

Privy Council Appeals Nos. 34-36 of 1918.

The Ship "Borghild" - - - - - *Appellant*

v.

James D'Entremont and others - - - - - *Respondents*

Same - - - - - *Appellant*

v.

William H. Jordan and Company and another - - - - - *Respondents*

Same - - - - - *Appellant*

v.

Nazaire Boudreau and others - - - - - *Respondents*

(Consolidated Appeals.)

FROM

THE SUPREME COURT OF CANADA.

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE
PRIVY COUNCIL, DELIVERED THE 27TH FEBRUARY, 1919.

Present at the Hearing :

- LORD SUMNER.
- LORD PARMOOR.
- LORD WRENBURY.
- LORD STERNDALE.
- SIR ARTHUR CHANNELL.

[Delivered by LORD STERNDALE.]

This is an appeal from a judgment of the Supreme Court of Canada affirming a decision of the Judge of the Exchequer Court of Canada, Nova Scotia Admiralty District, in three consolidated actions brought against the S.S. "Borghild" for damages arising out of a collision between that vessel and the fishing schooner "Oriole." As a result of the collision the

“ Oriole ” and her cargo were sunk and five of her crew drowned. The actions were brought by the survivors of the crew of the “ Oriole ” claiming for their effects, the owners and master of the “ Oriole ” claiming for the value of the vessel and cargo, and the personal representatives of those of the crew who were lost claiming damages for the loss occasioned to them by their death. Drysdale, J. held the “ Borghild ” alone to blame for the collision, and this judgment was affirmed by the Supreme Court. The defendants on the appeal to the Supreme Court and before their Lordships did not contest that part of the judgments which held the “ Borghild ” to blame, and only asked that they should be varied by holding that both vessels were to blame in equal degree.

The “ Oriole ” was an American fishing vessel of 144 tons gross and 104 tons nett, about 115 feet long, and manned by a crew of 22 hands all told, and at the time of collision was bound home to the port of Gloucester, Mass., with a full cargo of halibut. At the time she became aware of the “ Borghild ” she was sailing closehauled on the port tack, carrying, except the fore topsail, all sail, including the balloon jib. The wind was about W.S.W., and she was heading about N.W. by W. $\frac{1}{2}$ W. The force of the wind was in issue, and will be discussed later. The “ Borghild ” is a Norwegian steamer of 3,700 tons gross and 2,200 nett register, 330 feet long, manned by a crew of 25 hands all told, and bound from Herring Cove, New Brunswick, to France. She was on a course of S. 9° E. The collision took place in a dense fog to the S. and W. of Seal Island off Nova Scotia, near the entrance to the bay of Fundy, the “ Borghild ” striking the “ Oriole ” on the starboard side at an angle described by both sides as a right angle, with the result that she sank in a very short time. The fog-horn of the “ Oriole ” was only heard twice by those on board of the “ Borghild,” and it was only when it was heard for the second time that it was distinguished as a double blast, showing that she was on the port tack. When the fog-horn of the “ Oriole ” was first heard the engines of the “ Borghild ” were put to slow, and afterwards, just before the “ Oriole ” came in sight, were put full speed astern and her helm was put hard a port, but it is said that the helm had no material effect on her heading. She has been held to blame for excessive speed, for not stopping her engines when she heard the whistle of the “ Oriole ” forward of her beam, and for a bad look out.

The distance at which the vessels came in sight of one another was very short: it was stated by the plaintiffs as about 50 or 60 feet, and by the defendants’ master at 60 to 90 feet. Those on board the “ Oriole ” heard the whistle of the “ Borghild ” three times, though they did not when first heard distinguish it to be a steamer’s whistle, and when the “ Borghild ” came in sight the helm of the “ Oriole ” was ordered hard a starboard, but the wheel had not been got over when the collision occurred.

If the courses given by the two vessels and the angle of the blow are quite accurate, the “ Borghild ” must have altered substantially under her port helm; but their Lordships are of

opinion that these data are not ascertained with sufficient accuracy to enable any satisfactory conclusion to be drawn as to this alteration, except that the vessels were at first approaching one another at less than a right angle, and therefore their joint speed would bring them together rapidly. The important question in the case is whether the speed of the "Oriole" was immoderate considering the state of the weather.

