

TORONTO ADMIRALTY DISTRICT.

THE CANADIAN LAKE & OCEAN }
 NAVIGATION COMPANY, LIMITED.. } PLAINTIFFS;

1906

April 12.

AGAINST

THE SHIP *DOROTHY*.*Collision—Strict observance of rules of road—Lookout.*

In a case of collision, one vessel cannot justify a departure from the rules of navigation by the fact that the other vessel was also disregarding the rules. On the contrary a primary disregard of the rules by one vessel imposes on the other vessel the duty of special care, prompt action and maritime skill, as well as the duty of acting in strict conformity to the rules applicable to the latter in the circumstances.

Collision regulations have been framed for the protection of lives and property in navigation and are so strictly enforced that even where a vessel commits a comparatively venial error it cannot be absolved from the consequences.

The rules of the road must be strictly observed, and when they are violated by both vessels this court will hold them equally liable.

ACTION for collision by the plaintiffs, the owners of the ship *J. H. Plummer* against the ship *Dorothy*.

The case was tried at the City of Toronto on the 13th, 14th, 15th and 16th and 27th days of February, and the 8th, 9th, 12th and 13th days of March, 1906, (some evidence *de bene esse* having been personally taken before the Judge at St. Catharines on the 28th and 29th days of September, 1905), and judgment was reserved.

The facts are set out in the reasons for judgment.

Francis King, for the plaintiffs;

W. D. McPherson, for the defendant.

HODGINS, L. J. now (April 12th, 1906) delivered judgment.

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This case is an illustration of the experience which Admiralty Courts have had of the conflict of evidence in collision cases. As has been well said by Mr. Justice Davis of the Supreme Court of the United States, "It always almost universally happens in cases of this description [collision] that different accounts are given of the occurrence by those in the employment of the respective vessels; and that the court has difficulty in this conflict of evidence, of deciding to which side a preferable credence should be given. There are generally however, in every case, some undeniable facts which enable the court to determine where the blame lies." *The Great Republic* (1). And a similar experience has been given in the House of Lords by Lord Blackburn in the *Khedive* (2). "The Judge of the Admiralty, in giving the reasons for his judgment, observed that the evidence was, as is not unusual, very conflicting, and that he had not been able to reconcile it with the supposition that both parties intended to speak the truth."

The collision between the steamers in this case took place on the afternoon of the 21st August, 1905, in the Soulanges Canal, in the Province of Quebec, not far from the guard lock at Coteau. The Preliminary Act of each party states that the time of the collision was 3.30 p.m. The engine-room log-book of the *Dorothy* gives the time of the collision as 3.60 (4 o'clock) p.m.—a discrepancy of 30 minutes. Both pleadings say that "the weather was clear and there was practically no wind, and very little current in the canal." The plaintiff's steamer *J. H. Plummer* is of 992 tons register, about 254 feet long, 37 feet beam, and 24 feet deep, and was on a voyage from Fort William on Lake Superior to Montreal. The *Dorothy* is of 287 net tons, 147 feet long, 27 feet beam, and 16 feet deep, and was on a voyage from Wilmington, in the State of Delaware, to Houghton, in the State

(1) 23 Wall. p. 29.

(2) 5 App. Cas. p. 880.

of Michigan, United States. While the *J. H. Plummer* was coming out of the lock, passing signals of one blast each were exchanged between the steamers, indicating that they would pass each other port to port.

The Preliminary Act of the *J. H. Plummer* in describing the collision alleges that the *Dorothy* "sheered from her side of the canal across the course of the *J. H. Plummer*," and the answer to question 14 charges that the fault attributed to the *Dorothy* is improper navigation, first in leaving her side of the canal and throwing herself across the course of the *J. H. Plummer*, and then in attempting to straighten up and regain her first course, after the *Plummer's* two whistle signal, instead of either reversing her engines and coming to a stop, or else continuing towards the south bank in the direction of her sheer.

