

BETWEEN:

THE MOTOR VESSEL DONNA-
 CONA II AND HER OWNERS } APPELLANTS;
 (*Defendants*)

1960
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 May 9

 1961
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 Mar. 24

AND

MONTSHIP LINES LIMITED, OWN-
 ERS OF THE MOTOR VESSEL } RESPONDENTS.
 MONTROSE (*Plaintiffs*)

Shipping—Appeal from judgment of District Judge in Admiralty—Collision in Quebec Harbour—Negligence of officers of both ships—Failure of both ships to comply with Regulations for Preventing Collisions at Sea—Apportionment of blame—Regulations for Preventing Collisions at Sea, rules 25(a), 28 and 29.

In an action and counterclaim for damages resulting from a collision in the Harbour of Quebec between the M.V. *Montrose* downward bound and the M.V. *Donnacona II* upward bound, the District Judge in Admiralty found that the *Donnacona II* was solely responsible for the collision. On an appeal from the judgment

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Held: That those in charge of the *Donnacona II* were blameworthy for the reasons given by the trial judge, that the collision would not have happened had not *Donnacona II* failed to keep to starboard as required by Regulation 8 of the *St. Lawrence River Regulations*.

2. That one factor that brought this about was the failure of *Donnacona II* to keep a proper look-out as required by rule 29 of the *Regulations for Preventing Collisions at Sea*.
3. That another fault was her failure immediately before the collision to slacken speed in the face of obvious danger instead of proceeding at full speed ahead.
4. That the admissions of those in charge of the *Montrose* showed that contrary to the *Regulations for Preventing Collisions at Sea*, rule 28(a), the *Montrose* two minutes before the collision altered course without signaling on her siren, and that she was not, as required by Rule 29 of the *Regulations*, maintaining a proper look-out.
5. That the violation of rules 28 and 29 by the *Montrose* constituted negligence which contributed to the collision.
6. That there was common fault of which 75% was attributable to the appellants and 25% to the respondents.

APPEAL from the judgment of the District Judge in Admiralty for the Quebec Admiralty District.

The appeal was heard before the Honourable Mr. Justice Kearney at Quebec.

Leopold Langlois for appellants.

Jean Brisset, Q.C. for respondents.

KEARNEY J. now (March 24, 1961) delivered the following judgment:

This is an appeal from a judgment of the Honourable Arthur I. Smith, District Judge in Admiralty for the District of Quebec, rendered on November 6, 1958.

The action is for damage sustained by collision between the M/V *Montrose* and the M/V *Donnacona II* which occurred within the limits of the Harbour of Quebec. The litigation comprises an action and counterclaim. By the aforesaid judgment the appellants were held solely responsible for the collision; their counterclaim was accordingly dismissed and the respondents' action maintained, with costs in each instance; and reference was made to the registrar for determination of said damages in the usual manner.

The *Montrose* is a steel single screw cargo motor vessel registered at the port of London, England, of 915.36 gross tons and 402.14 tons net register, 225.5 feet in length,

36 feet in breadth, geared by one direct-acting internal combustion diesel engine developing 1,500 I.H.P., maximum speed 13 knots, and manned by a crew of 20 all told.

The *Donnacona II* is a steel twin screw vessel registered at the port of Quebec, of 329.52 tons gross, 239.87 tons net register, 140.9 feet in length and 30.3 feet in breadth, fitted with two Fairbanks-Morse diesel engines of 160 horse-power brake, and manned by a crew of 6 all told.

On August 3, 1956, prior to the collision the *Donnacona II*, as she rounded Point Levis and was proceeding upstream somewhere north of midchannel, sighted four vessels downbound. The leading one proved to be the out-bound *Homeric* proceeding somewhat south of midchannel; the second and third were two tugs which had serviced the *Homeric* and were navigating one behind the other at about 500 feet from the north shore wharves; and lastly what proved to be the *Montrose*, destined for Lisbon, somewhat north of midchannel where she was changing pilots. *Donnacona II* passed the *Homeric* red to red; the tugs turned into their berths before meeting her and at 0131 E.D.S.T., almost opposite the customs reporting station at Quebec and a little south of the middle of the river, the collision occurred when the bluff bows of the *Donnacona II* struck the port side of the *Montrose* in the way of hatch No. 2 at an angle of approximately 80°.

The parties in holding each other solely responsible for the collision reciprocally attributed almost identical acts of negligence: failure to keep a good look-out, or any look-out at all; to pass each other as they should have done in the circumstances; failure to navigate on the proper side of the channel; to give proper signals; to maintain a moderate and appropriate rate of speed; the whole contrary to good seamanship and the *Regulations for Preventing Collisions at Sea* and the *St. Lawrence River Regulations*.

