
ON APPEAL FROM THE NOVA SCOTIA ADMIRALTY DISTRICT

THE SHIP *CAVELIER*, HER CARGO }
 AND FREIGHT (DEFENDANT) } APPELLANT;

AND

LIVERPOOL SHIPPING COMPANY }
 (PLAINTIFF) } RESPONDENT.

1931
 Sept. 22.
 Oct. 17.

Shipping—Collision—Altering course—Articles 19, 22, 23, 27 and 29 of the Rules of the Road—Travelling red to red.

The collision herein occurred in Halifax harbour, the bow of the *C.* striking the *K.* on her starboard quarter. The *C.* was heading for the Inner Automatic Buoy and the *K.* was northward and westward of the buoy,

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each showing her red light to the other, until the *K.*, almost immediately after passing the buoy, altered her course suddenly, showing her green light on the port bow of the *C.* which would be about half to three-quarters of a mile S.S.E. of the buoy, and in attempting to cross the bow of the *C.* was struck as aforesaid. The *K.* gave no signal of her intention to change her course.

Held, [varying the judgment appealed from] that as the vessels were travelling red to red, the *K.* by altering her course without justification, and especially without signalling the *C.* her intention to do so, and in attempting to cross the *C.*'s bow, thus creating a danger of collision, violated Articles 19, 22, 23, 27 and 29 of the International Rules of the Road, and was guilty of mismanagement and bad seamanship, and was solely to blame for the collision which occurred.

This was an appeal from the judgment of the Honourable Mr. Justice Mellish, Local Judge in Admiralty, for the Nova Scotia Admiralty District, finding both vessels to blame for the collision, and condemning the plaintiff to two-thirds of the damages and the defendant to one-third.

The following are the reasons for the judgment of the Local Judge.

MELLISH, L.J.A. (April 21, 1931), delivered the following judgment.

This is an action for damages sustained by the plaintiff's ship the *Mary E. Kenny* with the defendant ship off Halifax harbour on the 17th November last. The *Mary E. Kenny* is a motor boat, 68 feet long 16 feet beam and 7 feet depth; gross tonnage 49, nett 40. The *Cavelier* is a steam freighter.

The *Kenny's* crew on duty just before the collision were the master, Ernst, who was steering the ship, and a seaman, Crouse, who is said by Ernst to have been on duty as look-out, but who was unfortunately drowned just after the collision. The collision occurred between 3 and 4 o'clock in the night, which was dark but with good visibility. The only witness on behalf of the plaintiff is the master, who says that he was bound from Halifax to Newfoundland, that he sailed from Halifax after passing George's Island on a course due south to the Inner Automatic buoy; that he rounded this buoy close—50 feet; and that he then proceeded on a course S.E. $\frac{1}{2}$ S. to pick up the Outer Automatic Buoy and incidentally to test his compass; that he first saw the *Cavelier* when the *Kenny* was about half a mile north of the Inner Automatic buoy and about two miles away, about two points on his *port* bow,

showing her green light. After rounding this buoy and changing his course $3\frac{1}{2}$ points to the eastward he says that he again saw the *Cavelier's* green light about $1\frac{1}{2}$ or $1\frac{1}{4}$ miles away, about half a point on his *starboard* bow; that when his attention was next called to the *Cavelier* by a single blast of the latter's whistle she was about three points on his *starboard* bow shewing both side lights about $\frac{1}{4}$ mile away; that in about 20 or 30 seconds the collision occurred and that during this interval to avoid the collision he starboarded his helm; that the collision followed, the *Cavelier* striking the *Kenny* on the starboard quarter at an angle of about 60' from the bow of the *Kenny* cutting into her about seven feet.

