoring at the usual anchorage in the southern part of the Bay. In doing this, she necessarily had to cross in a southeasterly direction the course of any outgoing vessel from the inner harbour which might attempt to navigate through the fog, which is described as "dense."

The *Princess Adelaide* is a single-screw steamship of Canadian registry, 3,060 tons gross, 290 feet long, 40 feet beam, and 16 knots speed. She plies daily between Vancouver and Victoria, carrying passengers for the Canadian Pacific Railway Company. She left her berth at Vancouver in the fog at 10.43 a.m., passed through the Narrows, and, emerging into the Bay at Prospect Point at 11.01 o'clock by her time, developed a speed of 12 knots, which she maintained upon her usual outward course, with little diminution, if any, until the moment of the collision.

The learned local judge, in his findings, states the matter thus:

At the time of collision the weather was calm, but with a dense fog and the tide at the last of the flood. According to the admission of the *Princess Adelaide's* master, she was running through the fog, after she left the Narrows, at a speed of twelve knots on a course which her master says was S.W. 3/4 S, as he marked it on the Admiralty Chart, and he also

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says, and there is no sound reason to doubt that statement, that he did not change that course till the collision became imminent. He had stopped his engine about half a minute before the collision upon hearing the fog whistles from a tug to port, and then, again, from a ship to starboard that turned out to be the *Hampholm*, which he first saw emerging from the fog at a distance of about 300 feet between 2 and 3 points on his starboard bow, and tried to clear her by putting his helm hard astarboard with full speed ahead, but it was too late to avoid the collision, the stem of the *Hampholm* cutting into the *Adelaide* on her starboard side, a little forward amidships, as shown by the position of the models on exhibit 4, which is admitted by both parties to be substantially correct. At the moment of impact the *Adelaide* was still swinging, with a speed of about 11 knots, at least, to avoid the *Hampholm*, which still had, I am satisfied, upon the conflicting evidence on the point, a slight amount of way on her when she sighted the *Adelaide*, but not exceeding 1½ knots; her preliminary acts admits she had "steerage way only." * * *

The *Hampholm*, inward bound to the Narrows, at 10.05 had passed and seen Point Atkinson, half a mile off, on a course E. by N., at a speed of about 4 knots, but shortly afterwards, in view of the density of the fog, had decided not to attempt to enter the Narrows, but to proceed cautiously, by "slow ahead" and "stop" alternately, to the usual anchorage in the southerly part of English Bay, which was in general the proper action to take in the circumstances, and to do so she altered her course at 10.25 to E.N.E. and continued on it at a decreasing alternate speed down to about 3 and 2 knots, and finally, owing to the signals of other vessels, again changed her course, at 10.50, to E.S.E., giving the proper signals and taking soundings.

While on that course and at least as early as 11.12, she heard the signal of another vessel (which turned out to be the *Adelaide*) about 5-6 points on the port bow, upon which she stopped her engines and blew her whistle, to which the *Adelaide* replied, and after another exchange of whistles and when the *Adelaide* was whistling for the third time (if not the fourth, as the *Hampholm*'s master gives it) she almost immediately emerged from the fog, at a distance of about 3-500 feet, and apparently heading almost directly for the *Hampholm*, or at least across her bow, upon which the *Hampholm* reversed her engines full speed and put her helm hard aport, but too late to avert the impact, as already noted. The master of the *Hampholm* says he was struck by the *Adelaide* less than "half a minute" after sighting her.

It is, I think, worth mentioning an additional fact, about which there is no dispute, which is thus stated by Capt. Hunter, master of the *Adelaide*, speaking of the last signal which he had from the *Hampholm*:

A. She just came in view then; I put the helm hard astarboard and put the engine full ahead.

Q. Yes. What was the effect on your ship of putting the helm hard astarboard?—A. Well, we swung to port about three-quarters of a point, and then I seen the *Hampholm* coming along and I thought that we might clear him by putting the helm hard aport and swinging the other way—swinging around him, but he was coming too fast and we were too close together then.

Q. Did the port helm order have any effect on the ship?—A. Yes, it stopped the swinging.

Q. Stopped the swing to port?—A. Yes.

Q. What course did the *Hampholm* appear to be on when you saw her?—A. Oh, well, approximately she would be about—I would say about south-east by south or thereabouts.

Q. And what distance away did she seem to you?—A. About 300 feet.

Q. About 300 feet from your ship?—A. Yes, sir.

Later on he says he went hard aport with a view to avoiding a collision, although it is difficult, upon his evidence, to understand the conjunction of these manoeuvres. He admits, however, that in the event the hard aport movement had no more effect than to stop the previous swing to port; but, if the captain thought that the hope of avoiding a collision could be realized only in this manner, it would seem to have been quite out of the reach of anticipation that he would allow so little time and space for the purpose:—about half a minute, or less as found at the trial, and about 300 feet, according to his own testimony.

