

Vancouver
1964

BRITISH COLUMBIA ADMIRALTY DISTRICT

Sept. 14-16,
21, 22

BETWEEN:

Oct. 28

GEORGE PERDIA PLAINTIFF;

AND

KINGCOME NAVIGATION CO. LTD. DEFENDANT.

*Shipping—Collision of ships in Vancouver Harbour in dense fog—
Apportionment of fault.*

Plaintiff seiner *Western Spray* of 55 tons collided with defendant tug *Ivanhoe* of 168 tons near the First Narrows Bridge in Vancouver Harbour. *Western Spray* was inbound at 3 knots and *Ivanhoe* outbound at 4 to 4½ knots. Both ships sounded fog horns. *Ivanhoe* (but not *Western Spray*) was radar-equipped. Neither was aware of the other until they were about 50 feet apart when both put their engines full astern. *Ivanhoe's* master and helmsman were in her wheelhouse but there was no lookout forward of her wheelhouse, her mate and 4 other crew members being otherwise engaged. *Western Spray's* master was in her wheelhouse and had one lookout forward and other crew members nearby. *Western Spray* was close to mid-channel at the time.

Held, Ivanhoe was 85% at fault and *Western Spray* 15% at fault for the collision. The position of difficulty was created by *Ivanhoe* due to bad seamanship of her master (1) in proceeding at an immoderate speed under the circumstances; (2) in failing to observe the radar or alternatively to have it in good condition; (3) in failing to maintain a proper lookout forward of the wheelhouse; and (4) in not having the mate available to relieve him from some of his manifold duties in the wheelhouse and to make proper use of the balance of the crew. The master of *Western Spray* was at fault only in proceeding too close to mid-channel. In the conditions of fog he should have proceeded well to the south of mid-channel.

John I. Bird, Q.C. for plaintiff.

R. Hayman for defendant.

NORRIS D.J.A.:—This action concerns a collision between the seiner *Western Spray* owned by the plaintiff and of which he was the master at the time of the collision, and a tug *Ivanhoe* owned by the defendant company of which the master was one Arthur Forrest. The engine of the *Western Spray* was a 150 H.P. diesel. That of the *Ivanhoe* was a heavy duty Union six cylinder 600 H.P. engine which had a fly-wheel weighing 4 to 4½ tons being about 4½ feet in diameter. The engine turned at full speed 240 revolutions per minute. The *Western Spray* is registered at 55 tons gross tonnage, being 66 feet in overall length, and carried a

crew of six including the master. The *Ivanhoe* was 168 tons gross tonnage, was between 110 to 115 feet overall, and carried a crew of seven including the master.

The collision took place at 10:00 A.M. on September 20, 1962, in Vancouver Harbour just outside the First Narrows Bridge. At the time of the collision a dense fog prevailed in Vancouver Harbour and in particular in and around the point of collision. The *Western Spray* was inward bound from a fishing ground. The *Ivanhoe* was outward bound without a tow. The *Western Spray* had no tow but it was carrying the fishing equipment usual for such a seiner. The *Western Spray* was fitted with the following navigational aids: magnetic compass, echo sounder, radio-telephone and fog whistle. It did not carry radar equipment. The *Ivanhoe* had the same navigational aids, save for the echo sounder, and in addition was fitted with a radar set.

As the vessels approached the First Narrows Bridge there was no wind. The condition of the sea was flat calm. The visibility was about 50 feet. The tide was flowing west to east against the *Ivanhoe*, the tide being between two and three knots, having reached the last half of the flood. The masters who were navigating their respective vessels claimed to having been sounding proper and regular fog signals but neither heard the other. The master of the *Ivanhoe* gave evidence that he did not see the *Western Spray* in his radar at any time. The vessels were some 50 feet apart when each was observed by the other.

I find that while the master of the *Ivanhoe* rang his telegraph full speed astern on sighting the *Western Spray*, the *Western Spray* being much more manoeuvrable and the engines being controlled by a throttle in the wheelhouse, it took much longer for the master of the *Ivanhoe* to take off the way on his vessel than it took the master of the *Western Spray*, who, on sighting the *Ivanhoe*, put his engines "full astern".