The master of the *Cavelier* swears that the *Cavelier* was awaiting a pilot on a course N. 50 W. from the vicinity of the Outer Automatic buoy; that the pilot came aboard, and that the ship's course was then directed to the Inner Automatic N.N.W. when he saw the red light of the *Kenny* two to two and a half miles away, half a point on his port bow; this was after the pilot came aboard and the ship was proceeding full away for the buoy at 3.07—a moderate northerly breeze; that the look-out reported the red light at the same time. He first saw the *Kenny's* light at 3.10 which broadened to two points on his port bow; that the *Kenny* then changed her course shewing her green side light only, about two points on the *Cavelier's* port bow when about half a mile away; that then the following steps were taken by the *Cavelier*—stop, hard a port, full speed astern, with appropriate signals; that the *Kenny* continued on her course shewing her green light; and that the *Cavelier* struck the *Kenny* on her starboard side, about two minutes after the green light was first seen, about $\frac{3}{4}$ mile S.E. of the Inner Automatic buoy. According to the *Cavelier's* log the collision took place at 3.17 or seven minutes, taking the captain's testimony, after the *Kenny* was first seen. On cross examination he puts the *Kenny* two cables westward of the buoy when first seen.

The *Cavelier's* look-out, Arcand, says he came on duty at 3 a.m., that at 3.10 he saw a light, "first one the white, and I looked afterwards, and the red one: and I gave two bells"; that he saw the red light one point on the port bow, and afterwards the red and green, and then the green.

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This witness appeared to be at some disadvantage in speaking English, but appeared to be an intelligent witness and had a mate's certificate. He says nothing about seeing either the green or red lights of the *Kenny* two points on the port bow, but he is I think the only witness on the defendant ship who says he saw all the *Kenny's* lights at once, although he does not say how they bore when he saw them.

The second officer of the *Cavelier*, Roach, corroborates the captain as to the *Kenny's* green light being two points on the port bow of the *Cavelier* and the distance from the Inner Automatic when the collision occurred. The following extract is from his evidence:

Q. Which way were they moving?—A. Towards us very rapidly.

Q. Straight towards you or to your left or right?—A. About an angle of 90 degrees he appeared to be coming across our bow.

Q. You did hit the ship?—A. Yes.

By the Court:

Q. How much did you shift your head before the collision?—A. I should say something about six points; the helm was hard aport we were swinging very rapidly; I think she was heading about N.E.

As to the position of the *Kenny* when first seen he says:

A. He appeared to be slightly to the westward of the buoy, possibly a little N. of W. of the buoy.

Q. Fairly close to it?—A. Yes, not too far.

A. He must have been very handy to the buoy when we saw him first.

The *Cavelier's* helmsman, Rose, who also held a mate's coasting certificate, says the first lights he saw were the *Kenny's* white and green lights two points on the port bow. He heard no report from the look-out. After seeing the green light the *Cavelier* he says "Gave him one blast, hard a port, and stop—pretty nearly the same time—and then maybe a minute or so after that, the engines went full astern; I heard the captain jingling the telegraph."

Reyno, the pilot in charge of the *Cavelier*, according to his evidence, boarded the ship about two miles S.S.E. of the Inner Automatic buoy at 3.07 a.m. Then "went full ahead, ported our helm on the buoy" the ship heading N.N.W. After about three minutes he saw the red and white lights of the *Kenny* a couple of miles off, half a point on the port bow; then broadening to two points. After this the *Kenny* "changed to green, altered to the eastward."

The evidence then proceeds as follows:

Q. You could not see the ship?—A. No.

Q. What do you mean altered to eastward?—A. He starboarded his helm and pulled around the buoy.

By the Court:

Q. Did you think that was what he was doing?—A. When he showed his green, yes.

At the time of the collision he says the *Cavelier* was making $1\frac{1}{2}$ knots heading about N.E. That when he first saw the *Kenny* she would be about W. or N.W. of the buoy in his judgment and that the collision was about head on.

The plaintiff's preliminary act says:

That the collision took place $\frac{1}{2}$ mile S.E. $\frac{1}{2}$ S. from the Inner Automatic Buoy.