Drysdale, J. found that her speed was 6 knots, but that such speed was not immoderate. The learned judges in the Supreme Court who gave detailed reasons for their judgments did not entirely agree in their view of the facts. The Chief Justice did not find what the speed of the "Oriole" was in fact, but considered that it was not more than sufficient to give her steerage way. The learned judge seems to have been under a little misapprehension as to the evidence, for he states that all the witnesses on both sides admitted that the wind was light, and speaks of the effect of the current on the "Oriole." As will be seen later, most of the witnesses from the "Borghild" described the wind as of greater force than a light wind, and the current was proved to be so slight as to be negligible. Davies, J. was not satisfied that the speed of the "Oriole" was 6 knots as found by Drysdale, J., but expressed the opinion that whether it was $4\frac{1}{2}$ or $6\frac{1}{2}$ knots or between those rates it did not exceed what was necessary for her to keep good steerage way. He also came to the conclusion that the wind was light or very light.

Anglin, J. was not satisfied that the speed of the "Oriole" was more than $3\frac{1}{2}$ or 4 knots through the water, and accepted the explanation of the master as to the contradictory statement made by him to which reference will be made later. Idington and Duff, JJ. concurred without giving detailed reasons.

At the opening of his argument the learned counsel for the respondents—a counsel of great ability and experience in Admiralty matters—admitted that if the finding that the speed of the "Oriole" was 6 knots through the water were upheld, the decision that such speed was not immoderate could not stand. The question of whether that finding should be upheld is therefore vital.

Before the trial of the action an enquiry was held before a Wreck Commissioner, and at that enquiry the master of the "Oriole" stated more than once that the speed of his vessel was 6 to $6\frac{1}{2}$ knots through the water, and that the wind was a moderate breeze. No evidence inconsistent with that statement was given at that enquiry, except that two witnesses from the "Borghild" described the wind as light. One of them, however, also said that the "Oriole" was going fast, as he judged from the wave at her bow. Some evidence was taken before the registrar, and one of the witnesses from the "Oriole" then described the wind as a moderate breeze. At the trial of the action the master of the "Oriole" gave evidence that his statements before the Wreck Commissioner were made under a mistake: that he had meant 6 to $6\frac{1}{2}$ knots over the ground, and that he had been under the impression that there was a current running in his favour of

about 2 knots. He also stated that the wind was light. This account was corroborated by several members of his crew. Drysdale, J., who heard and saw these witnesses, came to these conclusions on this point :—

The officers of said " Oriole " were examined before a Wreck Commissioner shortly after the accident, and whilst conditions were all fresh made deliberate statements respecting the speed of the schooner, statements I have no doubt detailing their then honest convictions. When these suits came on a deliberate attempt was made to vary or change the first statements so made respecting speed, and to have it understood that the speed of the " Oriole " was much less than at first stated. The preliminary acts in these actions were put in stating the speed of the " Oriole " at 3 or 4 miles an hour, whereas the officers before the Commissioner had pledged their oath to 6 to 6½ knots on the occasion in question. I am of opinion that the effort to change position on this question was an after-thought, and further, not a success. The schooner was sailing close hauled by the wind with practically all her sail set, and hauled by the wind with practically all her sail set and hauled flat, and I think making 6 knots an hour. Was this excessive speed under the circumstances, and further did such speed contribute to the accident ?

When a statement has been made prejudicial to the case of the person making it and it is alleged that it was made under a mistake, no one is so competent to decide whether that allegation is correct as the judge who hears the evidence and can observe the manner of those making it. Their Lordships are of opinion that the finding of a judge under those circumstances, that the explanation is an after-thought and should not be accepted, ought not to be set aside except under very special circumstances, showing that the judge has misapprehended the evidence or the effect of documents put before him. In this case their Lordships are of opinion that no such circumstances exist.

