

IN ADMIRALTY

BETWEEN :

CYRILLE BELISLE APPELLANT;

Montreal
1967
Apr. 4-5

AND

THE MINISTER OF TRANSPORT RESPONDENT.

Shipping—Suspension of pilot’s certificate—Canada Shipping Act, R.S.C. 1952, c. 29, ss. 558, 568(1)(a)—“Wrongful act or default”, meaning —Findings of fault—Reversal on appeal—Degree of fault required —Raising new contention on appeal—Not permissible.

The M/V *Hermes* piloted by appellant down the St. Lawrence River on April 10th 1965 suddenly sheered to port in a narrow channel and collided with an up-bound ship. The Commissioner appointed to investigate the collision under s. 558 of the *Canada Shipping Act* found that the *Hermes* was navigating too close to the south shore, which caused bank suction and an uncontrollable turn to port, that the lower range light at that location had been displaced 40 feet during several years before the collision and the centre line of the

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channel was consequently falsely shown 250 feet towards the south bank. He found appellant blameworthy for deciding to meet the up-bound vessel in the narrow part of the channel, and that he was at fault (a) in going full speed in the narrow part of the channel, (b) in doing so when the buoy indicating the entrance of the narrow channel was not in place, (c) in following the line indicated by the range lights when he knew that the lower range light was displaced, (d) in proceeding at full speed with his first vessel of the year, and (e) in neglecting to use his radio-telephone. The Commissioner thereupon suspended appellant's certificate under s. 568(1)(a) of the *Canada Shipping Act*. On appeal to this Court the Commissioner's findings of fault by appellant were rejected.

Held, the suspension of appellant's certificate must therefore be quashed.

Moreover even if appellant was guilty of the acts or omissions as found by the Commissioner they were not of a sufficiently culpable nature to justify the suspension of his certificate under s. 568(1), nor were they shown to have caused or contributed to the collision. The wrongful act or default which must be proved if disciplinary action under s. 568(1) is to be taken can be any breach of duty which causes or contributes to the accident but an error of judgment in a moment of difficulty or danger may not be enough. It must be the doing of something which it was plainly the duty of the officer not to do or the omission to do something which it was plainly his duty to do. The *Princess Victoria* (1953) 2 Ll. L.L.R. 619; The *Carlisle* (1905-1908) 10 Asp. M.L.C. 287, referred to.

Held also, it was not open to the Minister of Transport to contend on the appeal that the Commissioner erred in finding that the final 11 feet displacement of the lower range light took place before and not after the collision.

APPEAL from suspension of pilot's certificate.

J. Paul Dufour for appellant.

Bernard Deschenes, Q.C. for respondent.

The judgment of the Court (JACKETT P., DUMOULIN and NOËL JJ.) was delivered by

NOËL J.:—This is an appeal from the decision of the Commissioner, Mr. Justice Charles A. Cannon, appointed by the respondent, the Minister of Transport, to hold a formal investigation pursuant to section 558 of the *Canada Shipping Act*, R.S.C. 1952, chapter 29, into the circumstances attending the collision between the M/V *Transatlantic* and the M/V *Hermes* on Lake St. Peter in the St. Lawrence River on April 10, 1965.

The collision occurred at a place situated between Sorel and Three Rivers, near the northeastern end of Yamachiche bend in an area in the navigational channel extend-

ing from curve No. 2 to the southwest at buoy 85L down channel to the northeast at curve No. 3. At that place, the channel is 550 feet wide and 35 feet deep.

The M/V *Hermes* loaded with 2,500 metric tons of general cargo on board under the command of her master, Captain Van Eyk, was proceeding downstream. Cyrille Belisle, a pilot of some 31 years of experience, was on board conning the vessel.

Upon entering Yamachiche bend and after negotiating the curve to port, the pilot was following a course fixed by lining up Pointe du Lac ranges in the same manner as he had often done in the past. Shortly after a red winter buoy, which was in the approximate position of and was replacing summer buoy 54L, was left abeam to port, the head of the *Hermes* took a sudden sheer to port and although immediate starboarding action was taken by the *Hermes* and the engines were reversed to full astern, it was not possible to prevent the vessel from colliding with the M/V *Transatlantic* which was proceeding upstream towards Montreal.

The Commissioner, who rendered his decision on March 18, 1966, held *inter alia* that the cause of the collision was that "The *Hermes* going into a narrow channel, was navigating too close to the south bank at too great a speed, which caused the phenomenon commonly known as 'bank suction'. This caused an uncontrollable turn to port and, consequently, the collision."

The Commissioner further found that if summer buoys and at least buoys 51L and 63L had been placed at the east and west ends of the Yamachiche anchorage to show navigators where the anchorage finished and where the channel began, the accident would not have happened because it would have indicated to pilot Belisle the exact place where the narrow channel began.