The Preliminary Act of the *Dorothy* alleges that the "*J. H. Plummer* apparently not navigating in accordance with the single blast signal, the engine of the *Dorothy* was stopped and backed. The *J. H. Plummer* then blew a passing signal of two blasts and sheered or steered to port toward and into the *Dorothy's* port bow." And the answer to question 14 charges, that the fault of the *J. H. Plummer* was that (1) "She violated article 28 of the rules of the road in the following particulars; (a) In that she did not direct her course to starboard as she agreed by her single blast passing signal. (b) In that she blew a passing signal of two blasts, and directed her course to port after agreeing by whistle signal to direct her course to starboard. (c) In that she failed to stop and reverse. (2.) That she violated article 29 of the rules of the road. (a.) In that she did not maintain a proper lookout. (3.) In that she violated article 25 of the rules of the road, in that she failed to keep to that side of the midchannel which lay on her own starboard side."

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The evidence given on this trial is a mass of contradictions, and necessitates such an analysis of the leading facts, and the drawing of such reasonable deductions therefrom, as will enable the court sitting as a jury to decide to which statements a preferable credence should be given.

The witnesses for the *J. H. Plummer* says that the *Dorothy* was improperly navigated, that she sheered across the bow of the *J. H. Plummer*, and that she kept going ahead up to the time of the collision. The *Dorothy's* witnesses say that the *J. H. Plummer* was improperly navigated, that she sheered across the bow of the *Dorothy* and kept going ahead at the time of the collision. Each side further says that its vessel stopped and reversed under the order "full speed astern."

The witnesses for the *J. H. Plummer* further say that the *Dorothy* sheered from one side to the other and that her stern struck the bank of the canal before the collision.

The *Dorothy's* witnesses say that she kept "absolutely parallel to the bank of the canal all the time," and that the force of the collision drove her bow on the bank of the canal.

Taking this latter statement first, which came out in the following answers of the captain of the *Dorothy*:
 Q. 403. "You were perfectly right in saying that she (the *Dorothy*) remained absolutely parallel to the bank all the time?—A. Yes, I think so." He had previously stated: Q. 247. "What was your position to the bank at the time of the collision?—A. Our bow was inclined towards the bank." Q. 249. "Prior to the striking?—A. Yes." Q. 250. "About how far from the bank?—A. When I started to back she was 30 or 35 feet from the bank, but in backing she would naturally swing a little, her stern would go out, and that would throw our bow towards the bank. I should say our bow

was possibly 25 feet from the bank when the *J. H. Plummer* hit us." Q. 251. "And her stern?—A. Her stern was probably a little towards the middle of the canal."

The evidence shows that instead of being "absolutely parallel to the bank all the time," the *Dorothy* was diagonally or angle-wise across the canal at the time of the collision. And it would seem a reasonable deduction from the backing movement described that the swinging of the *Dorothy's* stern outwards towards the middle of the canal would make her bow follow the track of the stern and move towards that outward course, provided her helm was kept amidships, or so moved as to counteract the outward swing of the stern from the bank—for it could not be presumed that the continuous moving backward would operate so as to cause the *Dorothy* to swing as on a fixed pivot.

This diagonal or angle-wise position of the *Dorothy*, is more fully described by the Captain of the *J. H. Plummer*. Q. 33 "What action did you observe the *Dorothy* to take after the one whistle agreement?—A. The *Dorothy* was making very bad steering; she was first on one bank and then on the other." Q. 54. "What was the first deviation, if any, that you observed after that? (her being on the *J. H. Plummer's* starboard side)—A. She started out for the middle of the canal." Q. 55. "How far did she get?—A. She got out across our bow, past the middle of the canal with her bow." Q. 73 "Where was the *Dorothy's* stern? A. Up against the bank or close against the bank." Q. 74. "Close to which bank was the stern of the *Dorothy*? A. The north bank, and her head heading to the south bank." Q. 89 "Out of her own water?—A. Yes." * * * and further on he said in answer to Q. 429. "She had come over to the north side and when she got to the north side she started out for

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the south side, and when she started for the south side I blowed two whistles."

Cinginni, the wheelsman of the *Dorothy* said, Q. 252.