Now the *Adelaide* contends, and the local judge agrees, that in the special circumstances of the case the *Hampholm* should have reversed her engines when she heard the second whistle from the *Adelaide*, or, at latest, upon hearing the third whistle, and that therefore, the *Hampholm* did not navigate with the requisite caution, and is consequently responsible for a degree of fault. Article 16 of the Collision Regulations admittedly applied. It provides that

Every vessel shall, in a fog, mist, falling snow, or heavy rain storms, go at a moderate speed, having careful regard to the existing circumstances and conditions.

A steam 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.

This article is, of course, to be interpreted in connection with articles 27 and 29, which insist upon due regard to all dangers of navigation and collision, the practice of seamen and any special circumstances which may render a departure from the rules necessary in order to avoid immediate danger; moreover, articles 19, 21, 22 and 23 have their application especially to the navigation of the *Adelaide*, and she certainly broke every one of these rules. It is said that, by reason of the fog and consequent difficulty of locating the respective positions, the starboard side rule could not operate until the vessels came within sight of each other, and so it may be; but, after that, it would seem that the rule could not with safety have been disregarded, unless

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overborne by special dangers or circumstances, and that, in any case, the previous navigation of the *Adelaide* should have been conducted in a manner which would have allowed of the possibility of avoiding the collision by the application of the rules laid down for common guidance.

There is abundant evidence to establish the cautious character of the *Hampholm's* navigation from the time she passed Point Atkinson. Her witnesses and records have been produced; and, from 10.56 o'clock, when she was dead in the water, until 11.14½ o'clock, when the collision occurred, it is shewn by her testimony and bell-book that her engine movements were as follows:

- 3 minutes stopped from 10.56 a.m. to 10.59 a.m.
- 1 minute slow ahead from 10.59 a.m. to 11 a.m.
- 1 minute stopped from 11 a.m. to 11.01 a.m.
- 4 minutes slow ahead from 11.01 to 11.05 a.m.
- 5 minutes stopped from 11.05 a.m. to 11.10 a.m.
- 2 minutes slow ahead from 11.10 a.m. to 11.12 a.m.
- 2 minutes stopped from 11.12 a.m. to 11.14 a.m.
- ½ minute full astern from 11.14 to 11.14½ (collision).

It was at 11.12 a.m. that the *Hampholm* heard, two or three points forward of her beam, on her port side, the whistle of a vessel which was the *Adelaide*, and her engines were thereupon immediately stopped and remained so until, when two minutes later the *Adelaide* came into view, put full astern under a hard aport helm.

Many cases have been cited; but, neither by any of these, nor by the practice of good seamanship, does it appear that the *Hampholm*, in the circumstances of this case, was required to reverse before the *Adelaide* became visible; and, in my view, the navigation of the *Hampholm* is free from blame. Upon the conceded facts, she could have come to a standstill within 30 feet, but I think her master did well to keep his ship in hand. It must be remembered, as said in Marsden on Collision, 8th edition, p. 8:

The rules are not made merely for the sake of the vessel which has to observe them, but for the sake of other vessels which may be approaching, or may be manoeuvring at close quarters, and who have every right and reason to suppose the rules will be observed, and none to suppose they will be broken.

And the same learned author says, at p. 403:

It would seem, therefore, that under the present law the duty to reverse does not arise (except, possibly, in the case of a steamship hearing

the foghorn of a sailing ship close to her and forward) until the ships are in sight of each other, or until the course of the ship, whose duty it is to keep her course, is clearly indicated to the other by the different directions in which her whistle is heard.

Upon the assumption that the *Adelaide* was proceeding at moderate speed and obeying the injunctions of the articles to which I have referred, the *Hampholm*, while the vessels were out of sight of each other in the fog, had no occasion to reverse the mere steerageway which she carried, while, on the other hand, it was a matter of prudence and good practice that the ship should not be put out of command. The advantage of maintaining steerageway is frequently recognized in the cases, and the Supreme Court of the United States, in the *Umbria* (1), says:

It is probably also true that, considering the great speed of the *Umbria*, it were better that the *Iberia* should keep her steerageway rather than stop her engines and reverse, since she would respond to her wheel more readily, if her engines were kept in motion than if her headway were entirely stopped. The case presented is not one where if both vessels had stopped and reversed, the collision might have been avoided; but whether, under the facts as they subsequently appeared to be, the *Iberia* could be deemed in fault for a manoeuvre which would have tended to avoid the collision rather than bring it about, by aiding her in keeping out of the way of the *Umbria*.