Counsel for the parties filed a stipulation agreeing there was a flood tide of two knots favouring *Donnacona II* and that the sworn statements signed by the following officers and ratings of the *Montrose* concerning the circumstances of the collision, and which were also filed, are to form part of the evidence in this case:

Captain William Urquhart, Master of the ship;
Edward Kempton, Second Mate;
John J. Nevin, A.B.;

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Kenneth Cameron Galbraith, Third Engineer;
 Peter Fox, A.B., Wheelsman.

The following facts are uncontested by the parties; at the time of the collision full darkness of night had fallen; the weather was calm; the wind was nil; just prior to the collision both ships were travelling at full speed.

The learned trial judge dealt with the evidence given on behalf of the respective parties as follows:

The proof shows that both vessels were carrying regulation lights. It is established that the *Montrose* had been steering on the Sillery Range Course of 039° True, but that on approaching the northern limits of Quebec Anchorage her course was altered to 024° Gyro. At 0119 the vessel's engines were ordered at half speed and at 0122 stop. At 0125 the *Montrose's* engines were put to slow ahead and the ship was brought slightly around to port to the pilotage ground.

The evidence adduced on behalf of the *Montrose* as to her position in the river as pilots were changed and her speed and the various courses steered by her thereafter was not contradicted. This evidence shows that the *Montrose* was approximately one to one and a half cables length North of midchannel when change of pilots was effected and that from that position she was, at 0128½ hours, ordered full speed ahead on a course of 024° True, which course was altered about ½ minute later to 035° True. Just prior to this the pilot on the *Montrose* had seen the white lights of a ship over a mile away, but shortly thereafter he sighted the green light of this vessel at a distance of some 3 or 4 cables. At first he thought that this might be merely a "shear" on the part of the approaching vessel, but then this ship continued to come to port, whereupon the pilot of the *Montrose* ordered hard-to-starboard, the vessels being at that moment approximately 2 cables apart. The order hard-a-starboard was almost immediately followed by the order full astern, but the vessels came into collision at approximately 0131 hours, the bow of the *Donnacona II* colliding with the portside of the *Montrose* and at an angle of approximately 80° from the stern. At the time of the collision the *Montrose* was swinging sharply to starboard and the *Donnacona II* was astern of the *Montrose* heading downriver.

The testimony of those on board the *Montrose* as to the position of the vessel when pilots were changed and as to her speed and to the courses steered by her thereafter is not merely uncontradicted, but is at least to some extent corroborated by the testimony of the witness Langlois, Pilot on the *Homeric*.

Three witnesses were heard on behalf of the *Donnacona II*; Thériault who was on watch at the Marine Signal Service Station located at Quebec, immediately opposite the place where the collision occurred; Piché, a 21 year old sailor, who was in the wheelhouse of the *Donnacona II* at the time of the collision, and Roland Beaudette, Mate of the Vessel, who was at the wheel.

The testimony of the witness Thériault, who stated that the collision occurred at the place where the *Montrose* changed pilots just as the Pilot Launch left her, is clearly unreliable. Not only is it contradicted by the witnesses heard on behalf of the *Montrose*, but it is inconsistent with the

fact, admitted by Mate Beaudette of the *Donnacona II*, that the collision occurred actually slightly to the South of midstream and considerably East of the place where the Pilots were changed.

The witness Piché testified that the *Donnacona II* as it navigated up-river passed within 500 to 600 feet of the wharves on the Quebec shore. His evidence is that he saw two tugs and the *Montrose* slightly to starboard coming down, the *Montrose* being astern of the other two vessels, and that the *Donnacona II* met the first two vessels green to green at a distance of 200 feet, but that the *Montrose* appeared to crowd the *Donnacona II* somewhat and then to veer more to starboard, whereupon the *Donnacona II* sounded two blasts and came hard-to-port, but in doing so was struck by the *Montrose*.

According to these witnesses, it was when the *Montrose* thus veered to starboard that her red light was seen by them for the first time. The *Donnacona II* had been coming at full speed, but just prior to collision her left motor was stopped.