Peter Wilson who was service supervisor of the Canadian Marconi Company gave evidence for the defendant company. I accept his evidence as that of a fully qualified and experienced expert on radar equipment. He testified that the radar set on the *Ivanhoe* was a set supplied by his company and installed on October 29, 1956 and inspected from time to time in 1962 (as well as earlier

1964

PERDIA

v.

KINGCOME
NAVIGATION
CO. LTD.

NORRIS D.J.A.

1964
 PERDIA
 v.
 KINGCOME
 NAVIGATION
 CO. LTD.
 Norris D.J.A

and later) in accordance with a contract with the company which covered rental of the equipment and servicing, and the supply of parts. He testified that on July 19, 1962, tubes in the set and a rectifier were replaced and a broken lead repaired; that on October 31, 1962 the set was inspected and it was found that the power supply was low and that the echoes were weak. He could not say as to how long this condition existed. At that time two rectifiers and a crystal were replaced. His evidence was to the effect that a weak echo would affect the ability of the operator to get results from the unit, that if the master did not see the *Western Spray* when the *Ivanhoe* was on the east side of the bridge, the cause must have been either that the set was not being properly observed or that the set was not properly tuned or it was not in good working condition. He testified that the First Narrows Bridge would not offer any real interference and that to get useful results from the radar, the operator must observe it continuously.

Captain Forrest of the *Ivanhoe* gave evidence that he used his radar continuously from the time he backed away from the dock until the collision. He further testified as follows:

Mr. HAYMAN:

Q. What did you turn on?

A. I turned the radio on and I called somebody, I forget now, called just for a radio check, and turned the radar on and it worked; it worked perfectly as far as I am concerned.

* * *

Q. Did you see the vessel the "WESTERN SPRAY" on your radar before the collision?

A. No, I did not. I didn't see the "WESTERN SPRAY" until it was right there.

Q. How far away was it when you first saw it?

A. Oh golly, maybe fifty feet, maybe less than that. Fifty feet I will say.

* * *

Mr. BIRD:

Q. Now, were you getting constant checks from the bridge signalman?

A. Yes, from Burnaby Shoals, yes.

Q. Were you pretty well in continuous communication with the bridge signalman from Burnaby Shoal out?

A. Yes, I would say yes, because he kept calling us and telling us our position.

Q. Did you at any time tell the bridge signalman that your radar was not working properly?

A. No, I did not.

Q. I don't want to labour this, I just want you to answer this, if your radar was working properly have you any explanation for your constant checks with the bridge signalman on his radar?

A. I didn't ask for the checks. He just called us and told us where we were. I didn't ask for them. I just told him where we were when we were at Burnaby Shoal and what we were going to do, and he kept giving us a radar check which was something I didn't ask for at all at any time.

1964
 }
 PERDIA
 v.
 KINGCOME
 NAVIGATION
 Co. LTD.
 ———
 NORRIS D.J.A.
 ———

Fletcher, the bridge signalman, did not agree with this last mentioned evidence. He testified as follows:

A. I called out "tug off Brockton Point. First Narrows calling", and immediately the "IVANHOE" answered and identified himself.

Q. Yes?

A. I stated his position.

Q. You stated his position?

A. I stated where on my set he was showing too far over to the south of mid-channel.

Mr. HAYMAN:

Q. Carry on, please.

A. The reply from the "IVANHOE" was a cheery "okay" but his radar—would I keep an eye on him, his radar wasn't working too well.

As to the speed of the *Ivanhoe* and the time to take the way off the vessel, the Chief Engineer, W. J. Rant, testified as follows:

Q. What speeds do you recall being rung down to you at between the ferry dock and the time of the collision?

A. After I backed out we got "half ahead" and stayed "half ahead".

Q. To the point of collision?

A. Yes.

* * *

Q. But as to the bite of the propeller in the water at the moment of impact, what would you say?

A. Oh, I don't think it had a chance to take any way off the vessel. It couldn't have been more than a second or two from the time I hit the air until the engine caught and started to rev up and when we hit.

* * *

THE COURT:

Q. What speed would the vessel be going at?

A. I would estimate between four and a half and five knots through the water at the 180 revs.

* * *

MR. BIRD:

Q. I think you also said that between the time the "full astern" order came down and the time the impact occurred there was no time for

1964

PERDIA

v.

KINGCOME
NAVIGATION
Co. LTD.

Norris D.J.A.

the astern action to have any effect on the forward action of the ship?

