

THE SHIP "CLACKAMAS" (DEFEND- } APPELLANT;  
 ANT) ..... }  
 AND  
 THE OWNERS OF THE SCHOONER }  
 "CAPE D'OR," (PLAINTIFFS)..... } RESPONDENTS

1925

\*Oct. 14.  
\*Dec. 10.

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA, NOVA  
SCOTIA ADMIRALTY DISTRICT

*Admiralty law—Shipping and navigation—Collision—Fog—Excessive  
speed—Proper signals*

It is a general rule that, in a fog, a steamship is going too fast if, by reason of her speed, she is unable to avoid a collision with a vessel from which she is bound to keep clear, and the risk of whose proximity she would reasonably be assumed to anticipate under existing conditions; only such speed is lawful as will permit her to avoid a collision by slacking speed or by stopping and reversing within the distance at which another vessel can be seen.

\*PRESENT:—Anglin C.J.C. and Duff, Mignault, Newcombe and Rinfret JJ.

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Judgment of the Exchequer Court of Canada, Nova Scotia Admiralty District (Mellish L.J.A.), holding defendant steamship liable for damages for collision between it and plaintiffs' schooner, affirmed.

Plaintiffs' schooner held, in the circumstances, not to have been a vessel "not being under command, or unable to manoeuvre" within art. 15 (e) of the Regulations, and not to have erred in her signals. *Semble*, a sailing vessel lying to in a fog, but having some of her sails up, is "under way," and is governed by art. 15 (c) (*Burrows v. Gower*, 119 Fed. Rep. 616).

APPEAL from the decision of the Exchequer Court of Canada, Nova Scotia Admiralty District (Mellish L. J. A.) given 18th June, 1925, holding the defendant steamship *Clackamas* solely responsible for a collision between it and the plaintiffs' schooner *Cape d'Or*, and giving judgment for the plaintiffs for damages to be assessed.

*C. J. Burchell* K.C. for appellant.

*W. C. Macdonald* K.C. for respondents.

The judgment of the court was delivered by

NEWCOMBE J.—The schooner *Cape d'Or*, while on a voyage from Turk's Island to La Have with a cargo of salt, was sunk off the south coast of Nova Scotia, about ten miles from La Have Head, in collision with the ss. *Clackamas*, which was making her way from Newport News to Halifax, laden with a cargo of coal. This happened in the afternoon of 30th April, 1925, at about 4.30 o'clock. There was a thick fog and strong easterly breeze. At noon on the day of the accident the schooner had come within about five miles of the coast, standing in by the wind about N.N.E., when, finding it too foggy to attempt to go closer or to enter the harbour, she wore or came about and hove to, heading off shore, waiting for the weather to clear. The fog increased during the afternoon; the wind hauled somewhat to the southward; at the time of the collision it was about E.S.E., and the schooner, as described, was hove to on the port tack, heading about south, and making three or perhaps four points of leeway; speed estimated at about three-quarters of a knot.

The course of the steamship is given as N. 80 E.; the sea was quite heavy, and at times broke over the ship's bow; her speed as found was four miles or more through the water. Both vessels were sounding the prescribed fog signals at the proper intervals; but, according to the testimony of the steamship's witnesses, the schooner's horn was

not heard on board the steamship until the vessels were very close to each other. The steamship was heavily laden and down by the head; her lookout was stationed on the bridge. The second mate who was in charge of the watch, when asked if a lookout could not have been placed on the bow, answered:

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Not with safety. The sea was breaking over and might have washed him off his feet and washed him overboard. There is no protection on the boat.

The distance from bridge to stem is more than 100 feet. James Poole, able seaman, who says he is a certified quarter-master, and who came on duty with the watch at four o'clock, was charged with the duty of keeping the lookout. He tells us that he was stationed right on the port side of the bridge, the wing of the bridge on the port side.

The effect of his evidence is that he heard from the schooner, first, "one blast close to our port bow, close to, ahead." This he reported to the officer of the watch. Asked what came next, he said:

There were two blasts in succession, but not directly after—probably several seconds; probably minutes—I could not be sure about that, and then there was a vessel (the schooner) hove in sight.

In cross-examination he said that, after reporting the one blast, he reported the two blasts; and, in answer to the court, he said, regarding the orders from the bridge, that, following the first blast, the order was port,

and then, when the next blast was heard at the longer interval, it was hard aport, and, as soon as the second blast and the second signal was given, it was hard aport again.

