Vancouver 1966
Jan. 17-21
Feb 8

BRITISH COLUMBIA ADMIRALTY DISTRICT

BETWEEN:

QUEEN CHARLOTTE FISHERIES LIMITED ..... PLAINTIFF;

AND

THE SHIP *TYEE SHELL* . . . . . DEFENDANT.

Shipping—Collision of ships—Narrow channel—Practice of seamen to pass port to port—Apportionment of fault.

Defendant ship, a coastal tanker of 1,600 gross tons, was proceeding east through the eastern portion of Johnstone Strait in the early morning of August 5th 1964 and altered course to port to overtake a fishing vessel about 2 miles ahead, thus bringing her to her port (or north) side of mid-channel. There her mate observed by radar the fishing packer *Norking* of 135 gross tons at a distance of 2½ miles proceeding west through dense fog on the north side of mid-channel. *Norking's* master observed defendant ship's course on his radar. Thereafter both ships continued to alter course to the north, *Norking* continuing at full speed throughout and defendant ship proceeding at full speed until just before it collided with *Norking*. The practice of seamen was to keep to the starboard side of the eastern portion of the strait so as to pass port to port.

Held, defendant ship was principally at fault for the collision. She created the position of difficulty in failing to continue her course to her starboard side of mid-channel. *Norking* was, however, at fault in proceeding throughout at full speed and in not navigating with caution. Fault apportioned 72% to defendant ship and 28% to *Norking*.

D. B. Smith and *L. Morris* for plaintiff.

J. I. Bird, Q.C. and *J. S. Clyne* for defendant.

SHEPPARD D.J.:—This action arises out of a collision in the eastern portion of Johnstone Strait on the 5th August, 1964, at 0325 between the *Tyee Shell*, the defendant vessel, and the *Norking* owned by the plaintiff. The *Tyee Shell*, a coastal tanker of 249 feet overall in length, 1,599 tons gross and 838 tons registered, with a cargo of 1,500 tons of oil, was inbound on a passage from Namu, B.C. to Vancouver, B.C. and proceeding east of Vansittart Point in the eastern portion of Johnstone Strait, there overtaking a fishing vessel about two miles ahead, altered course to port to overtake and pass that vessel. This carried her to her port side (or north) of mid-channel. There Oselg, the mate of the *Tyee Shell* on watch, observed by radar a vessel, later

proved to be the *Norking*, on the starboard bow at a distance of about two and one-half miles, which was going west on the north side of mid-channel. The mate of the *Tyee Shell* then decided that having crossed to the north side of mid-channel, he would remain there and continue north until the *Norking* had passed and thereafter would overtake and pass the fishing vessel.

The *Norking*, a fish packer of approximately 107 feet in length, of gross tonnage of 134.87 and registered tonnage of 91.71, her cargo 30 tons of ice, was on a voyage from Vancouver, B.C. to Namu, B.C. She was proceeding west through this eastern portion of Johnstone Strait. On watch, on the bridge were the Master at the radar, the mate as lookout at an open window of the wheelhouse and the helmsman. At Chatham Point and thereafter she ran into dense fog which continued until the time of collision with the visibility varying from time to time from 100 feet up to 100 or 150 yards. The vessel came abeam of Ripple Point on course 282° mag., at a distance under one-half mile, ran past to Point C (on Chart, Ex. 3), and proceeded west on 244° mag. which brought her on to her starboard side of the channel. The Master at the radar observed at a distance of about four and one-half miles off his port bow an echo which he first took to be a tug and tow but later saw that there were two vessels, one of which proved to be the *Tyee Shell*; the other was a fishing vessel. The *Tyee Shell* altered course to port to overtake and pass the other vessel and thereby crossed to the north side of mid-channel. The *Norking* was at that time in dense fog which was drifting to the west, but the *Tyee Shell* could see the fishing vessel being overtaken and that there was ahead a dense fog into which the *Tyee Shell* entered at 0321 some seven minutes before the collision.