According to Mate Beaudette, the *Donnacona II* passed Buoy 138M (should read 138B) at a distance of about 500 feet. He did not consult his compass but on leaving this position took a visual bearing and steered a course to bring his vessel within 550 feet of the breakwater. From that point he continued parallel to the shore and at about the same distance from it. He saw three vessels coming down, the first two of which he met green to green. As he approached the third, which was a little closer to shore than the first two, this vessel appeared to be crowding the *Donnacona II* whereupon he went to 6° to port, but the other vessels continued too close with his and fearing a collision he sounded two short blasts and went hard-to-port, but the *Montrose* was across his bows and too close to avoid the collision. The *Donnacona II* continued to go hard-to-port, sounded another signal and stopped her motor. Beaudette testified that he heard no signal from the *Montrose* prior to the signal given by the *Donnacona II*. It was only a matter of seconds before the impact when the *Montrose* was across her bows that Beaudette heard a signal from her and at the same moment saw her red light for the first time. It appears that at no time relevant to the collision was a compass bearing taken by the *Donnacona II* and all evidence given on her behalf as to her position and the courses steered by her appear to have been mere estimates based on observation of land marks. Mate Beaudette testified that he remembered meeting the *Homeric* abreast of the breakwater and that the vessels met red to red at a distance of about 300 feet.

The defence of the *Donnacona II* briefly stated is that proceeding upriver on a course parallel with and at a distance of approximately 550 feet from the Quebec shore she met and passed the two tugs green to green and was about to meet and pass in similar fashion (obviously the word *Montrose* was left out) when the latter proceeding on the wrong side of the channel, came to starboard in such a manner as to cut across the bows of the *Donnacona II* and thereby bring about the collision.

The trial judge then stated:

The undersigned has no hesitation in concluding that this version of the collision is not supported by the proof.

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The pith and substance of the judgment appealed from are contained, subject to the undermentioned amendment, in the following paragraph:

The fact that the *Donnacona II* allowed herself to get to the point at which she was when the collision occurred has not been satisfactorily explained. I am convinced however that had she kept to starboard, as she could and ought to have done, the collision would not have happened and it was the failure of the *Donnacona II* to observe Rule 12 of the Regulations which occasioned the disaster.

I might here insert that I think it could be said with equal force that, had *Montrose* remained on her proper side of the channel, the collision would not have occurred. In written argument counsel for the respondents submitted that regulation 12 was clearly inapplicable in the present instance and had undoubtedly been inserted through a clerical error, and that the trial judge intended to refer to regulation 8. This was contested by counsel for the appellants and I referred the case back to the trial judge to settle the disputed question. By judgment rendered on March 7, 1960, he ruled that this error was purely and simply due to a clerical or typographical oversight, and that what he intended to hold was that the collision would not have happened had not *Donnacona II* failed to keep to starboard, as she was required to do by regulation 8 of the *St. Lawrence River Regulations*. This regulation reads as follows:

Vessels drawing nine feet of water or less and barges and rafts shall at all times keep to the proper side of the fairway and away from the established steamer track between Quebec and Father Point, except when crossing the steamer track at right angles.

The case again came before me and on re-argument the appellants, while conceding that *Donnacona II* with her shallow draft came within its provisions submitted that the trial judge had erroneously invoked regulation 8 since it had no practical application within the limits of Quebec Harbour for the following reasons. It was enacted to prevent smaller vessels cluttering up restricted parts of the dredged channel between the eastern limits of Quebec Harbour and the western extremity of Father Point when with their shallow draft they could easily navigate outside it. There is no need of dredging a channel in the Quebec Harbour as,

owing to its natural depth, vessels having a maximum draft can use the full width of the river. In addition, that with wharves on both sides and ships crossing in various directions it cannot be said there is an established track in the port of Quebec.

That regulation 8 was meant to apply within the limits of the harbour readily appears from regulation 2 which states:

These regulations apply to the St. Lawrence River between Victoria Bridge at Montreal and Father Point including the harbours of Montreal, Three Rivers and *Quebec*. (Emphasis supplied)

I do not think it can be said that there is a well defined single track for upbound vessels and another single track for downbound vessels because of deep water docking facilities on both sides of the river, particularly on the Quebec side, which are used by both up and downbound vessels. This makes the practical application of regulation 8 difficult. Under the circumstances, this regulation, in my view, should be interpreted broadly and to signify that ships of light draft like *Donnacona II* should keep on their starboard side of midriver or midchannel and as close to shore as circumstances permit. I think that this is what *Donnacona II* allegedly intended to do but failed to carry out. I will first direct my attention to the causes and consequences of such failure.

Three witnesses were called on behalf of the appellants. The trial judge rejected the evidence of Mr. Thériault, who testified as to the location of the accident, and gave little credence to seaman Piché and mate Beaudette who described the manner in which the accident occurred. It is well established that where a question of credibility of witnesses arises its determination should be left to the trial judge.

I consider that those in charge of the *Donnacona II* were blameworthy for the reasons given by the trial judge, in support of which I would add the following.