The distance at which the vessels became visible to each other is variously estimated at from 600 feet to 300 feet; the master of the schooner considers that the collision took place perhaps two minutes from the time he saw the loom of the steamship; the mate says that about three minutes elapsed between the time when he saw the steamer break through the fog and the actual impact; Dunsworth, the only member of the crew who survived, can give no estimate, either of distance or of time. The master of the steamship and his officer of the watch say that the interval was about one minute. These are, of course, mere estimates or impressions of distance and of time, and were not intended to be exact, but they are useful to show, and indeed make it evident, that the interval of vision was

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very brief; moreover, it is noteworthy, and not without significance, that, in the judgment of the officers of the schooner, who were aware of the approach of the steamship some ten minutes before they could see her, and were therefore alert to the situation, the limit of visibility was appreciably greater than that given by the officer of the steamship's watch.

There was no change of course or speed by the schooner; on the steamship there were the port and hard aport movements of the wheel, to which the ship is said to have responded two points, and the reduction of speed consequent upon the execution of reverse orders.

Here I may observe, although my decision is not affected by the doubt which I entertain, that I am by no means convinced that the port and hard aport orders which were given by the officer of the watch were compatible with that careful regard to the existing circumstances and conditions which the regulations require; he realized that he was in thick fog; he realized also, if alive to his duty, that he was in a locality where vessels were not unlikely to be met, and that the transmission of signals was unreliable, owing to natural caprice and the noises of the elements and of his own ship; suddenly there was reported by his lookout, and he heard, one blast from the fog horn of a sailing vessel close to ahead on his port bow; no vessel could be seen; his speed against wind and sea was at the time at least between four and five knots. Was he, in these circumstances, reasonably entitled to assume that the sailing vessel was going away from him on the starboard tack to the northward, when in fact she was standing to the southward across his bow, and so to put the steamship hard aport, with the object of increasing the intervening distance; or was it not rather the part of prudence and good seamanship to stop and make sure of the position and course of the signalling vessel before the execution of any manœuvre, especially one which in the result served to aggravate, if not to cause, the collision?

The master of the steamship testifies that previously to the first dog watch he had been on the bridge practically all of the afternoon, but that when the watch was changed at four o'clock, he went to the chart room, which is directly under the wheel house, and is reached by a stairway of

nine steps leading down from the bridge. What happened is tersely described by the second mate as follows:

Q. The fog was thick?—A. Yes, fog, quite thick at the time.

Q. Will you tell us just what happened in connection with the collision, the first thing you heard, and all about it?—A. The first thing I heard one blast of a horn, just at the same instant the lookout man reported one blast of a horn. I immediately went in the wheel house and gave the order hard aport. The captain rushed up and grabbed the telegraph and started to put it on for full speed astern. Just as the words were out of my mouth, the vessel appeared out of the fog, a little on the port bow, not much more than the length of our own ship (269 feet) from us. I stayed on the bridge until we came together, and then I left the bridge immediately to get the lifeboat out.

Q. How long elapsed between the time you heard this one blast of the horn and the actual collision?—A. About a minute.

The learned trial judge found no fault on the part of the schooner.

The steamship was proceeding in thick fog in the track of the coastwise traffic; seaward only a few miles from La Have and Lunenburg, which are ports of considerable resort; prevented by her structure and equipment, or lack of equipment, and the breaking of the sea over the fore-castle head, from placing a lookout aloft or within 100 feet of her bow. In these circumstances prudence and due regard to the existing conditions required very cautious navigation; the master of the schooner testifies that other steamers were in the immediate vicinity; it is not unreasonable therefore to hold that the speed of the steamship should have been so regulated as, at least, to enable her to avoid another vessel which it was her duty to avoid. The fact that she not only came into collision with such a vessel, but also with such force as to cause that vessel immediately to sink, is very suggestive of excessive speed or of deficient lookout by the steamship, or perhaps of both; and, when these faults are found against her at the trial, the appellants must, in order to succeed upon the facts, demonstrate very clearly that the findings are against the evidence. This I think they failed to do.