While there may be some doubt as to the correctness of that finding owing to the possibility that the said buoys might have been displaced by floating ice, in the meantime, there is no doubt in my view of the correctness and significance of the Commissioner's further finding that another navigational aid, the lower range light of Pointe du Lac, placed on a cement block, had been displaced for several years. He indeed held that:

It is established by aerial photographs that between 1959 and 1964 the cement base was displaced by 29 feet. It is also established by civil

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engineer Huffy that the time of the inspection of June 8, 1965, the cement base was displaced towards the southeast by 40 feet; this means that there would have been a supplementary displacement of 11 feet between the fall of 1964 and June 1965, confirmed by triangulation of the 22nd of April (which the Commissioner later held had taken place before the 10th of April, 1965, i.e., before the collision).

The Commissioner also found that with a displacement of approximately 29 feet, the ranges in line showed the centre line of the channel near buoy 51L, where the sheering of the M/V *Hermes* took place, off true centre towards the south by 100 feet and that there would be a displacement of 250 feet off true centre with a displacement of the range of 40 feet (29 feet plus 11 feet)*.

The Commissioner then concluded as follows:

But whatever this displacement may be, it is certain that it was sufficient to make a ship pass too close to the south bank of the channel and thus cause a swing to port in the channel, which is what happened to the *Manchester Commerce*, to the *Carinthia* and to the *Hermes* herself.

He then concluded that:

Under the principle that the same causes bring about the same consequences, one can say certainly that the swings of the *Manchester Commerce* and of the *Carinthia* were caused by the same fact as the swing of the *Hermes*: that is to say by the fact that the line of the *Pointe du Lac* ranges was guiding ships too close to the south. There is therefore no doubt that this displacement existed on April 3rd and on April 9th, 1965, in order to cause the swing to port of the *Manchester Commerce* and of the *Carinthia*. Therefore it existed on the 10th of April 1965, and caused the swing of the *Hermes*.

Having thus determined the cause of the collision, the Commissioner also held that pilot Belisle on the M/V *Hermes* was blameworthy in this collision in that he "was imprudent in deciding to meet the *Transatlantic* in the narrow part of the channel when he could have met her in the wide part of the Yamachiche anchorage and that he was in fault:

(a) in going full speed into the narrow part of the channel when he had to meet a ship in it;

(b) in attempting this manoeuvre when buoy 51L that was to serve him as a guide to indicate the entrance of the narrow channel was not in place;

(c) in following the line given by the *Pointe du Lac* ranges in line when he knew since last year that the lower range was not in its place;

*The Court does not understand how 11 additional feet can have moved the central line of the channel 150 feet more to the south when 29 feet had moved it 100 feet. However, such was the finding of the Commissioner and no other explanation was given the Court during this appeal.

(d) in proceeding at full speed when it was the first time in 1965 that he was going down this part of the river as the pilot of a ship;

(e) in neglecting to use his radio-telephone.

He then added:

It is clear that in manoeuvring in this manner and in taking these risks pilot Belisle did not follow Rule 29 of the Regulations for Preventing Collisions at Sea, which reads as follows:

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.

It is clear that pilot Belisle did not take the precautions required by the ordinary practice of seamen or by the special circumstances of the case.

I will deal firstly with the appellant's wrongful acts or omissions as found by the Commissioner and based on his finding of fact that the last displacement of one of the ranges by 11 feet had occurred prior to the accident and will later consider the attack made by counsel for the respondent of the Commissioner's decision on this matter.

With respect to the finding that Belisle was imprudent in deciding to meet the *Transatlantic* as he did there appears from the evidence to have been no good reason why the *Hermes* coming downstream should have stopped or reduced her speed in order to meet the *Transatlantic* in the anchorage section of the Yamachiche bend rather than in the bend in the dredged channel. The weather and visibility were good and had there been any reason to take any measure in order to meet a vessel coming in the opposite direction at a sharp turn or narrow passage, the ship stemming the tide, i.e., the *Transatlantic* and not the *Hermes* (which was going downstream with the current) would have had to stop or come to a position of safety below or above the point of danger in accordance with Regulation 12, P.C. 1954-1925 dated December 3, 1954, (Appendix B), (Exhibit C-5).

Furthermore, it must be borne in mind that, although the Yamachiche bend and anchorage appear clearly on Exhibit C-2, on the day of the collision there was only one spar buoy on the north side that, if visible and reliable, would be of use in indicating to those on board the M/V *Hermes* the limits of the cut of the channel at the eastern part of the anchorage. On the other hand, it must be borne in mind that while the Pointe du Lac beacons were Belisle's only aid to navigation, the Commissioner has held that

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ships were entitled to rely on them "to know where is the centre of the narrow channel". Belisle was therefore entitled to believe that his ship would meet the *Transatlantic* in a normal manner, port to port and without difficulty.