I think those in charge of *Donnacona II* misjudged their true position which was farther from shore than they imagined, and one factor which brought this about was the

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failure to keep a proper look-out as required by rule 29 of the *Regulations for Preventing Collisions at Sea*, which states:

Nothing in these Rules shall exonerate any vessel or the owner, master or crew thereof, from the consequences of any neglect to carry lights or signals, or of any neglect to keep a proper look-out, or of the neglect of any precaution which may be required by the ordinary practice of seamen, or by the special circumstances of the case.

Seaman Piché, who was on watch with mate Beaudette, did not understand what his duties were as look-out. When mate Beaudette first sighted the green lights of two small vessels which were about 500 feet from shore and which he anticipated meeting, I think he was entitled to set a course calculated to meet them green to green instead of attempting to pass between them and the shore red to red. Had seaman Piché and mate Beaudette kept a sharp look-out, they would have realized they would not be required to meet the two small vessels. The wharf where the tugs were berthed and to which they were returning is upstream from Pointe-à-Carcy where the collision occurred, and the Canada Steamship Line wharf is more so, and it was clearly proved that at the time of the collision the first tug had reached the above-mentioned wharf. Indeed the two above witnesses erroneously testified that *before* the collision they had passed the two small vessels green to green, which was an impossibility, as there is abundant proof that the two tugs had not and never did reach the point where the collision occurred. Thus *Donnacona II* had enough leeway to veer, if necessary, to starboard and pass the *Montrose* red to red as she had passed the *Homeric* instead of changing course 6° to port in an attempt to pass her green to green.

Immediately before the collision *Donnacona II* was proceeding at nine knots over the ground and another fault, in my opinion, of a most serious character, committed by her, was her failure to take a precaution required by the most rudimentary principles of good seamanship, namely, to slacken her speed in the face of obvious danger instead of proceeding at full speed ahead. By contrast, Captain Edmond Plante, master of the tug *Château*, testified that because of the density of the traffic he reduced his speed to 4½-5 knots while keeping about 500 feet from the wharves in order to interfere with navigation as little as possible.

Since because of darkness those in charge of *Donnacona II* could not identify the oncoming vessels and could not be certain of the destination of the small vessels, or whether what proved to be the *Montrose* intended to dock on the north shore, or veer to starboard and proceed to sea, their failure to slacken speed was exceedingly imprudent.

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Mate Beaudette by going hard-to-port when the collision was imminent brought his ship on the wrong side of the channel, thus serving to make the accident inevitable, but I do not think much importance should be attached to ill conceived manoeuvres made after a situation has become desperate.

The next issue is whether the *Montrose* was blameless or whether she was in whole or in part responsible for the collision. I think it is with very little justification that the appellants complain of the specific findings of fact made by the trial judge, as far as they went. Nevertheless, in my opinion, there is merit in the submission that the trial judge failed to consider and pass upon important elements of proof emanating not from the appellants' witnesses but from the admissions of those in charge of the *Montrose*, which allegedly clearly showed that, quite apart from having, contrary to rule 25(a) of the *Regulations for Preventing Collisions at Sea*, changed pilots on the north side of the channel, her officers committed other acts of negligence in violation, more particularly, of regulations 28 and 29, which were the cause of or contributed to the collision.

The appellants also took exception to the manner in which the trial judge dealt with the failure of the *Montrose* to remain on the south side of midchannel when changing pilots and I will first deal with this issue.

Rule 25(a) of the *Regulations for Preventing Collisions at Sea* reads as follows:

In a narrow channel every power-driven vessel when proceeding along the course of the channel 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. (Italics are mine.)

To say that it would have been safe to stay on the starboard side of midchannel when changing pilots is, I think, an understatement. There is no suggestion in the record that it was in any way impractical for the pilot boat to meet the *Montrose* south of midchannel, although to do so might

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have entailed a little loss of time to the pilot concerned. The trial judge found that the change of pilots was at the place and in the manner which is usual. Jean-Paul Blouin, pilot of the *Montrose*, testified that the change is normally made a little north of the center line, but not much. The respondents, by effecting this change, particularly at night and in a busy narrow channel, at a point about one cable to a cable and a half (600 to 900 feet) north of center, were, I think, taking liberties with a so-called custom which has no official sanction, especially since by doing so they were violating rule 25(a) of the *International Rules of the Road*, as the *Regulations for Preventing Collisions at Sea* are generally known. A custom established by downbound pilots for their own convenience should, in my opinion, give way to the requirements of public safety. Circumstances alter cases and what might be done with relative impunity in broad daylight and during periods of light traffic could become dangerous in conditions such as existed in the instant case.