That the other ship was seen first about four miles away S. 5' E.

Defendant's preliminary act which was filed too late, and after there had been a marine enquiry by the government, says:

That the collision took place S.E. of that buoy and about a mile distant therefrom.

That the defendant ship was heading N.N.W. when the other was first seen.

It is difficult to find any fact in relation to this collision, but the evidence justifies I think the following findings which I make:

1. The collision took place at a point lying about S.E. $\frac{1}{2}$ S. of the Inner Automatic buoy.

2. That at the time of the collision the *Cavelier* was heading about N.E.

3. That the *Cavelier* changed her course just before the collision from N.N.W. to N.E.

4. That at the time of the collision the ships met on courses about at right angles.

5. That the *Kenny* rounded the Inner Automatic buoy and then took a course about S.E. $\frac{1}{2}$ S.

The first four of these findings are practically undisputed, at least by the defendant, but if they are to be accepted, the defendant's explanation of the accident cannot be accepted. Defendant claims that the *Kenny* was two points on the *Cavelier's* port bow when the *Kenny's* green light was first seen. If the *Cavelier* was then heading

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N.N.W. which is not disputed, it is impossible that the *Kenny* could have been heading S.E. $\frac{1}{2}$ S. or even S.E. Under such circumstances the *Kenny's* green light would be invisible by itself (i.e., apart from her red light) at any distance. And if the *Kenny's* course was more to the eastward so as to make her green light visible two points on the *Cavelier's* port bow, the ships could not have collided, S.E. or S.E. $\frac{1}{2}$ S. of the buoy at *right angles* with the *Cavelier* heading N.E. but must necessarily have collided at an obtuse angle to starboard of both ships, which no one contends for; and there is no evidence that the *Kenny* changed her course to starboard after her green light was first seen by the *Cavelier*. And in this connection, it is significant that neither the *Cavelier's* look-out or pilot say that the *Kenny's* green light was seen two points on the *Cavelier's* port bow. The *Kenny* appeared to this pilot to be rounding the buoy when her green light was displayed, which is corroborative to some extent at least of Ernst's evidence that he rounded the buoy close—although I think he probably did not round it as close as he claims. If the latter's intention were to round the buoy close on his course S.E. $\frac{1}{2}$ S. it is natural that on his previous course about S. he would be heading somewhat to the westward of the buoy and before changing his course would for some time be exposing his port or red light off the port bow of the *Cavelier* and would really have to cross the latter's bow twice before coming again on the starboard bow of the *Cavelier* where he was when a half mile north of the buoy. Having crossed the *Cavelier's* bow from starboard to port when on a course about S. the *Kenny* was attempting to pass from the *Cavelier's* port to her starboard. Ernst saw the *Cavelier*, he says, when he was a half mile north of the buoy and I think did not see her again until after he had changed his course without notice and I am not satisfied that he saw the *Cavelier's* green light on his starboard bow until after the *Cavelier* had changed her course to avoid him, i.e., immediately before the collision. The great weight of the evidence is against the contention that the *Cavelier* took the extraordinary course of porting to the green light after it had passed to her starboard bow.

I find that the *Kenny* was rounding the buoy as the pilot of the *Cavelier* thought she was doing when she shewed

her green light, but I find that the green light was not then as much as two points on the *Cavelier's* port bow, and that it should have been seen earlier by the *Cavelier* when she was more than half a mile from the *Kenny*. As the *Cavelier* would after seeing the light be swinging to starboard the green light of the *Kenny* would for some time widen on her port bow until the speed of the *Cavelier* would be so diminished that the green light of the *Kenny* seemed to cross her bow at right angles.