The appellants contend that the collision was the result of inevitable accident, but the learned trial judge was not satisfied with the lookout which was kept on the steamer, and moreover, he considered that in the circumstances of the case her speed was excessive. He says, very justly, that the requisite speed, which, according to the regulations, must be "moderate," should be determined relatively, hav-

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ing regard to the attendant conditions, and he finds that the steamship was going too fast if, by reason of her speed in the fog, she "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". No doubt each case must depend upon its own facts, but in this general conclusion the learned judge follows a rule which has frequently been enunciated and is well established by authority, *The Resolution* (1), *The Campania* (2), a decision of Gorrell Barnes J., which was reviewed and upheld by the Court of Appeal, in which the facts of the case and the authorities are carefully reviewed; reference is made to the fact that in some cases four miles an hour, and in one case three and a half miles an hour, were held to be an improper rate of speed, and it is there laid down as a general rule that

speed such that another vessel cannot be avoided after being seen is excessive.

*The Oceanic* (3) was held to be at fault by the House of Lords in a case which bears her name, because she was going at a speed which rendered it impossible to stop within the limit of observation, and in that case Lord Halsbury observes that:

A good deal depends in each case upon the facts and circumstances as they are proved, and the President of the Admiralty Court had an opportunity of judging the evidence of the different witnesses in a way which we have not. So far as the judgment is affected by the particular facts put in proof I must accept what he has found, but, of course, a great deal turns, not upon any conflict of testimony, but upon the inferences which are to be drawn from facts which hardly appear to be disputed on either side. Now the rule appears to me to be a very intelligible and commonsense one to avoid danger to vessels in the navigation of the seas, and the question what is or is not a moderate speed in a fog must depend in a great measure whether the fog is slight or dense, and whether there is an opportunity of seeing the near approach of a ship so as to know what can be done or ought to be done by nautical skill to avoid collision. Apart from any rule, one would think that where it was known that two bodies were approaching, and that there was no absolute means of knowing the direction in which they were coming and the danger which was to be avoided, the commonsense thing would be to stop until the direction was ascertained, and also whether it was possible to avoid the serious danger which might arise.

In *The Counsellor* (4), Bargrave Deane J. states the rule thus:

(1) [1889] Asp. M.L.C. 363.  
 (2) [1901] P. 289.

(3) 88 L.T.R. 303.  
 (4) [1913] P. 70.

I think a very fair rule to make is this, and it is one which has been suggested to me by one of the Elder Brethren: You ought not to go so fast in a fog that you cannot pull up within the distance that you can see. If you cannot see more than 400 feet you ought to be going at such a speed that you can pull up. If you are going in a fog at such a speed that you cannot pull up in time if anything requires you to pull up, you are going too fast. If you cannot retain steerage way at such a speed, then you should manage by alternately stopping and putting the engines ahead.

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The same rule is applied in the District Court of the United States, *The Normandie* (1), and in the Circuit Court, *The Raleigh* (2), where it is said with reference to the ship:

it is enough to establish her liability that she was proceeding at a speed under which she could not, by any degree of promptitude and skill, avoid a collision by reversing her engines within the distance at which she could discover approaching or stationary vessels. The rule is that such speed only is lawful or moderate speed in a fog as will permit a steamer seasonably and effectually to avoid a collision by slacking speed, or by stopping and reversing, within the distance at which another vessel can be seen. If this rule is a severe one, and practically requires a steamship to come to a stop, and remain stopped, when navigating a river having an extensive commerce, or in a crowded harbour, it is too well established to be disregarded.

To the same effect is the decision of the Circuit Court in *The Bolivia* (3), where the ship was held to blame because under the existing state of the fog, and exercising the best vigilance, she could not discover another vessel more than 300 or 400 feet away, yet maintained such a speed that, after reversing, her headway through the water could not be stopped within three times that distance. The locality was one frequented by numerous vessels in the coasting trade, and lay in one of the paths of the ocean traffic between Europe and the principal commercial port of this country.

There is some contradiction or confusion as between the lookout and the officer of the steamship's watch; they agree that the first signal heard from the schooner was a single blast, which would indicate that the schooner was on the starboard tack, and it was presumably for this reason that the officer immediately gave the orders, "port" and "hard aport"; but the officer, according to his evidence, did not hear the two blasts which the lookout says he heard and reported, following the single blast, before the schooner came into sight through the fog. The steamship was sounding her prolonged blast regularly, and there was, of course, considerable noise due to the wind, and the breaking of the seas, which may have interfered with the reception and report of the signals.

(1) 43 Fed. Rep. 151, at p. 156.

