

BRITISH COLUMBIA ADMIRALTY DISTRICT

1952
June 23 & 24
July 4

BETWEEN:

PRINCE RUPERT FISHERMEN'S } PLAINTIFF;
CO-OPERATIVE ASSOCIATION }

AND

THE SHIP *CAPILANO* DEFENDANT.

Shipping—Collision—Inexperienced deckhand on watch alone—Negligence on part of Master and watchman—Damages.

Held: That it was negligence on the part of the Master of a ship to leave an inexperienced deckhand on watch alone at night without definite instructions to call the Master if he saw the lights of another ship at all close or if in any doubt whatever, and it was also negligence on the part of the deckhand not to call the Master in such circumstances.

ACTION for damages resulting from collision between two ships.

The action was tried before the Honourable Mr. Justice Sidney Smith, Deputy Judge in Admiralty for the British Columbia Admiralty District, at Vancouver.

F. H. H. Parkes and G. F. McMaster for plaintiff.

John I. Bird and W. D. C. Tuck for defendant.

The facts and questions of law raised are stated in the reasons for judgment.

SMITH D.J.A. now (July 4, 1952) delivered the following judgment:

This is an action of damage by collision between the plaintiffs' Motor Fishpacker *Kanawaka*, 76 feet long, 18 feet beam, 91 tons gross tonnage, and the defendant Motorship *Capilano*, 145 feet long, 27 feet beam, 539 tons gross tonnage, owned by the Union Steamships Ltd. Vancouver, which occurred about 10.45 p.m. on 24th May of this year, about three miles off Gower Point, in the Strait of Georgia.

The M.V. *Kanawaka* manned by 6 men all told and laden with some drums of oil, had left Vancouver at 8.15 p.m. that evening and was proceeding northward to Prince Rupert, while the M.V. *Capilano*, with 15 of a crew and with some general cargo, was proceeding from Billings Bay to Vancouver. The two vessels, at the material times, were on converging courses of ten degrees. The weather

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was fine, the atmosphere clear and not particularly dark. In these conditions they should not have collided; that they did so was due, I think, to the fault of both.

Only one man in each ship was keeping a look-out; Ketill Nerheim, deckhand, in the *Kanawaka* and Cecil R. Marshall, 2nd officer, in the *Capilano*. The case for the *Kanawaka* was that while proceeding towards Gower Point on a course of 265° magnetic she saw the two white mast-head lights and later the green light of the *Capilano* on her starboard bow; that the two vessels would have passed green to green had not the *Capilano* when about to pass, suddenly altered her course to starboard and collided with the *Kanawaka* resulting, shortly thereafter, in the total loss of that vessel and her cargo. No lives were lost. The case for the *Capilano* was that when on a course 95° magnetic she saw the red light of the *Kanawaka* on her port bow, that the two vessels would have passed port to port had not the *Kanawaka* suddenly and without warning, sharply ported her wheel and crossed the bows of the *Capilano*, thereby making collision inevitable.

I have decided that the story of the *Kanawaka* is the more acceptable. The *Kanawaka* left Vancouver in Nerheim's watch, but the Master took her out of harbour and as far as Point Atkinson. Then he turned her over to Nerheim with instructions to keep her off the land one mile at least, to alter his course at Cape Roger Curtis to 265° compass (which was also the magnetic course) and to call him at 10 p.m. to listen to the Fishermen's "conference" on the radio. It was customary at this time for the plaintiffs' vessels to receive orders and exchange news. The Master then retired to his room immediately abaft the wheel-house leaving the door open, lay down in his bunk and went to sleep.

I was impressed by the manner in which Nerheim gave his evidence. He is a Norwegian, 27 years of age, and quite plainly a man of education, intelligence and integrity. He holds a Bachelor of Science degree from the University at Oslo. He was at this time taking a medical course at the University of Southern California, and had come to Canada to make some money to continue his studies. He had only been in this country two months. This was his

first job and he had been employed only one month prior to the collision. He had no previous experience of the sea except as a boy in sail-boats on the Norwegian Coast. Some may say this is the best of sea-training, and it may be so. But it was not of much use in the events of this night. He had also done a trip as 2nd cook in a freighter in the course of which, as I understood, he had visited Vancouver. No doubt this is what drew him back to this Coast. He was not shaken in cross-examination. His positions, times, distances and the amount of his course alteration were all approximations; so little is gained by plotting his courses on the chart.