The sequence of changes in course is as follows: 0314, the *Tyee Shell* altered course to port 10°, that is, to 081° true, to overtake and pass the fishing vessel. The *Norking* at a distance of four and one-half miles, by radar saw the *Tyee Shell* ahead, and altered course $\frac{1}{4}$ point ($2\frac{1}{2}$° to 3°) to starboard. The *Tyee Shell* saw by radar the *Norking* when distant about two and one-half miles and thereupon at 0320 altered course to 070° true. The *Norking* again altered course to starboard $\frac{1}{4}$ point. At 0321 the *Tyee*

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Shell rang standby engines on account of fog. At 0322 the *Tyee Shell* again altered course to port to 065° true. At 0323 she reduced speed to slow, at 0324 changed to full astern, at 0326 to slow astern and at 0328 collided with the *Norking*.

In the collision the stem of the *Tyee Shell* cut into the port bow of the *Norking* aft of the stem and forward of the bridge almost to midships. The question is the fault which has contributed to that collision.

The evidence does not prove this eastern portion of Johnstone Strait to be a narrow channel within Rule 25, nor does it disprove it, but it is established that those on watch of the *Tyee Shell* did neglect the precautions required by the ordinary practice of seamen, contrary to Rule 29. In *The Jaroslaw Dabrowski*[1], Langton J. at p. 27, in citing *The Varmdo*[2], held that the test of a narrow channel "within the rule is that which by the practice of seamen is treated, and necessarily treated, as a narrow channel". This eastern portion of the Strait, that is from Camp Point to Ripple Point, is approximately eight miles in length from east to west, and the navigable channel, that between lines drawn on each side between the headlands, is about three-quarters of a mile wide. On the west side of this eastern portion of the Strait there is Race Passage and on the east the passage between Pender Island and Ripple Point. These passages to the west and to the east are narrow channels within Rule 25 and have been so held in *Union Steamships Limited v. Alaska Steamship Company*[3]. *New England Fish Company of Oregon v. Britamerican Ltd*[4]. Hence each vessel entering into or emerging from either narrow channel must keep to her starboard side of the narrow channel so as to permit therein a port to port passing (Rule 25), and it would obviously add a difficulty to navigation in clear weather and a menace in restricted visibility to permit vessels to proceed on either side of this portion of the Strait in any direction. On the weight of the evidence, the common practice of seamen is to keep to the starboard side of this eastern portion of the Strait so as to pass port to port. That is proven by the evidence of

[1] [1952] 2 Ll. L.R. 20.
[2] [1940] P. 15.
[3] (1952) 15 W.W.W.R. 121 (*Re* Race Passage)
[4] [1959] Ex. C.R. 256.

Captain Horne, a B.C. Pilot, Captain McIntosh, Master of the *Norking*, Steel, the mate of that vessel, who testified that the practice is for vessels to keep to starboard of mid-channel, westbound to the north shore, and that the vessels pass port to port. According to Captain Horne, the exception is rare, to the effect that if you have a vessel giving you a broad green and you watch for some minutes, it is better to take green to green. Such evidence is to be preferred to that of Captain Belotti, who said that vessels pass green to green and red to red in the proportion of 50 to 50, although he himself prefers red to red if the circumstances permit.

The *Tyee Shell* when abeam the Vansittart Point was on a course of 091° true which course would have taken her over towards the starboard side of the channel. Moreover, the *Tyee Shell* had been overtaking a fishing vessel of which the stern light could be seen and which fishing vessel was on a course which permitted her to pass the *Norking* port to port without incident. Nevertheless the second mate of the *Tyee Shell* decided to alter course 10° to port and then continued to hold over along the north shore by altering course a total of 26° to port onto 065° true, and all of this in spite of the fact that the mate of the *Tyee Shell* could see by radar that the *Norking* was holding along the north shore.

The *Tyee Shell* was at fault under Rule 29 in not following the ordinary practice of seamen in failing to keep to her starboard side of the channel so as to pass the *Norking* port to port. There was nothing to have prevented the *Tyee Shell*, from slowing down and following the fishing vessel until she had passed the *Norking*, or to have prevented the *Tyee Shell*, after having altered course to port, to have returned to her starboard side of the channel. The mate on watch stated that having got to the north he decided to keep on to the north, and hence he intended passing the *Norking* starboard to starboard somewhere to the north of mid-channel. So far as those on the *Tyee Shell* could know at a distance of two and one-half miles, the meeting vessel, which proved to be the *Norking*, might have had no radar and therefore would be obliged to follow her starboard shore in fog to know where she was. The *Tyee Shell* was therefore at fault in failing to keep to her starboard side of mid-channel, as required by the ordinary

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practice of seamen, and in failing to keep to her starboard side she has committed the additional faults:

(1) She failed to slacken speed and remain behind the fishing vessel and thereby pass the *Norking* to port as did the fishing vessel.