The collision is said in plaintiff's preliminary Act to have taken place about half a mile from the buoy and in defendant's preliminary Act about a mile from it. The latter's preliminary Act was delivered after the evidence was taken so late as to be of no use for the purpose for which it is primarily intended. The only evidence on the point, that of the master of the *Cavelier*, puts the distance at about three-fourths of a mile. I am accordingly of opinion that the green light of the *Kenny* was visible westward of the buoy at more than half a mile and should have been seen on the *Cavelier's* bridge before it was, and that it was less than two points on the port bow of the *Cavelier* when it was so seen. Whether at that time the green light was so fine on the *Cavelier's* port bow as to justify her keeping her course and speed or in using a starboard rather than a port helm is difficult to determine.

When the *Kenny* shewed her red light off the *Cavelier's* port bow (red to red) it was to be expected that the *Kenny* would not imperil this safe position which may perhaps account for, though not justify, the *Kenny's* green light not being sooner seen. A green light off the port bow would appear to be a more important one to report than a red one, but it does not appear that any side light except the red one was reported by the look-out.

From the defendant's Preliminary Act and from the defendant's conduct of the trial, there is an indication that the *Cavelier's* officials may have thought that the rules as to meeting ships were applicable to these steamships. This however is clearly not so, as there is no evidence that both side lights of either ship were seen ahead of the other.

In the result I find:

1. That the *Kenny* was at fault in not keeping a good look-out, and in not stopping or reversing when she heard

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or should have heard the *Cavelier's* course signal, and that she should not have attempted to cross from the port to the starboard bow of the *Cavelier* under the circumstances at least without giving a signal. (4 P.D. 226.)

2. That the *Cavelier* was at fault in not earlier seeing the *Kenny's* starboard light.

By consent of the parties, Captain W. F. Mitchell, local Examiner of Masters and Mates, has given me the great benefit of his services as assessor herein.

In the result I adjudge that the plaintiff should bear two-thirds of the damage caused by the collision and the defendant one-third.

The appeal was heard before the Honourable Mr. Justice Audette at Ottawa.

Lucien Beaugard, K.C., J. E. Rutledge for the appellant.

The Hon. W. L. Hall, K.C., for respondent.

The facts are stated in the reasons for judgment of the Honourable Mr. Justice Audette, printed below, and of the Honourable Mr. Justice Mellish.

AUDETTE J., now (October 17, 1931), delivered the following judgment:

This is an appeal from the judgment of the Local Judge of the Nova Scotia Admiralty District, pronounced on the 21st May, 1931, decreeing that the respondent should bear two-thirds of the damage caused by the collision in question in this case and that the appellant should bear one-third of such damage. And furthermore that the respondent recover from the appellant one-third of the damage suffered by the respondent. No costs to either party.

The present appeal, however, is limited to such part of the said judgment "whereby the ship *Cavelier* was adjudged at fault at not earlier seeing the starboard light of the ship or motor boat *Mary E. Kenny* and as a result thereof was ordered to bear one-third of the damage caused by the collision between the ship *Cavelier* and the ship *Mary E. Kenny*. The appellant hereby asking that the *Mary E. Kenny* be held wholly to blame for the said collision, the whole with costs.

The facts of the case being stated at length in Reasons for Judgment of the Local Judge, it becomes unnecessary to repeat them here.

The SS. *Cavelier* is a steamer of 3,396 tons gross and 2,213 net tonnage, speed 12 knots. The *Mary E. Kenny* is a motor vessel of 49 gross tons, speed $7\frac{1}{2}$ knots.

The *Cavelier* being a large vessel having two mast head lights, at regulation height, would be visible to the *Kenny* before the lights of the latter vessel were visible to the *Cavelier* and any change in the course of the *Cavelier*, with her two mast lights, could be readily detected by the *Kenny*, irrespective of the side lights; while in the case of the *Kenny*, with a single mast head light and showing either a port or a starboard light, the change in her course could only be ascertained with certainty by the approaching vessel by carefully watching the compass bearing of the light on the *Kenny*.