A. No. because with that engine running at half speed it would take between 25 and 30 seconds before that engine could come to a stop before you could start it astern. The revolving parts of that engine alone must weigh 18 tons, the moving parts. To bring that to a stop before it can go astern would take I would say 25 seconds.

Q. Almost half a minute?

A. Yes.

Q. Was that known to the master?

A. Oh, yes, definitely.

The master, Forrest, gave the following evidence on discovery which was put in as part of the plaintiff's case.

204 Q. Did you alter speed at all from the time you left the jetty? I think you said you were on slow speed.

A. Slow speed all the way up.

205 Q. All the way out?

A. All the way up.

206 Q. Until what point?

A. Till we hit.

207 Q. Till you hit the "WESTERN SPRAY"?

A. Yes.

208 Q. So there was no order on the telegraph, or change of engine speed until after the collision?

A. After the collision, then it was rung down "full astern".

Q. Yes I see.

* * *

229 Q. Did your vessel respond to the helm change prior to the collision?

A. Just, just, because she's a big, heavy ship.

230 Q. She responds slowly, does she?

A. Slowly.

On the matter of speed, I accept the evidence of the engineer where it conflicts with that of the master, whose evidence was at best uncertain on other matters such, for example, as his compass course out of Vancouver Harbour, about which he should have no difficulty. I find that immediately before the collision the *Western Spray* was travelling at a speed of not more than 3 knots and that the *Ivanhoe* was travelling at a speed of 4 to 4½ knots at that time.

Immediately before the collision there were present in the wheelhouse of the *Ivanhoe* the master, Forrest, and a deckhand Suveges, who was the helmsman. The mate Bettis was lying on his bunk below and other members of the

Ivanhoe crew were stowing gear or otherwise engaged and none of them were on lookout. There was no lookout forward of the wheelhouse. On the *Western Spray* there was present in the wheelhouse the master, Perdia. Forward on the vessel some 15 feet from the stem there was a lookout, one Pavlich, a seaman, and close to the wheelhouse and aft of where Pavlich was standing there was a seaman, Martin, standing relaying messages to the master. In addition, on the *Western Spray* one Shewchuk, a seaman, was on the dodger above the wheelhouse. With him there was another man, since deceased.

1964
 }
 PERDIA
 v.
 KINGCOMB
 NAVIGATION
 Co. LTD.
 —
 NOTTIS D.J.A.
 —

In the collision the stem of the *Ivanhoe* struck the *Western Spray* some 18 feet aft of its stem. The course of the *Western Spray* was given by the master, whose evidence I accept, as 70° magnetic. As I understand that, his evidence in this regard was of his general course with such incidental deviations as conditions and good seamanship warranted. Both masters knew the Vancouver Harbour, and particularly the vicinity of the First Narrows, well. Both had gone in and out of the harbour in fog on previous occasions. The master of the *Western Spray* was navigating from fog signals and using his echo sounder for the safety of his own vessel and as a matter of good seamanship. The master of the *Ivanhoe* gave evidence that he was navigating by the use of the radar and without request by him, received certain directions from the bridge tender, Fletcher, stationed on the First Narrows Bridge.

At the time of the collision, Pavlich, the seaman who was on deck of the *Western Spray* passing messages, clambered aboard the *Ivanhoe* and made fast a line to that vessel. The *Western Spray* was towed to the north shore where she sank, subsequently being raised. The *Western Spray* suffered heavy damage, not only to the vessel itself, but also to the fishing equipment.

There is a conflict of evidence between the master of the *Western Spray* and the master of the *Ivanhoe* as to the point of collision, the master of the *Western Spray* placing it about mid-channel immediately to the west of the First Narrows Bridge, and the master of the *Ivanhoe* placing it at the northern extremity of the channel, immediately off the First Narrows beacon. On the evidence of Perdia, the master of the *Western Spray* as accepted, he was not at

1964
 PERDIA
 v.
 KINGCOME
 NAVIGATION
 Co. LTD.
 Norris D.J.A.

fault in relation to the collision, save perhaps to some minor extent in connection with a failure to call the bridge tender on the correct radio channel. On the whole of the acceptable evidence, while the point of collision cannot be fixed exactly, Perdia had navigated his vessel so as to get his vessel into the First Narrows channel. I find that as a matter of wise precaution he should have kept more to the south of the channel in view of fog conditions, but I do not find on the evidence that he was in the north half of the channel.