(2) Having altered course to 081° true from 0314 to 0320 and thereby proceeding to the north side of the channel, she failed to return to her starboard side but made further changes to port by altering to 070° and 065° true.

(3) She failed to see by radar whether or not the way was clear before turnimg to port 10° to overtake and pass the fishing vessel. Captain McIntosh testified that he first saw by radar the vessels to port. After the *Tyee Shell* had altered to 081° true she had the *Norking* to starboard.

In contrast thereto the *Norking* followed a proper course. She came abeam of Ripple Point on 280° mag. at a distance of approximately one-half mile, then ran past to point C (on Chart, Ex. 3) and there altered course to 244° mag. That is a proper course and would bring her in good position to clear Vansittart Point on the north, to permit her to keep to her starboard of Race Passage and to pass on her port any vessels met in the meantime. Further, the tide did not set at 3 knots through the Strait. Captain McIntosh stated that at such rate there would be a turbulence at Knox Bay, which was not the case, and further, the helmsman stated that the tide was not sufficiently strong to have any appreciable effect in keeping the course. It appears rather that the effect of the tide after Vansittart Point throughout this eastern portion of the Strait at that stage, namely on the ebb for one hour and twenty minutes, would be at the most one knot, thereby reducing the speed of the *Tyee Shell* from 12 knots to 11 knots at full speed; that would have permitted her to reach the point of collision at 0328 as shown on Chart (Ex. 3) which she would not have reached against a 3-knot tide.

The initial fault was that of the *Tyee Shell* exclusively. It was urged by counsel that there were subsequent faults

that had contributed to the collision. The subsequent faults raised are as follows:

(1) It was contended that the *Norking* had a defective lookout both visually and by radar. Captain McIntosh, her Master, has stated that to the west of Chatham Point there was dense fog which continued to the point of collision and in which the visibility was 100 feet, or from 100 to 150 yards. Evidently there were pockets in which the visibility varied but the fog would generally be described as dense. Oselg, the mate of the *Tyee Shell* admits that his vessel was in dense fog for seven minutes before the collision. The *Norking* had on the bridge at material times from Chatham Point westward, the Master at the radar, the mate at an open window to the starboard side of the bridge, and the helmsman, and in the engine room the second engineer. There is no evidence that the mate was not in a proper place for a lookout as this was a small vessel and he was within 40 to 50 feet of the stem. The mate was alert, as he heard the first fog signal of the *Tyee Shell* and reported it to the Master, and heard the *Tyee Shell* when coming close immediately before the collision, which he also reported. He was there to listen and to see. There was a dense fog but he did see the green light of the *Tyee Shell* as the ships collided.

As to the radar, the fault alleged is that the Master, Captain McIntosh, had had only one-half hour of instruction and did not use the cursor. There is no evidence that there was absence of competency in the use of the radar. The *Norking* saw the *Tyee Shell* at a distance of four and one-half miles but the *Tyee Shell* did not see the *Norking* ahead until she was within two and one-half miles. It was admitted that the course and speed of the *Tyee Shell* was not plotted by the Master of the *Norking* but neither was that of the *Norking* plotted by the *Tyee Shell*. The real contention was that the radar of the *Norking* was defective by reason of having a blind spot, but the evidence is that the radar was operating effectively.

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In contrast thereto the *Tyee Shell* had a defective lookout both visually and by radar. The second mate and helmsman only were on the bridge. There the mate had to set the course, check the course maintained, operate the engine changes as the throttle was in the wheelhouse, operate the radar and the whistle, keep the wheelhouse log, and maintain a lookout visually and by radar. Amongst those duties the mate had not sufficient time to maintain a proper lookout and in any event the bridge was 150 feet from the stem where the lookout should have been placed. There was a deckhand on watch who was available to be called as a lookout but he was allowed to clean out the after portion of the vessel. The Master in such dense fog should have been on the bridge where he could take charge and relieve the mate of some of the duties. However, the Master was not called, although fog was seen ahead and the vessel was in dense fog for seven minutes before the collision. Standing orders required the Master to be called.

The *Norking* kept a proper lookout but the *Tyee Shell* did not and hence was at fault under Rule 29.