(2) 44 Fed. Rep. 781.

(3) 49 Fed. Rep. 169, at p. 171.

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It is not and, having regard to the evidence and findings, cannot be denied that the schooner was at intervals sounding two blasts upon her fog horn, the efficiency of which is not in question; but it is a ground of the appeal that the master of the schooner erred in moving the schooner's fog horn, after he first heard the steamship's signal, from the gallant fore-castle deck to the lazarette hatch, abaft the deck house, where the captain himself took charge of the horn and worked it up to the time of the collision. This was done, as the captain explains, in order that the signals might be heard better by the oncoming ship which seemed to be directly abeam. He says

he was of the opinion it would be heard better by the approaching ship from a position aft, clear of all sails, different wind currents.

Upon this there is no evidence in conflict with the opinion so expressed.

It is said, however, that the schooner's blasts were not sounded at the intervals prescribed by the regulations relating to sound signals for fog. A sailing vessel under way should sound, at intervals of not more than one minute, when on the port tack, two blasts in succession. It was not suggested at the trial that two blasts in succession were not the appropriate signals; the master of the schooner testified that he gave these blasts at intervals of about one minute, and he was not asked for anything more definite than this answer; it was not suggested to him that the interval was either too long or too short; he had been personally sounding the fog horn aft for about ten minutes before the collision; nevertheless an objection is now taken by reason of the following evidence, given by the officer of the watch in his direct examination:—

Q. Had your course remained the same from the time you first heard the signals until the collision?—A. Yes.

Q. Were your signals being sounded?—A. Yes, continuously, with the proper intervals between.

Q. Remember how many signals there were given?—A. Two blasts every 1½ minutes.

And, although the officer was not cross-examined upon his answer, "two blasts every one and one-half minutes," it is urged upon the appeal that the schooner did not comply with the regulation which requires the signals to be given, in the words of the rule, "at intervals of not more than one minute." I do not consider, however, in view of the master's testimony, the course of the trial as explained,



and the questions which were there in controversy, that the learned judge's finding can be disturbed.

Finally, it is submitted by the appellant's factum, although the point was neither discussed nor mentioned at the hearing of the appeal, nor, so far as appears, at the trial, that the schooner was

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a vessel under way which was unable to get out of the way of an approaching vessel, through not being under command, or unable to manoeuvre as required by these rules,

within the meaning of art. 15 (e), rather than "a sailing vessel under way," within the meaning of art. 15 (c) of the regulations, and therefore that she erred in giving two blasts in succession; it is said that the signal ought to have been one prolonged blast, followed by two short blasts. But, in my view, although the schooner was in the circumstances justified in not attempting to execute any manoeuvre in order to avoid the steamship, and, although, having regard to the wind and sea and set of her sails, and the course and bearing of the steamship, it may not have been possible for the schooner, after the position of the steamship was discovered, to keep out of the way by the execution of any manoeuvre on her part, nevertheless she cannot accurately be described as a vessel not under command or unable to manoeuvre. Indeed her master says that she could have manoeuvred, although not usefully, having regard to the conditions to which I have referred, and the second mate of the steamship, the officer in charge, testifies in direct examination that the proper signal for a schooner hove to on the port tack is two blasts; therefore he was not misled by the signals actually given. I observe moreover that it was held in the United States District Court in *Burrows v. Gower* (1), that a sailing vessel lying to in a fog, but having some of her sails up, is "under way," and is governed by art. 15 (c), and that therefore, when on the starboard tack, the proper fog signal is one blast, adopting the application of the article as expounded by Marsden on Collisions, see 8th ed., p. 345.

I conclude, applying the words of Lord Halsbury in the case of *The Oceanic* (2), that the local judge in Admiralty had an opportunity of judging the evidence of the different witnesses in a way which we have not. So far as the judgment is affected by the

(1) 119 Fed. Rep. 616.

(2) 88 L.T.R. 303.

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particular facts put in proof, I must accept what he has found, but of course a great deal turns, not upon any conflict of testimony, but upon the inferences which are to be drawn from facts which hardly appear to be disputed on either side.

Neither the findings nor the inferences are, in my opinion, unjust, and I would therefore dismiss the appeal.

*Appeal dismissed with costs.*

Solicitor for the appellant: *C. J. Burchell.*

Solicitor for the respondents: *L. A. Lovett.*

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