Even the master of the *Adelaide* frankly testifies that he has no complaint. He says:

Q. Now, have you any complaint to make with the manoeuvring—with the navigation of the *Hampholm*?—A. No, sir.

Q. So that, so far as she was concerned the accident was, as you state in this accident report, unavoidable?—A. Unavoidable as far as I could see, yes.

I cannot avoid the conclusion that the cause, and the only effective cause, which brought about the collision of these two vessels was the excessive and reckless speed of the *Adelaide* in proceeding in the dense fog which prevailed, and in a harbour where ships were so likely to be met, at the immoderate rate of 12 knots, when the visibility, as realized by her master and the officers and members of her crew who testified, was only about 300 feet, and persisting in the maintenance of that speed when she was aware, by the signals of the *Hampholm* heard in the *Adelaide's* wheelhouse, that a steamship was approaching on her starboard bow, so as to involve risk of collision. Let the visibility be increased, as suggested by the learned

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(1) (1897) 166 U.S. 404, at 418, 419.

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local judge, to 500 feet, or to 600 feet, as estimated by the *Hampholm's* witnesses; even then, as the event shews, the *Adelaide* entered the area of visibility with a speed which made it impossible for her, as the giving-way ship under article 19, or otherwise, by any action on her part, to keep out of the way, and for the *Hampholm*, notwithstanding the cautious character of her navigation, to resort to any manoeuvre which would successfully aid to avert the collision. See *British Columbia Electric Railway Company Limited v. Loach* (1).

The cause of this accident was not unlike that in *The Rosalind v. The Senlac* (2); and the following passage, from the judgment of Duff J., at pp. 69 and 70, may, in substance, be affirmed of the *Adelaide*, in place of the *Senlac*, and of the *Hampholm*, in place of the *Rosalind*.

The most ordinary attention to the most obvious risks of the situation would have led the *Senlac*, at the time she gave the starboard signal, to take such measures as might be necessary to avoid a collision; and this could easily have been done by simply stopping her engines. The truth seems to be that, at the moment the ships were in a position involving risk of collision, but no actual peril if both ships should be navigated with the caution which such a situation required; but that, while the *Rosalind* was navigated with care, the *Senlac* was navigated with a reckless disregard of the safety of both ships. It was this recklessness that was the proximate cause of the collision.

An appeal *de plano* to the Judicial Committee was dismissed, 25th October, 1909; Lord Macnaghten saying that their Lordships agreed with the Supreme Court of Canada in thinking that

the *Senlac* was navigated with a reckless disregard of her own safety and of the safety of any other vessel that might be approaching her. Their Lordships have had an opportunity of conferring with the Nautical Assessors, and that is their view also.

There are some observations in *United States Shipping Board v. Laird Line* (3), which, I think, have their application to the limit, in the special and unusual circumstances of this case. At page 291, Lord Dunedin said:

Accordingly, the *Rowan* is hit by a consideration analogous to that which prevailed in the well-known case of the *Bywell Castle* (4), and many others—namely, that it is not in the mouth of those who have created the danger of the situation to be minutely critical of what is done by those whom they have by their fault involved in the danger.

(1) [1916] A.C. 719.

(2) (1908) 41 Can. S.C.R. 54.

(3) [1924] A.C. 286.

(4) 4 P.D. 219.

And, at page 293, Lord Shaw, referring also to the case of the *Bywell Castle* (1), said:

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My Lords, I have thought it right to cite these very authoritative judgments because, if the doctrine there laid down be lost sight of, a region of refinement is apt to be entered upon under which the true responsibility for the substantial wrongdoing may be improperly whittled down and a fanciful wrongdoing may be raised improperly into a region of substance as a contributing cause.

Moreover the Supreme Court of the United States, in *The Umbria* (2), uses this language:

Of course there is a point depending upon the number, distinctness and apparent position of the approaching signals, beyond which precautions are unnecessary and the master has the right to assume that he has shaken off the other vessel, but it is entirely clear that that point had not been reached in this case, and that the immediate cause of the collision was the order to go ahead at full speed before the course and position of the *Iberia* had been definitely ascertained. Indeed, so gross was the fault of the *Umbria* in this connection, that we should unhesitatingly apply the rule laid down in *The City of New York* (3), and *The Ludvig Holberg* (4), that any doubts regarding the management of the other vessel, or the contribution of her faults, if any, to the collision, should be resolved in her favour.

For these reasons I have come to the conclusion that this appeal ought to be dismissed with costs.

Appeals dismissed with costs.

Solicitor for the appellants: *J. E. McMullen.*

Solicitors for the respondents: *Griffin, Montgomery & Smith.*