The master of the *Ivanhoe* gave evidence as to the relative position of the two vessels at the time of the collision, as follows:

MR. BIRD:

Q. You recall being examined for discovery:

"Q. I see. When did you first see the 'WESTERN SPRAY'?

A. About 45 or 50 feet ahead of us.

Q. Yes, and how was she lying relative to your position? Oh well, were you end on?

A. Just about end on.

Q. Yes, just about end on?

A. About end on, yes."

You recall being asked those questions and giving those answers?

A. Yes.

Q. Are they true?

A. Yes.

Q. Continuing at Question 222:

"Q. Yes, and what did you observe from then until the collision with respect to the 'WESTERN SPRAY'? What did you see after that?

A. You will have to—how do you mean that one?

Q. Well, did the position of the two vessels with respect to each other alter in any respect?

A. Do you mean what could have been done or—

Q. No, did the 'WESTERN SPRAY' appear to continue to come on end on?

A. Oh yes, yes.

Q. Did you make any alteration of helm?

A. I altered hard to starboard."

Do you recall being asked those questions and giving those answers?

A. Yes.

Q. Are they true?

A. Yes.

The evidence of Perdia, the master of the *Western Spray* with reference to the relative positions of the vessels is to the effect that the two vessels were end on.

1964
PERDIA
v.
KINGCOME
NAVIGATION
Co. LTD.
NORTIS D.J.A.

Captain Forrest was unable to give his compass course, a matter on which a master of his experience and knowledge of Vancouver Harbour should have been able to testify to without hesitation. He gave evidence that after leaving the Kingcome dock and getting out into the fairway he followed a steady course north of mid-channel and passed under the bridge at a point practically to the extreme north edge of the channel. He remembered previously passing a Vancouver Tug and Barge vessel which he thought was the *Joan Lindsay*. As to passing this vessel his evidence is as follows:

THE COURT:

Q. When you were off Brockton Point?

A. Yes, the bridge tender told us there was a tug inbound with a scow, which was Vancouver Tug.

* * *

MR. HAYMAN:

Q. . . . all I want you to do with the balance of your evidence is tell the Court anything you remember about the Vancouver Tug and Barge. Do you remember passing the Vancouver Tug and Barge?

A. Oh yes, remember passing it. In fact, I could even see it, it was so close to us. I remember hollering at him, but naturally he couldn't hear us because according to our radar he was too close to the North side of the channel.

Q. How were you relative to the north side of the channel at that point?

A. Oh, I figured about half way between middle of the channel and the north side of the channel, which we were—

THE COURT: What did he say, Mr. Hayman?

MR. HAYMAN: At the time of passing Captain Forrest thinks he was between the middle of the channel and the north side of the channel, and then he made some remark about I would say where he was or something to that effect.

Fletcher gave the following evidence as to this passing:

A. Yes, my lord. Also inbound was the tug "JOAN LINDSAY" with a covered barge or vanbar, Vancouver Barge. He was slightly north of mid-channel. I warned the "JOAN LINDSAY" or rather told him that he was north of mid-channel and his reply was that he had just noticed that and would correct it.

Q. Did you see his movements?

A. Yes, sir. The tug "IVANHOE" came in a bit and I noticed that when approaching Calamity Beacon, which is about half a mile

1964

PERDIA

v.

KINGCOME
NAVIGATION
Co. LTD.

Norris D.J.A.

from—I apologize, you already know where the beacon is. The “JOAN LINDSAY” inbound and the “IVANHOE” outbound I considered were on reciprocal courses.

Q. You saw the “IVANHOE” come in?

A. The “IVANHOE” was coming out, my lord.

Q. But turned in you said to the channel?

A. Yes, but the “JOAN LINDSAY” with his barge and the “IVANHOE” were on reciprocal courses. I warned both vessels and suggested they both go to starboard.

Q. Then what did you see?

A. Then they both turned to starboard and were clear of each other. The “IVANHOE” I contacted. I was thanked by both vessels. I told the “IVANHOE” that he was abeam of Calamity and gave the traffic west of the bridge.