It therefore follows that it is not possible under these circumstances to find in the conduct of the appellant, in choosing to enter the channel and meet the *Transatlantic* therein, anything to justify the suspension of the appellant's certificate as a pilot.

The Commissioner held Belisle blameworthy for going full speed into a narrow part of the channel when he had to meet a ship in it. The evidence discloses that the speed of the *Hermes* was 15 knots which is not full speed but full manoeuvring speed and which, under the favourable weather conditions which prevailed at that time, does not appear to have been excessive. Furthermore, he was guiding the ship by the Pointe du Lac range beacons on which he was entitled to rely and while he was entering a portion of the channel that, at this point, was narrower than it had been in Yamachiche bend which he was leaving, it was still of a breadth of 550 feet, which allowed ample room for navigation having regard to the size of the two ships involved. Now, although there is always a danger of interaction between two ships meeting in a narrow channel and of bank effect, which may cause a ship to sheer if a ship is too close to the bank, the appellant had no way of knowing at the time, and there was no reason why he should have apprehended, that he was being misled by Pointe du Lac range into an area in proximity to the bank (the latter being covered by water) where danger of bank effect existed and, therefore, cannot be held blameworthy because of the speed of the *Hermes* at the time even if such speed would increase the unforeseeable bank effect on his vessel.

Indeed, had the *Hermes* been in the central portion of her own fairway as Belisle was entitled to assume he was with Pointe du Lac ranges in line, there was no imprudence in entering the cut at full manoeuvring speed.

The Commissioner blames the appellant, secondly, for attempting this manoeuvre (i.e. going full speed into the narrow part of the channel) which, for the appellant, consisted only in a slight change of course to port, when summer buoy 51L, a guide to indicate the entrance of the narrow channel, was not in place.

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The evidence discloses that buoys are not considered fully reliable at any time and of course the summer buoys had not been in place here during the period of winter navigation. The only permanent aids to navigation in this area were the Pointe du Lac ranges which the appellant was entitled to rely on in order to navigate through the channel at this point regardless of the presence or absence of any floating aid to navigation. Here again, it is not possible to find, in the conduct of the appellant, anything that would justify the suspension of his certificate.

The appellant was taken to task by the Commissioner, thirdly, for "...following the line given by the Pointe du Lac ranges in line when he knew since last year that the lower range was not in its place;" and, fourthly, for "...proceeding at full speed when it was the first time in 1965 that he was going down this part of the river as the pilot of a ship;".

The evidence discloses that between 1959 and 1964 there was a movement of the cement base of the lower range (as distinct from the steel tower itself on which the range was fitted) towards the southeast of the order of approximately 21 feet with a net effect at the end of the course of a misalignment of 100 feet south of the center line. The structure itself, however, had been strengthened by lengthening two of its legs to take care of the tilt of the base prior to 1963 which would have moved the beacon and light some six feet to the northwest and compensated somewhat for the displacement of the base.

The evidence of the appellant and other pilots discloses that prior to the year 1965, they knew that, with Pointe du Lac range lights or beacons in line, a vessel proceeding downriver would be about halfway between the imaginary center line in the dredged channel and the imaginary line marking the edge of the channel to the south.

For a down bound ship it was a practice of the mariners to correct the situation by keeping the ranges in line and thus placing the ship on the starboard side of the mid-channel and for an upbound ship, it consisted in opening the ranges astern to the north, thus placing the ship on her side of true-mid-channel and thereby allowing a safe port to port meeting.

While the appellant knew of the above displacement, he had no reason to suspect that the conditions had changed

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since 1964. No notification of any such change had been issued by the Department of Transport and there is no evidence of any other ground for apprehension having come to his attention. He could not have known, and did not know, nor had he any reason to believe that between 1964 and the date of the collision, the cement base of the lower range of Pointe du Lac had been displaced towards the southeast by an additional 11 feet which had the effect of showing the center line of the channel near buoy 54L about 250 feet south of the true center.

Under the above circumstances, this Court cannot see how the appellant can be held blameworthy for the displacement of the lower range of Pointe du Lac or in proceeding at full manoeuvring speed in a channel relying on the line given by the Pointe du Lac ranges which he had no reason to believe had moved beyond the position they were in in the fall of 1964 nor can he be blamed for proceeding downstream at manoeuvring speed even if he was going down this part of the river for the first time in 1965.

The appellant was finally blamed for "...neglecting to use his radio-telephone".

The evidence discloses that no signal was given prior to the collision because both ships were too close by then and the collision had then become inevitable. As a matter of fact, the appellant being in no position that would cause him to anticipate any danger, it is difficult to understand why the appellant should have used the radio-telephone, how he could have done so and in what manner it would have prevented the collision. There is no suggestion that it occurred to the pilot on the other ship involved to use that instrument to warn the appellant of the apprehensions that he says that he had as a result of his observations and no finding or evidence upon which a finding could have been made that he could have communicated anything to the appellant that would have avoided the collision.