"Was she (the *Dorothy*) coming ahead all the time?—A.

Yes. Just at the time of the collision we go back a little across towards the bank, she run to the bank." Q.

53 "What direction was she pointing in that way?—A.

She was pointing towards the bank." But others of the *Dorothy's* officers swear she was going full speed astern before the collision; while officers of the *J. H. Plummer* swear that she moved forward, and sheered from side to side and that her bow went over the centre line of the canal.

On this point, whether the *Dorothy* was moving forward or reversing, the evidence of Denison, a passenger, is material. Qs. 16 and 17. "Tell us what you noticed with reference to the beginning from the time you first noticed her (the *Dorothy*)?—A. I noticed her coming up the canal, a considerable distance down the canal, and when she got further up the canal she veered from the side she was traveling on to over the centre of the canal." Q. 18 "Towards which bank?—A. Towards the right hand bank which would be the south bank. She passed over the centre line of the canal—I don't know as to the distance, how far over, but she came over towards the south bank a considerable distance, and then gradually straightened herself out, and returned to her course pretty well about the centre of the canal. She came along on that course for some distance, and within a short distance of the *J. H. Plummer*, she swung across the canal in almost an identical manner to the way she had done in the first place." Q. 22. "When she swung across this time what position would her stern occupy with reference to the north bank?—A. Approximately close to it." Q. 23. "And her bow with reference to the centre line of the canal?—A. Past it."

There are some other material facts disclosed in the evidence which have a bearing on the question as to which side a preferable credence shall be given.

(1) The criticism of the wheelsman of the *J. H. Plummer* on the steering of the *Dorothy* when approaching the *J. H. Plummer*, which was brought out on the cross-examination of the Captain of the *J. H. Plummer*. Q. 255. "From the time you left the guard lock up to the time of the collision was any statement made to you, or anything said to you by any man or officer of the *J. H. Plummer*?—A. There was by the wheelsman." Q. 256. "What did he say?—A. He said that this boat here the *Dorothy*, was making awfully bad steering; and I said yes, I am going to go as slow as I can and as careful as I can." (2) The conversation between the Captains as they passed immediately after the collision, which I find to have been as given by the Captain on the *J. H. Plummer*. "When we got abreast of one another, bridge to bridge, or just about, I says to him, "Captain, I done all I could for you." he says, "I know you did, my stern was on the bottom, and I could not help it, or dragged the bottom, or something to that effect." These two facts are more consistent with the evidence given on the part of the *J. H. Plummer* than that given on the part of the *Dorothy*.

Then consideration must also be given to the expert evidence respecting the size of the rudders in ocean and shallow fresh water navigation, and the enlargement of the *Dorothy's* after the collision. Captain McMaugh's evidence is material. Q. 36. "If you observed a vessel taking a devious course from bank to bank, in approaching you, how would you account for that,—what is causing that?—A. She is certainly very erratic in her movement. It might be caused by the officer, or want of proper steering apparatus." Q. 38. "Would the size of the rudder have anything to do with the erratic move-

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ment;—A. Yes it has. That has been the trouble with most of these sea-going vessels coming to our fresh water that the rudders have been found too small for canal purposes, and in nearly every instance they have been enlarged.” The following month when the *Dorothy* was in the dry dock at Cleveland for repairs, her rudder was enlarged by an extension of about 15 to 18 inches at the top and about 12 inches at the centre:

Another fact brought out in evidence, but not commented on by counsel, is the discrepancy between the time of the collision as stated in the Preliminary Act filed by the *Dorothy*, 3.30 p.m., and the time stated in the engine-room log-book, 3.60 or 4 p.m.,—a difference of half an hour. From an inspection of the engine-room log-book it seemed to have been very carelessly kept; and it certainly does not record a daily or regular statement of the signals given to the engine-room. No amendment to the Preliminary Act is now allowable, as stated by Dr. Lushington in *The Vortigern* (1). “Neither party is allowed to depart from the case he has set up in his Preliminary Act.” The same hour, 3.30 p.m. appears in the statement of defence and no application was made to amend, or to state more correctly in the pleadings the alleged log-book time of the collision. See the *Miranda* (2).