(2) It is further contended that the *Norking* was at fault in failing to stop the engines, and as she proceeded throughout at full speed (10 knots) she also failed to navigate with caution as required by Rule 16(*b*). The *Norking* did commit those faults.

The *Tyee Shell* did not navigate at altered speed near or on entering or in the fog as laid down in Marsden's Work, The Law of Collisions at Sea, 11th ed., p. 770, cited in *Imperial Oil Limited v. M/S Willowbranch*[1] as follows:

> Apart from the regulations, the law requires a ship to be navigated in or near a fog at a moderate speed; the regulations make no alteration in the law in this respect.
>
> Vessels approaching a bank of fog or snow, which they are about to enter, should, as a matter of seamanship, go at a moderate speed. Failure to comply with this duty does not, however, amount to a breach of rule 16; but if, in the result, her speed when she enters the fog is not moderate she may then be in breach...

[1] [1964] S.C.R. 402 at 407.

The mate on watch sighted fog ahead and knew that the *Norking*, visible on radar, was ahead two and one-half miles but hidden by the fog. Nevertheless the *Tyee Shell* later, at 0321, entered the fog at full speed, at 0322 altered course to port to 065°. The mate on watch admits that the changes in course had not materially changed the bearing of the *Norking*.

The mate of the *Tyee Shell* testified that he stopped the engines for one minute but the wheel-house log, the engine room log and the preliminary act contain no such entry. The engines were not stopped before the collision. At the time of the collision the *Tyee Shell* had sufficient way on to penetrate the bow of the *Norking* up to amidships.

(3) It is contended that the *Norking* altered course in fog without knowing the course of the other vessel. Neither vessel plotted the course and speed of the other.

(4) It is contended that the *Norking* took no avoiding action. That is not tenable. Throughout, the *Norking* changed to starboard believing that the *Tyee Shell* would return to her proper side to pass port to port, and further that the *Tyee Shell* would not follow so closely to the north shore as could the *Norking*, a small vessel. The collision occurred about $2\frac{1}{2}$ cables from the north shore.

The faults which caused the collision may be summarized as follows bearing in mind the rule that only those faults that did contribute are relevant: *Thompson v. Ontario Sewer Pipe Company*[1].

The *Tyee Shell* committed the initial fault in failing to keep to her starboard side of the channel so as to pass the *Norking* port to port, therefore was at fault under Rule 29 and that fault continued until the collision. In *Imperial Oil Limited v. M/S "Willowbranch"*, *supra*, Ritchie J. in stating the judgment of the Court said at p. 410:

In my opinion, however, the fault of these two ships is not to be assessed only in terms of their respective actions at close quarters, and I

[1] (1908) 40 S.C.R. 396.

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adopt the language used by Wilmer J. in *The Billings Victory* ((1949) Lloyds Rep. 877 at 883), where he said:

> "It appears to me that the most important thing to give effect to in considering degrees of blame is the question which of the two vessels created the position of difficulty."

In this instance the *Tyee Shell* created "the position of difficulty" in failing to continue her course to her starboard side of mid-channel and further not only continued that fault to collision but also added additional faults.

The *Tyee Shell* did not keep a proper lookout as required by Rule 29. The *Tyee Shell* did not navigate with caution.

The *Norking* was at fault in proceeding throughout at full speed, therefore she did not navigate with caution until the danger of collision was over as required by Rule 16(*b*). It was urged in mitigation that such fault was not an originating cause but rather occurred in taking avoiding action which was required by the initial fault of the *Tyee Shell* and that the Master of the *Norking* kept going to starboard thinking that the *Norking* could go so close to the north shore that the other and larger vessel, the *Tyee Shell* could not follow. However, the *Norking* did not navigate with caution, and the Rule requires that it do so. Here the faults appear to be essentially questions of fact: *The Heranger*[1], per Lord Wright at p. 101.

Under the circumstances of this case the fault of the *Tyee Shell* is the greater, not only in having committed the initial fault, but also in adding thereto by subsequent faults of navigation. The *Norking* was at fault within Rule 16 (*b*). I assess the degrees of respective fault as follows: against the *Tyee Shell* 72%, and against the *Norking* 28%.

There will be a reference to the Registrar to determine the amount of the damages. The costs and interest may be spoken to.

I wish to express my appreciation for the able and competent assistance of the Assessors, Captain R. W. Draney and Captain E. B. Caldwell.

[1] [1939] A.C. 94.