Prior to the sudden and unforeseeable sheering of the M/V *Hermes* both vessels were on their own side of the channel at a safe distance of each other and there was no obligation for either one to give out signals of any kind or to use the radio-telephone until the sudden and unexpected sheering to port and, of course, by then it was too late to discuss the situation over the radio-telephone. Here again,

the appellant cannot be held guilty of any wrongful act or omission sufficient to justify the suspension of his certificate.

A good part of the argument in the present appeal dealt with the purpose of a formal investigation under section 558 of the *Canada Shipping Act*, R.S.C. 1952, and the disciplinary powers of the Court.

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It may be useful to state hereunder what these powers are:

568. (1) The certificate of a master, mate, or engineer, or the licence of a pilot may be cancelled or suspended

(a) by a court holding a formal investigation into a shipping casualty under this Part, or by a naval court constituted under this Act, if the court finds that the loss or abandonment of, or serious damage to, any ship, or loss of life, has been caused by his wrongful act or default, but the court shall not cancel or suspend a certificate unless one at least of the assessors concurs in the finding of the court;

Under this provision, the Court cannot take disciplinary action against such an officer unless he has committed some "wrongful act" or has been guilty of some "default" and such wrongful act or default has "caused" the "loss or abandonment of, or serious damage to any ship or loss of life".

It is for the Court to determine whether the officer's conduct is sufficiently culpable to amount to a wrongful act or default which has "caused" such a casualty either by such misconduct or such failure in prudence, care, or watchfulness in the ordinary requirements of seamanship in regard to human life or in regard to the protection of property as to warrant disciplinary action.

The wrongful act or default so involved does not necessarily have to be of a criminal or *quasi* criminal nature. It has been said that it can be a breach of legal duty of any degree which causes or contributes to the casualty under investigation (cf. *The Princess Victoria*¹ at p. 627).

An error of judgment in a moment of difficulty and danger, however, does not necessarily render an officer's certificate liable to be dealt with. There is no test that has been formulated that serves in all circumstances for determining when an act or omission is of a character that calls for the imposition of a disciplinary action. Possibly as useful a test as any is that the wrongful act must be the doing of something that "plainly" he ought not to have done and

¹ (1953) 2 L.L. L.L.R. 619

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the default must consist in omitting to do something which it was "plainly" his duty to do. (cf. *The Carlisle*¹ per Bargrave Dean J. at p. 293).

Applying that test, it follows that even if the appellant was guilty of the acts or omissions which the Court of Investigation found him to have been guilty of, which, as has already been indicated, has, in the opinion of this Court, not been demonstrated, they were not of a sufficiently culpable nature to justify the suspension of his certificate, nor was it established, in view of the Commissioner's finding that the range light's last displacement took place prior to the collision, that these acts or omissions were the cause or even a contributing cause of the collision. Counsel for the Minister of Transport took an alternative position in this Court. He attacked the position taken by the Commissioner in holding that the last displacement of the range light had occurred prior to the collision, submitting that the evidence on this point was such that it should be inferred that this displacement took place between the 14th and 17th of April 1965, which was a few days after the collision. During the course of argument the Court took the position that it was not open to the respondent to put forward this submission in this appeal. No attack was made upon the appellant's testimony that he did set his course by the range lights and followed them. In fact, one of the charges against him, of which he was found guilty, was that he did follow the range lights at too great a speed when he should not have done so. Assuming that he did follow the line indicated by the range lights, his ship could not have followed the course that it did unless the last displacement had already taken place. The only explanation of the disaster, if the last displacement had not already taken place, is that pilot Belisle had failed to set his course by reference to the range lights. An accusation that he did not avail himself of the only aid to navigation that was available to him would have been a very serious one indeed. No such charge was made against him before the Commissioner and it is too late at this stage to endeavour to support the Commissioner's decision to suspend the pilot's licence on the basis of a charge against which he has never had an opportunity to defend himself.

¹ (1905-1908) 10 Asp. M.L.C. 287.

It therefore follows that this appeal is allowed and the suspension by the Commissioner of the appellant's certificate is quashed.

Having successfully appealed from the finding of the Court of Investigation there appears to be no reason why the appellant should not have the costs of the present appeal. The Court, therefore, orders that the appellant be paid the costs of this appeal as if it was an appeal to the Exchequer Court of Canada from a decision of a District Judge in Admiralty.

We are indebted to our two assessors, Captain John P. Martin, Master Foreign going and Captain Maurice Koenig, Master Foreign going and pilot for the very able advice they gave us on matters of seamanship. Both of these gentlemen have concurred in the decision of the Court.

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