After a careful review of the evidence I have come to the conclusion that a preferable credence should be given to the evidence adduced on the part of the *J. H. Plummer*, as to the facts of the collision; and I therefore find that the navigation of the *Dorothy* was faulty, and caused her to sheer from side to side in the canal, and that she is mainly responsible for the collision.

I further find that this sheering of the *Dorothy* from side to side, before meeting the *J. H. Plummer*, being inconsistent with, and a violation of, the mutual agree-

(1) Swab. 518.

(2) 7 P. D. 185.

ment arrived at by the single blast signal to pass port to port, warranted the *J. H. Plummer* in assuming that such agreement could not be carried out, and that a new agreement was necessary—but what was the appropriate action or agreement will be considered later on. *The Des Moines* (1):

While I find that the chief fault for this collision was the faulty navigation of the *Dorothy* there are some facts affecting the liability of the *J. H. Plummer* which must be considered. The first is respecting her compliance with Article 25a (1904) which provides that "In narrow channels, every steam vessel 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." The evidence given by the officers of the *Plummer* establishes the fact, that after leaving the guard lock, she overlapped the centre line of the canal by about eight or ten feet, or about one fourth of her beam. A similar overlapping by the *Dorothy* is proved by the evidence of Wright, immediately before the collision. He said that the *Dorothy's* nose was about ten feet across the centre line of the canal; and that she then began straightening up. Q. 259. "And what then happened? A. Then she struck us on the port side of the stem and scarred us there."

Both vessels therefore violated the rule of the road, which as stated in *Towboat No. 7, Norfolk and Western* (2), requires that when vessels approach each other in channels, especially narrow ones, each vessel is bound to keep well over to the side of the channel on his starboard hand. See also the *Newport News* (3).

The localities of the wounds caused by the collision, on both steamers are important in determining where in the canal the collision must have taken place. The *J. H.*

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(1) 154 U.S. 584.

(2) 74 Fed. R. 906.

(3) 105 Fed. R. 389.

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Plummer's beam is about 37 feet; and assuming her being as stated, about 8 or 10 feet over the centre line, her stem would be a little within her starboard side of the canal, and the wound on her being about ten inches from her stem on her port bow; and the *Dorothy's* beam being about 27 feet, and the wound on her being about 6 or 8 inches from her stem or port bow, are facts which justify the conclusion that the collision must have taken place about or on the centre line of the canal, and that neither vessel was keeping wholly within her own water. For it has been well said that "the wound made by a collision is one fact which outweighs all other evidence as to locality or speed,—it cannot be argued or explained away." And I find this conclusion warranted by the evidence, it follows that the *Plummer* was also in fault in not complying with the rule of the road quoted above which requires that "In narrow channels, every steam vessel shall, when it is safe and practicable, keep to that side of the fairway or midchannel which lies on the starboard side of such vessel." The normal width of the canal is 164 feet, and the width at the bottom is said to be about from 100 to 120 feet wide—thus giving a sufficient water space of from 50 to 60 feet to each steamer to pass the other within her own water.

The sailing rule above quoted was considered in *The Unity* (1). The case of a vessel coming midway down the channel of the river rather south inclined to the south. Dr. Lushington quoting the rule of the road, and commenting on the expression "whenever it is safe and practicable," said "What is the meaning of these words? I apprehend it to be where there is no local impediment of any kind, no difficulty arising from the peculiar formation of the channel itself, no storm, no wind, or anything of that kind occurring. Then the obligation continued to keep to the starboard side, and no consider-

(1) Swab. 101.

ation of convenience, no opportunity of accelerating the speed, none whatever, can justify a disobedience of this statute."

And in the *Fanny M. Carvill* (1), the Judicial Committee of the Privy Council held that the infringement of the rule "must be one having some possible connection with the collision," thus throwing upon the party guilty of the infringement the burden of showing that it could not possibly have contributed to the collision. Proof of that kind has not been given, nor does it seem possible.