The master's statement that the wind was a moderate breeze was in accordance with the bulk of evidence called from the " Borghild " before the Wreck Commissioner. This evidence was put in at the trial as the defendants' evidence, and it described the wind as a breeze, a fresh breeze, a topsail breeze, or words to that effect, and was not then seriously challenged by any of the evidence called from the " Oriole."

Their Lordships are of opinion that the master of the " Oriole " was right when he called the wind a moderate breeze. This is not a very precise term, but it does not mean a breeze so light that a vessel like the " Oriole " must carry all sail including her balloon jib in order to keep steerage way. The " Oriole " was making for her home port and was carrying her balloon jib, a sail that would be very useful in helping her to get to her destination as soon as possible, but would not in a moderate breeze be serviceable if her object were to keep a moderate speed and manœuvre easily for other vessels in the fog. The main explanation given for the master's statement was that he had erroneously supposed he had a current with him, and added the force of that current to his speed through the water. It is, however, to be noticed that the plaintiffs' preliminary act, founded no doubt on

information obtained from the master and filed on the second day of the enquiry before the Wreck Commissioner, stated that there was no force in the tide, and this was confirmed by the evidence of an expert called by the plaintiffs, who said that there was not more than three-quarters of a knot of current. The master had been navigating in this neighbourhood for a long time, and was no doubt well acquainted with the tides and currents. Some suggestions were put to him on the second day of his examination before the Wreck Commissioner as to a current, but his answers show that the question of current was not really present to his mind at that time as important. For what it is worth, too, he answered distinctly that his speed was 6 knots through the water. It is evident also that he did not consider the current a sufficient explanation, because at the trial he also altered his evidence as to the wind, describing it as light, and not as a moderate breeze. He had been navigating this vessel for 18 months; he described her as the fastest fishing vessel afloat, and he knew quite well what speed she could make under given conditions, and as Drysdale, J. said, he made these statements when the matters were fresh in his recollection.

Their Lordships are therefore of opinion that there were no circumstances to show that the learned Judge in any way misapprehended the evidence, and that his finding as to the actual speed of the "Oriole" after hearing and seeing the witnesses should not be disturbed. It is admitted that in that case his finding that the speed was not immoderate, which is not entirely a question of fact but partly of nautical opinion, cannot stand.

The evidence of the witnesses from the "Oriole" also proved that 6 knots was not necessary to keep steerage way.

It was, however, contended that the speed of the "Oriole" if immoderate did not contribute to the collision, and it was pointed out that if the "Borghild" had stopped sooner and not ported, the collision might not have happened, as she might have gone under the stern of the "Oriole." That may be so, but it is also possible that given the wrong manœuvres of the "Borghild" the collision might not have happened if the "Oriole" had been going slower, as then the "Borghild" might have crossed ahead of her. One important object in going slow in a fog is to give each vessel time to hear the signals made by the other as often as possible before they are close to one another, and thus afford an opportunity to judge their relative positions. In this case the signals were not heard until the vessels were so close that a collision was imminent. In their Lordships' opinion this collision was brought about by wrong navigation of both vessels, which prevented them from hearing the sound signals as often as they should, continuing up to the time of and contributing to the collision. Both vessels should therefore be held to blame.

There still remains to be considered the division of the loss under the Maritime Conventions Act of 1911.

The judgment in the case of the claim by the representatives of the deceased seamen is not affected by the decision of their Lordships, as in that case the liability of the vessels is joint and several, and therefore that judgment must stand.

In the other two cases their Lordships are of opinion that upon the materials before them it is not possible to apportion the degree of fault of the two vessels, and both must be held equally liable.

The appellants have succeeded on the main point in the appeal, and the respondents, other than the representatives of the deceased seamen, must therefore pay the costs of the consolidated appeals here and before the Supreme Court of Canada. All parties must bear their own costs of the trial before Drysdale, J.

Their Lordships will humbly advise His Majesty accordingly.

In the Privy Council.

THE SHIP "BORGHILD"

⁂.

JAMES D'ENTREMONT AND OTHERS.

SAME

⁂.

WILLIAM H. JORDAN AND COMPANY AND
ANOTHER.

SAME

⁂.

NAZAIRE BOUDREAU AND OTHERS.

DELIVERED BY LORD STERNDALE.