This witness gave evidence that he saw both vessels on his radar screen approaching each other to the point of collision. He fixed the point of collision slightly to the west and little north of that fixed by the plaintiff. The courses of the respective vessels as plotted by him in Court on the chart (Ex. 1A) show that the two vessels were following parallel courses east and west until the *Western Spray* reached a point almost to the south of the point of collision as fixed by him, when, according to the evidence of this witness:

... This fish boat, it seemed to be as if it just swung around almost 90 degrees, just went across like that on the radar. Now, that wasn't a distinct echo when he was going over. It was just as if—something from a distinct echo to a blur is the only way I can explain it. He was very clear there and when he suddenly went swishing over to port I would say 70 degrees. I know it is a lot, but I would say it was as bad as that.

THE COURT:

Q. You say it wasn't clear on the radar?

A. No, sir, I said he was clear until he turned to port suddenly.

Q. But you said something about your radar.

A. I said the echo on the radar was distinct up to that point.

Q. And then—

A. The turn was so sudden that it just shows a streak going across to port.

He went on to give evidence as follows:

Q. Just so we have that clear, your range rings enable you to tell with reasonable accuracy how far a vessel is away from your position on the bridge?

A. Yes, sir.

Q. But it is quite another matter to attempt to determine how far two vessels that you see on the radar are apart?

A. It is in this case, except as I stated before there is one, and that is the heading markers—anything close to them is a pretty good guide...

* * *

1964
PERDIA

v.
KINGCOME
NAVIGATION
Co. LTD.

MR. BIRD:

Q. When you observed the "IVANHOE" going out and the "WESTERN SPRAY" coming in you weren't thinking there was going to be a collision at that time, were you, until just before it happened?

Norris D.J.A.

A. I was concerned with the fish boat leaving the other two and coming across, but at that time if he had kept his course he would have still—I must not say that, but on the radar I say that he didn't keep his course, he swung "round to port", but if he had maintained his course nothing would have happened at all because the "IVANHOE" as far as I could see was heading out perfectly normally.

Q. But this is how it appeared to you on the radar, isn't it?

A. Yes, on the radar.

* * *

Q. Let us go this far, you thought from what you observed on the radar that the ships were approaching one another on reciprocal courses, did you?

A. No, sir, the ships were clearing until this fish boat swung to port.

Q. You thought she swung to port?

A. Yes, sir, I would say I am pretty convinced that she swung to port because if she had maintained the course—

Q. You have answered my question, but go ahead if you have something to add?

A. If the boat concerned we will say maintained his course he would still show on my radar, but when that blur went across it wasn't.

* * *

THE COURT:

Q. Just a moment, I want to get one thing clear. You said 100 feet before the point of impact that you saw this turn made. Now, when you said 100 feet, you mean 100 feet from—

A. From the vessel to the point of turn, sir.

Q. East and west?

A. Yes, sir.

Q. That is to say, a projection of 100 feet, not the course of the turn?

A. No, sir, the projection of 100 feet.

I regret that I am unable to accept the evidence of Fletcher, the bridge tender, as being helpful in deciding where the fault lay in the matter of this collision. It is to be remembered that he was testifying as to events which happened in September, 1962, some two years before the trial. Because of the fog he, of course, did not have a direct view of the vessels. Quite understandably he did not plot their courses as they appeared on the radar screen. He did not make log entries of the crucial happenings. His evidence

1964
 }
 PERDIA
 v.
 KINGCOME
 NAVIGATION
 Co. LTD.
 Norris D.J.A.

was based on his recollection of what he saw on the radar screen that long ago—of the relative courses of the vessels, of positions and of the distances between vessels in close quarters as they appeared on the screen. He was quite voluble in examination-in-chief and irritable under cross-examination. He gave evidence in a positive manner of what he stated the radar screen showed two years ago as to courses, short distances between vessels and position without the benefit of any record with which he might refresh his memory. Of much of the matter on which he testified he could not possibly have real recollection. I am satisfied from his evidence and from the manner in which he gave it that while doubtless he thought that he was being honest, he was merely giving a reconstruction—his theory of what he imagined had occurred. As an example, he said that there was a blur on the radar which indicated that the *Western Spray* changed course from a perfectly safe and proper course in the south of the channel to a course from south to north which was the cause of the collision. I do not believe that the witness really remembered this blur at the date of the trial, and I am of the opinion, having heard the evidence, that if there were some such blur it was merely the result of the actual collision.