I have intimated that the faulty navigation of the *Dorothy* in sheering from side to side in the canal warranted the captain of the *J. H. Plummer* in proposing that a new agreement should be arranged for the steamers passing each other in the canal. The captain under rule 23 proposed by a two blast signal to pass starboard to starboard. This signal was not answered by the *Dorothy* as it should have been, and I must here repeat the rule referred to in *Cadwell v. Bielman* (2), that "the duty to answer a signal is as imperative as the duty to give one." But I think that the appropriate signal under the rule when he noticed the faulty navigation of the *Dorothy*, and the warning comment of his wheelsman that "the *Dorothy* was making awfully bad steering" should have been the danger signal indicated in the same rule, as follows: "In every case where the pilot of one steamer fails to understand the course or intention of an approaching steamer, whether from signals being given or answered erroneously, or from other causes, the pilot of such steamer so receiving the first passing signal, or the pilot so in doubt, shall sound several short and rapid blasts of the whistle, not less than four, and if the vessels shall have approached within half a mile of each other "both shall reduce their speed to bare steerage

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(1) 13 A. C. 455n.

(2) 10 Ex. C. R. 155.

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way and if necessary stop and reverse." When the faulty navigation of the *Dorothy* was noticed I think the *J. H. Plummer* should then have stopped and, if necessary, reverse. See the *Albert Dumois* (1).

Then as to the contention that there was no proper lookout on the *J. H. Plummer*, I cannot, after reading the comments of the captain and wheelsman, find that the absence of a lookout, as required by the rules, contributed to the collision. And in the *Blue Jacket* (2), it was said, "It is well settled that the absence of a lookout is not material when the presence of one would not have availed to prevent a collision (3)."

The *Merchants Shipping Act*, 1894 (Imp.) provides (4) where in the case of a collision it is proved to the court before whom the case is tried that any of the collision regulations have been infringed, the ship by which the regulations have been infringed shall be deemed to be in fault, unless it is shown to the satisfaction of the court that the circumstances of the case made departure from the regulations necessary.

These collision regulations have been framed for the protection of lives and property in navigating the sea and the inland lakes and rivers, and for the guidance of navigators taking early and prompt measures to avoid "the risk of a collision." And so strictly have the courts enforced them that even when a vessel committed a comparatively venial error it was held that it could not be absolved from the consequences prescribed by law, and must be held liable. The *Aratoon Apcar* (5).

It is therefore no justification for a departure from the rules of navigation that one vessel was disregarding the duty of observing an obligatory rule, that the other is therefore authorized to proceed other than in strict con-

(1) 177 U. S. 240.

(2) 144 U. S. 371.

(3) 144 U. S. 389.

(4) Sec. 419, sub-sec. 8.

(5) 15 A. C. 37.

formity to the rule she is bound to observe, and which she sees the other is disregarding. Instead of affording any right, or discretion, or relaxation of vigilance, it imposes the duty of special care, prompt action and maritime skill. For it has been well said by Sir James W. Colville in the *Frederick William* (1). "To leave to masters of vessels a discretion as to obeying, or departing from the sailing rules is dangerous to the public; and that to require them to exercise such discretion, except in a very clear case of necessity, is hard upon the masters themselves, inasmuch as the slightest departure from these rules is almost invariably relied upon as constituting a case of at least contributory negligence."

No circumstances have been proved in this case, warranting a departure by either steamer from the collision regulations, and I must therefore find that each of them infringed the regulations as to the rule of the road, and that both of them therefore were in fault for the collision.

The damages caused to both ships will be equally divided, and each party will bear his own costs. Reference to the District Registrar to take the necessary accounts."*

Judgment accordingly.

Plaintiff's Solicitor: *Smythe, King & Smythe.*

Defendant's Solicitor: *W. D. McPherson.*

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(1) 4 A. C. at p. 672.

See R. S. C. c. 79, s. 70. See *Agra and Elizabeth Jenkins* L. R. 1 P. C. 501; and the form of the

decree in the *Stoomvaart Maatschappij Nederland v. The Peninsular and Oriental Navigation Company*, 7 A. C. 795.