To qualify this statement, it is generally admitted that the master of the *Kenny* first observed the two mast head lights and the green light of the *Cavelier* on her port bow, while the *Kenny* was still approximately half a mile of the Inner Automatic Buoy—at a distance from one another of about $2\frac{1}{2}$ miles. Presumably at that time the *Cavelier* was still on her north 50° west course picking up the pilot and before that vessel was headed for the Inner Automatic Buoy on her N.N.W. course.

According to the evidence submitted on behalf of the *Cavelier*, the *Kenny's* lights were first observed when the *Cavelier* was at point B on exhibit E-H, which is approximately one and three-quarter miles S.S.E. of the Inner Automatic Buoy, when the single mast head light and red light of the *Kenny* were reported by the lookout half a point on the bow of the *Cavelier*.

These statements would appear to be correct in each case after checking from the chart the respective angles of approach, assuming that each vessel was on the course as stated when the respective lights were first observed.

Therefore, when the *Cavelier* was first on her N.N.W. course heading for the Inner Automatic Buoy, the *Kenny* was still to the northward and westward of that buoy, and such being the case, each vessel must have been showing her red light—with possibly the *Cavelier* showing both

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side lights, until such time as the *Kenny* altered her course, almost immediately after passing the buoy, suddenly showing her green light on the port bow of the *Cavelier* when she would be approximately half to three-quarters of a mile S.S.E. of the Inner Automatic Buoy.

By so changing her course, in face of an approaching vessel showing either her red, or her red and green and the two white head mast lights, the *Kenny*, without justification and in obvious transgression of the well known rules of the road, interfered with the safety of the *Cavelier* and thereby jeopardized her position in attempting to cross her bow from port to starboard at an unsafe distance and without signalling her intention of so doing.

It was only after the *Kenny* thus altered her course for the Outer Automatic Buoy that her green light became visible to the *Cavelier*, when the master, realizing the risk of collision resulting from such lubberly manoeuvre, immediately did all in his power to avoid the collision, gave one short blast, which remained unanswered, ordered the helm hard a port, stopped his engines, followed by a full astern order and a three blast signal. I find without hesitation that the *Cavelier* was properly equipped and all through behaved with good seamanship and did all that was possible and all that is provided by the rules of the road in such an emergency—that is to say in the agony of collision—through the obviously wrong manoeuvring of the *Kenny*. When the *Kenny* heard the one blast of the *Cavelier*, intimating she was directing and keeping her course to starboard, she still had time to stop and reverse to avoid the collision. She still had time to resume her former course and pass red to red. However, she stubbornly persisted and proceeded full speed on her altered course and was still going full speed ahead at the time of collision while the *Cavelier* at that time, if not stopped, might be going ahead on her *momentum* at the speed of one or one mile and a half an hour.

Previous to the time the *Kenny* altered her course, both vessels were travelling in opposite directions, each showing her red lights. While in that position, the master of the *Kenny*, without signalling, changed his course to port, against the strict inhibition of such course provided by the rules of the road and aggravated his manoeuvre by

admitting in his evidence that he did not look at the *Cavelier* immediately before altering his course.

I have come to the conclusion that the master of the *Kenny* has violated Articles 19, 22, 23, 27 and 29 of the International Rules of the Road. There was no justification for altering his course under the circumstances, and much more so without any signal to the other vessel of such intention, and that he is guilty of mismanagement and bad seamanship. This manoeuvre was erratic and devoid of any seamanship. He created the danger of collision, placed the *Cavelier* in the agony of collision while the latter has shown all through good seamanship and has done all in her power to avoid this collision.

The *Kenny* is solely to blame for the collision; she should not have attempted to cross the bow of the *Cavelier* under the circumstances. The appeal is allowed with costs both before this court and before the trial judge.

I have had the advantage in this case of being assisted by Captain L. G. Dixon, Marine Superintendent of the Department of Marine of Canada, a Captain in the Merchant Service and a retired Lieutenant R.N.R., who has been of great service to me and I am pleased to say that he entirely shares the view I have arrived at upon the facts.

Judgment accordingly.

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