Further, Fletcher gave evidence that when the inbound vessel was at a point, which according to the chart (Ex. 1A) would be over 2,500 feet west of the bridge, he called to him through the loud hailer. His evidence as to this was as follows:

- A. The fishboat carried on and was pretty close to the 287 marker or rather the heading marker, and I got on the loud hailer—there is one on the west and one on the east and they boom out over the bridge, and I called out “inbound fishboat, inbound fishboat mid-channel, I have a tug outbound light under the bridge”. I kept yelling that, and of course the “IVANHOE” had got further out now, and then he altered course—as he appeared on the radar he altered course I should say approximately two or three degrees which brought him absolutely parallel with the heading marker. This is the “IVANHOE”, my lord.

The witness was observing the vessel only through the radar and as Fletcher had no previous communication with any vessel which he could identify as this “fish-boat” and as many vessels other than fishboats of about the same size pass in and out of the Narrows it would seem that his version of this hailing is purely reconstruction. It will be

noted that his evidence was that when the *Ivanhoe* was off Brockton Point it was south of mid-channel and it corrected its course. This is not in accordance with Forrest's evidence that his course was steady one north of mid-channel. It is to be noted also that Forrest denies that he told Fletcher that his radar was not working well. While Fletcher was observing the course of the *Ivanhoe*, according to his evidence, he was in radio communication with it as well as with a number of other vessels, the *Solander* and the *Joan Lindsay*, an unidentified vessel, and three fishboats, of which, according to his evidence, the *Western Spray* was one. He gave evidence also of the courses of all these vessels as he observed them on his radar screen, save, as regards the *Ivanhoe*, in respect of the short period when it was under or almost under the bridge. I am of the opinion that the witness did not remember all these details with the certainty which he indicated, and that his evidence in this regard, particularly as to the courses of the *Ivanhoe* and the *Western Spray* just before or at the time of collision is the result of reconstruction since the collision, and therefore it is unsafe to accept such evidence.

The master of the *Ivanhoe* testified that he and the helmsman were the only two of the crew of seven who were in the wheelhouse. The fog condition necessitated close attention by the helmsman to his duties, such as watching his compass, and he could not maintain a lookout. Although the mate was in his bunk and other crew members were available, no additional member was detailed as lookout or to assist the master, who was required to navigate the vessel, check the courses steered, engage in conversations on the radio telephone with the First Narrows Bridge and other vessels, keep a lookout, read the radar—looking down into it—and sound the fog signals. While he was thus engaged there was distraction from the hum of the engine, which the master admitted made "quite a noise" and from the voices on the radio, and from static. As he did not see the *Western Spray* on the radar when it was unquestionably there to be seen if the radar was in proper working order, it is clear, either that proper attention was not being paid to it, or it was not operating properly, thus becoming instead of a navigational aid, a menace to navigation, reliance being placed on it.

1964
 PERDIA
 v.
 KINGSCOME
 NAVIGATION
 Co. LTD.
 ———
 Norris D.J.A.

1964
 PERDIA
 v.
 KINGCOME
 NAVIGATION
 Co. LTD.
 NORRIS D.J.A.

I find that the collision took place close to the position marked on the chart (Ex. B1) by the master of the *Western Spray*, which position was on the extension of the course which Fletcher said the *Western Spray* was following before, as he alleged, that vessel turned to port. Such position is not a great distance to the east of the point of collision marked by Fletcher.

I find that both vessels were approaching each other end on and that neither changed course before the respective masters observed the other vessel. It is my opinion that the fact that the *Western Spray* was struck on the starboard bow was probably due to the fact that when the engines were reversed immediately before the collision, and possibly because of the action of the tide as well, this action had the effect of swinging her bow to port.

In determining responsibility for the collision, I adopt, with respect, the principle enunciated by Ritchie J. *per curiam* in *Imperial Oil Limited and M/S Willowbranch*¹:

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 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."

. . . I am satisfied that "the position of difficulty" would not have arisen at all if the radar sets with which both ships were equipped had been tended with the degree of care to which Rand J. referred in *The Dagmar v. The Chinook* ([1951] S.C.R. 608 at 612, 4 D.L.R. 1) at page 612 where he said:

"If radar is to furnish a new sight through fog the report which it brings must be interpreted by active and constant intelligence on the part of the operator."