The trial judge expressed the opinion that the fact of changing pilots somewhat north of midchannel cannot be considered to have been a cause contributing to the collision. If this were the only fault and there were no other subsequent acts of negligence ascribable to the *Montrose*, I would not be disposed to interfere with the above-mentioned finding.

It is, however, a well recognized principle in maritime collision cases that a vessel guilty of initial negligence has to establish that she did everything she could to prevent the consequences of such negligence before she can claim that the other vessel is the sole cause of the accident. Lord Moulton, in *S.S. Alexander Shukoff v. S.S. Gothland. S.S. Larenberg v. S.S. Gothland*¹, stated:

The ship guilty of the initial negligence remains bound to do everything that she can to prevent the consequences of that negligence, and the burden upon her is to show that she has done so before she can claim that the negligence of the other ship is the sole cause of the accident.

Rule 28(a) of the *Regulations for Preventing Collisions at Sea* reads in part as follows:

When vessels are in sight of one another, a power-driven vessel under way, in taking any course authorized or required by these Rules, shall indicate that course by the following signals on her whistle, namely:—

One short blast to mean "I am altering my course to starboard."

¹[1921] 1 A.C. 216, 246.

That the *Montrose* two minutes before the collision altered her course from 024° to 035° without signalling on her siren is not contested. The evidence of those in charge of her clearly shows she failed to do so. *Montrose* on first sighting the green light of *Donnacona II*, when the latter was still three or four cables away, should have immediately signalled and slackened her speed. It is interesting to note that mate Beaudette said in his testimony that, if he had heard the *Montrose's* signal when he was lower down river, he would have taken other action than he did. With another vessel in sight bearing down on her, the failure of the *Montrose* to signal promptly increased the risk of collision and constituted, I think, a serious fault.

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The respondents alleged that a sharp look-out was being maintained on the *Montrose* but the admissions of those in charge of her show that no proper look-out was being maintained as required by rule 29 of the *Regulations for Preventing Collisions at Sea*.

According to Captain Urquhart, the master, immediately after the pilot's launch had cleared the ship's side, because it was a clear night he left the bridge and went to his room and two minutes later he felt the impact of the collision which appeared to be heavy and the ship shuddered.

Pilot Blouin who stated that he first sighted the white light of what proved to be the *Donnacona II* at a distance of approximately a mile suddenly saw her green light when she was only a few cables away. I might here interpose that pilot Blouin's statement that he took no action because he thought that the appearance of the green light was due to a sheer is irreconcilable with his statement that at no time did he see her red light.

Edward Kempton, during whose watch the collision occurred, testified that he was not in the wheelhouse; he was busy making entries in the deck engine movement book and, until he suddenly heard the pilot exclaim hard-a-starboard and order one sharp blast, he had not seen the green light of the *Donnacona II* and at this time she was about 100 yards away.

Seaman Nevin, who was supposed to be acting as look-out, instead of being on the bridge, according to his own evidence, was busy putting away the pilot's luggage and preparing tea for the officers.

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Only wheelman Fox's evidence remains to be considered and he stated he did not see the masthead and green light of the *Donnacona II* until just before the collision and after the *Montrose* had blown a short blast signal.

Marsden's Collisions at Sea, 1953, Tenth Edition, at page 566, states:

If a ship is proved to have been negligent in not keeping a proper look-out she will be held answerable for all the reasonable consequences of her negligence.

An infringement of a regulation having no possible connection with the collision must be disregarded and there is no presumption that a breach of the rules constitutes a contributory cause of the collision; but here the breaches complained of and clearly proved had the effect of materially increasing the danger and risk of collision. It is worth adding that admittedly the *Donnacona II* was navigating with a flood tide current of two knots and that on account of this she was entitled to receive preferred consideration at the hands of the *Montrose*.

Leaving aside the fact of the *Montrose* being north of midchannel, which the trial judge considered did not contribute to the collision, I am convinced as are my two assessors, whose assistance I very much appreciate, that the faults above described, and particularly the violation of rules 28 and 29 by those in charge of the *Montrose*, constituted negligence which in a measure contributed to the collision.

For the foregoing reasons, with respect and reluctance I find that there was common fault of which I would attribute 75% to the appellants and 25% to the respondents. The appeal is allowed with costs, and the judgment appealed from will be varied accordingly.

The costs in the Admiralty District Court will be apportioned in the same manner as the liability, so that the solicitors for the plaintiffs-respondents shall be entitled to 75% of their costs and the solicitors for the defendants and counter-appellants to 25% of their costs. The amount of the damages suffered by the respective parties is referred to the district registrar for assessment.

Judgment accordingly.