Nerheim unfortunately did not call the Master at 10 o'clock, because the radio reception was not good and he could not get the "conference". He altered course as instructed at Roger Curtis and, as he thought, about ten minutes later and ten miles away saw a white light and shortly after two white lights about half-a-point on his starboard bow. He thought correctly that this was a power vessel on much the same course as his own, and hauled out some five to ten degrees to give her more sea room. About five minutes later he returned to his course of 265°. At that time he saw the other vessel's green light about the same bearing on his starboard bow and judged they would pass starboard to starboard. He watched her carefully and found that when about 300 yards off she showed her red light, gave one short blast, and altered her course suddenly to starboard. He concluded that the only chance to avoid a collision was to alter his to port, and so he did. This almost succeeded but not quite. The *Capilano* (for it was she) struck him on the starboard quarter, six to seven feet from the stern, with the resultant sinking.

I think that the initial fault here lay with the Master. He should have given more specific instructions to Nerheim. He should have told him most emphatically to call him if and when he saw the lights of another vessel at all close, or if he were in any doubt whatever. To leave him there, with his little pertinent experience, not even knowing, as I gathered, how to signal below to stop the engines, was in the circumstances inexcusable. Then I think Nerheim should have called the Master, regardless of instructions, when he saw the lights of the *Capilano* bearing down on him. The

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question of lights here is extremely difficult and confusing. As I have said, Nerheim saw the *Capilano's* masthead lights and green light close on his starboard bow. But his chief engineer, who was on deck from time to time, said he saw the *Capilano's* white lights and red light (not the green) on much the same bearing. I have puzzled a great deal over this. The only conclusion I can reach, and that a not very satisfactory one, is that both her red and green lights were then visible, and that for some reason the engineer saw the former and the deckhand the latter.

The *Capilano's* account is just as difficult to understand. Marshall said he saw the *Kanawaka's* red light about 1 to 1½ points on his port bow, and about 1½ miles away. He was unable to say why he did not see the *Kanawaka's* white masthead light. This was electric, was burning brightly, and by the regulations was visible five miles. Yet he did not see it then or at any time. With respect to the red light he gives different accounts in his pleadings and in his evidence at the trial. In the former he says that he carefully watched the red light and saw it suddenly change to green as if the wheel had been sharply ported. Before me the effect of his evidence was that he saw the red light four or five (perhaps six) minutes before the collision; that he watched it for three or four minutes; that its bearing did not substantially change; that he then withdrew his attention from it for a minute or more, being satisfied that the two ships would pass clear red to red; that he then noticed the red had changed to green. He immediately starboarded, gave one blast, and went full astern; but he struck the *Kanawaka* very soon afterwards on her starboard quarter. I have no doubt that the *Capilano* was the first to alter course; in other words, that the *Capilano* starboarded and that this caused the *Kanawaka* to port and not the other way round, as claimed by the *Capilano*. It may be of some significance that the quartermaster at the *Capilano's* wheel saw the green light of the *Kanawaka* but saw nothing of her red light.

I did not form any unfavourable opinion of Marshall. I thought he gave his testimony truthfully as he saw it. I appreciated that he was the holder of a passenger mate's certificate and had had some twenty-six years' experience as an officer on this Coast. But I could not associate his

evidence with an efficient look-out or with the dictates of good seamanship. It seemed to me quite evident no proper look-out was being kept on the *Capilano* that Marshall failed to appreciate the significance of what he did observe, and so failed to take proper measures in due time to avoid the collision.

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Mr. Parkes referred me to the well-known passage from Smith, D.J.A. the speech of Lord Sumner in *The Peter Benoit* (1) dealing with apportionment of liability. I have had that passage in mind; and have considered at length every relevant circumstance in the navigation of both vessels; and in the end I think I must distinguish between the degrees of fault. I hold the *Kanawaka* two-thirds, the *Capilano* one-third to blame, with corresponding costs.

Each vessel conceded that if the other were held in fault she would be entitled to limit her liability. I therefore hold that both are so entitled. If necessary, a reference will be held by the learned Deputy Registrar to determine the respective damages. Should any question arise in the working out of this judgment, either side may apply.

Judgment accordingly.

(1) (1915) 13 Asp. 203 at 208.