In my opinion the position of difficulty was created by the *Ivanhoe* and was due to bad seamanship, using that term in a comprehensive sense, on the part of the master of that vessel. One fault of the *Ivanhoe* on the matter of seamanship was that it was not proceeding at a speed that was moderate under the circumstances of fog, the narrow passage and other traffic, which was or might be expected in the passage. Again I refer to the judgment of Ritchie J. in

¹ [1964] S.C.R. 402 at 410.

Imperial Oil Limited and M/S Willowbranch, supra at p. 407:

1964
PERDIA
v.

KINGCOME
NAVIGATION
Co. LTD.

Norris D.J.A.

I agree with the following excerpt from Marsden's Work, *The Law of Collisions at Sea*, 11th ed., page 770:

"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..."

It appears to me that the requirement of Rule 16(a) is not designed merely for the purpose of lessening the violence of collisions between ships, but rather that its primary purpose is to prevent collisions altogether by providing that each ship shall go at such a speed as to afford the maximum time for the taking of avoiding action when another suddenly comes into view at a short distance. I can see no answer in the present case to the contention that if the *Imperial Halifax* had started reducing speed four minutes sooner than she did (i.e., when she first sighted the fog), her ability to stop before the collision occurred would have been proportionately increased.

at p. 409:

In this regard, counsel for the *Willowbranch* sought to invoke the provisions of Rule 18 of the Regulations, the opening sentence of which reads as follows:

"Rule 18: When two power-driven vessels are meeting end on, or nearly end on, so as to involve risk of collision, each shall alter her course to starboard, so that each may pass on the port side of the other."

It is, I think, important to remember that Rules 17 to 27 inclusive are contained in Part C of the Regulations which is entitled "Steering and Sailing Rules", and which contains the following preliminary paragraph:

"In obeying and construing these Rules, any action taken should be positive, in ample time, and with due regard to the observance of good seamanship."

Also the passage from the *Willowbranch* case at p. 410 first quoted.

See also *The Ship Clackamas v. The Owners of the Schooner Cape D'Or*¹ Newcombe J. at pp. 335-6:

He says, very justly, that the requisite speed, which, according to the regulations, must be "moderate", should be determined relatively, having regard to the attendant conditions, and he finds that the steamship was going too fast if, by reason of her speed in the fog, she "was unable to avoid a collision with the vessel from which she was bound to keep clear, and the risk of whose proximity she would reasonably be assumed to anticipate under existing conditions". No doubt each case must depend

¹ [1926] S.C.R. 331.

1964
 }
 PERDIA
 v.
 KINGCOME
 NAVIGATION
 Co. Ltd.
 —
 Norris D.J.A.
 —

upon its own facts, but in this general conclusion the learned judge follows a rule which has frequently been enunciated and is well established by authority, *The Resolution* (1889) Asp. M.L.C. 363, *The Campania* [1901] P. 289) a decision of Gorrel Barnes J., which was reviewed and upheld by the Court of Appeal, in which the facts of the case and the authorities are carefully reviewed; reference is made to the fact that in some cases four miles an hour, and in one case three and a half miles an hour, were held to be an improper rate of speed, and it is there laid down as a general rule that

“speed such that another vessel cannot be avoided after being seen is excessive.”

See also *Canada Steamship Lines Limited v. The Ship Maria Paolina G and her Owners*,¹ Fournier J. at p. 220:

Excessive speed in fog being a statutory fault, a vessel violating this rule has to prove that her speed was not the or one of the causes of the collision.

In *Griffin on Collision*, pp. 312 et seq., it is stated:

“Since the obligation to go at moderate speed in fog is statutory, a vessel violating the rule has the burden of showing that her speed could not have contributed to the collision,—a burden which can rarely be sustained.”

The burden of showing that the speed of the *Ivanhoe* could not have contributed to the collision, as referred to by Fournier J. has not in this case been sustained by the defendant.

The fault in the matter of the failure to attend to the radar, or alternatively, to have it in good condition has already been referred to. The master of the *Ivanhoe* failed to see the *Western Spray* at all. The importance of close attention to radar when vessels are equipped with it is also referred to by Ritchie J. in the passage already quoted from the *Willowbranch* case at p. 410, and at p. 411 he says:

The echo of the *Imperial Halifax* was detected on the radar two and a half miles away and yet, despite this warning, the course of the approaching ship was never plotted. On the contrary, the *Willowbranch* appears to have adopted a series of courses which resulted in the ship edging her way directly into the path of the *Imperial Halifax*. If the radar information had been “interpreted by active and constant intelligence on the part of the operator”, I find it difficult to believe that this action would have been taken.

Similarly I find it difficult to believe that there would have been any collision if the radar on the *Ivanhoe* was being observed and was in working order.

See also *Canada Steamship Lines Limited v. The Ship Maria Paolina G and her Owners*, *supra*, at p. 219.

¹ [1954] Ex. C.R. 211.

The failure to maintain a proper lookout forward of the wheelhouse is evidence of general bad seamanship on the part of the *Ivanhoe*. I adopt the language of the learned author of the 10th edition of Marsden's *Collisions at Sea* at pp. 567-8:

The look-out must be vigilant and sufficient according to the exigencies of the case, and it has been said that a look-out who hears a signal without reporting it might just as well not be there; in crowded waters the look-out cannot report every light he sees, but must report every material light as soon as it becomes material. The denser the fog and the worse the weather the greater the cause for vigilance. A ship cannot be heard to say that a look-out was of no use because the weather was so thick that another ship could not be seen until actually in collision. In *The Mellona* ((1847) 3 W. Rob. 7, 13), Dr. Lushington said: "It is no excuse to urge that from the intensity of the darkness no vigilance, however great, could have enabled the *Mellona* to have descried the *George* in time to avoid the collision. In proportion to the greatness of the necessity, the greater ought to have been the care and vigilance employed."

In ordinary cases one or more hands should be specially stationed on the look-out by day as well as at night. They should not be engaged upon any other duty; and they should usually be stationed in the bows, or in that part of the ship from which other vessels can best be seen and their signals heard.

Counsel for the plaintiff argued forcibly that the master of the *Ivanhoe* in addition to the matters already referred to, was guilty of bad seamanship in failing to organize his vessel and his crew and their duties so that navigation of the vessel might be attended to by him efficiently and without distraction. I have already referred to these matters and I must find that counsel's submission should be given effect to. Under the difficult conditions and circumstances of the morning in question, proper use was not made of the crew and in particular of the mate who was qualified to and should have relieved the master of some of his manifold duties in the wheelhouse. The necessity for this precaution should have been apparent to the master of the *Ivanhoe* from the outset.

Perdia, the master of the *Western Spray* failed to use his radio properly in endeavouring to call the First Narrows Bridge but in view of my findings as to the evidence of the master of the *Ivanhoe* and of the bridge tender, I cannot find that this contributed to the collision in any way. I do find, however, that while the acceptable evidence does not enable me to fix the point of collision exactly, the master of the *Western Spray* was at fault in proceeding in the fog too

1964
 PERDIA
 v.
 KINGCOME
 NAVIGATION
 CO. LTD.
 ———
 Norris D.J.A.

1964
 }
 PERDIA
 v.
 KINGCOME
 NAVIGATION
 CO. LTD.
 ———
 Norris D.J.A.
 ———

close to the center of the channel. In other respects he was not at fault. He reduced speed when he got into the fog and was proceeding at a moderate speed at the time of the collision; he was operating the lighter and more manoeuvrable vessel and reversed his engines when the collision became imminent. He was maintaining a proper look-out throughout. He was navigating the *Western Spray* from his knowledge of the channel and the fog signals. Counsel for the defendant submitted that he was "lost in the fog" but there is no evidence to support that conclusion even accepting the evidence of the bridge tender as to his course approaching the bridge, which does not differ in any substantial degree from that of Perdia, subject to what I have said as to the bridge tender's evidence as to the "blur" on the radar screen. He was in the channel at the time of the collision. It is arguable that the position of difficulty would not have arisen at all but for the over-riding negligence of the *Ivanhoe*, but in view of the fact that the exact point of collision cannot be fixed and that the *Western Spray* was in any event very close to the center of the channel, while the condition of fog required him, as a matter of good seamanship, to have proceeded well to the south of mid-channel, I find that his failure in this respect contributed to the collision but to a degree considerably less than that of the master of the *Ivanhoe*. I fix the liability of the *Ivanhoe* for the collision at 85% and the liability of the *Western Spray* at 15%.

There will be judgment accordingly and I direct a reference to the Registrar to assess the damages.

I think that I should express my appreciation for the assistance of my two Assessors, Captain J. Park and Captain E. B. Caldwell, the benefit of whose skill and long experience has been of the greatest value to me.