

THE WARATAH SHIPPING COMPANY INCORPORATED. V THE SHIP YARRA.

and

DEN NORSKE AFRIKA OG AUSTRALIE LINIE. V THE SHIP MUSCOOTA.

Judgment

Knox C.J.

On the 25th. of December 1922 the sailing ship Muscoota and the steamer Yarra came into collision at about 9.40 p.m. off Wilson's Promontory. The collision appears to have taken place at a point between two miles and two and one half miles in a southerly direction from the Signal Station on the Promontory. Considerable damage was sustained by both vessels and the owners of each brought an action against the other to recover damages. The actions were heard together without pleadings each party having been ordered to give notice of the acts and omissions intended to be relied on at the trial. The acts are

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omissions relied on by the owners of the Muscoota were as follows viz

- (1) That no proper look-out was being kept on the Yarra before and at the time of the collision.
- (2) That the Yarra committed a breach of duty in not keeping out of the way of the Muscoota.
- (3) That the Yarra altered her course and so caused the collision.
- (4) That the Yarra being on the Muscoota's port bow for about 15 minutes before the collision and the Muscoota being then close hauled on the port tack the Yarra directed her course to port across the Muscoota's bows.
- (5) That the Yarra failed to reduce speed or go astern when the collision was imminent.

The owners of the Yarra relied upon the following acts and omissions

viz:-

(1) That the Muscoota failed to exhibit the prescribed lights and thereby committed a breach of the Regulations for preventing collision and deprived the Yarra of an opportunity to see her at a reasonable distance.

(2) That the Muscoota neglected to show a flare up or ~~pyrotechnic~~ pyrotechnic light and thereby ^{by deprived} the Yarra of an opportunity to take effective measures to keep clear of the Muscoota.

(3) That the Muscoota altered her course about two minutes before the collision and thereby caused the collision by rendering abortive the measures taken by the Yarra to avoid the Muscoota.

(4) That the Muscoota was deficient in complement and defective in equipment and was navigated in an improper and unseamanlike manner and neglected to keep a proper look out and to show lights or signals

The main point in dispute was whether the Muscoota was at and before the time of the collision exhibiting the lights prescribed

by the Regulations, i.e. a green light on her starboard side and a red light on her port side, and it will be necessary to deal in some detail with the conflicting evidence on this question. Before doing so however it will be convenient to state certain facts which were not seriously disputed.

The Yarra, a steamer 410 feet long, was proceeding from Newcastle to Port Adelaide in ballast, and at and before the time of the collision her speed was about 9 knots an hour. She was showing ^{two} electric masthead lights ~~(2)~~ ^{electric} and side lights. It was a dark night with showers of rain at intervals. The wind was between N. and N.W. - a strong breeze - the sea was moderate.

The Muscoota, a four-master barque 350 feet long overall, was bound from Melbourne to Sydney and was proceeding in an easterly direction. She was close hauled on the port tack, and her speed was about 7 knots

by the Yarra that
 an hour. It is admitted *it is estimated by the Muscoota* immediately before the collision - not more than 2 minutes before - the helm of the Yarra was starboarded causing her to turn towards her left and *it is estimated by the Muscoota* that after the Yarra had begun to answer her helm the helm of the Muscoota was ported causing her to turn towards her right, both ships thus turning in a southerly direction assuming the Muscoota to have answered her helm. In the result the Muscoota struck the Yarra on the starboard side approximately at a right angle amidships her jibboom striking the funnel of the Yarra.

The jibboom of the Muscoota was carried away and with the headsails

attached hung

over her starboard bow.

According to the evidence given for the Yarra her course was S. 52° W. from a point four miles off Cliffy Island to a point abreast of Wilson's Promontory two miles off, and from that point, which is said to have been reached about 7 minutes before the collision, her course is said to have been S. 70° W. until her helm was put hard a starboard not more than 2 minutes before the collision. As to the exact direction in which the Muscoota was heading before her helm was ported just before the collision the evidence is by no means clear. She appears to have been brought on to the wind on the port tack about an hour before the collision some time after she had passed Citadel Island in a south-easterly direction.

When she was close hauled and her yards braced up her compass course was said to be N.E. The evidence is that from that point - which is not fixed - she was sailed close to the wind until a little more than a minute before the collision when her helm was put hard-a-port, but as the evidence stands it is, I think, impossible to say with any certainty precisely in what direction she was heading before her helm was ported. ^{However} It is ~~/~~reasonably certain ^{that} ~~X~~ she was heading between E. and N.E.

The questions of fact which were seriously contested may be stated thus :-

- (1) Was the Muscoota exhibiting the prescribed lights before and at the time of the collision ?
- (2) Was a proper look-out being kept on the Yarra before the collision?

(3) Did the action of the Yarra in starboarding her helm cause or contribute to the collision?

(4) Did the action of the Muscoota in porting her helm cause or contribute to the collision?

(5) Did the Muscoota keep a proper look out before the collision?

I proceed to consider these questions.

(1) There is a direct conflict of evidence on this point. For the Muscoota Fingarsen the boatswain, and Rantanen the look out man swear positively to having seen the side lights burning brightly shortly before the collision. Mac-kenzie the first mate says that at eight o'clock he went on to the fore-castle head and saw the lights burning
Brig

Carlson swears that he lit the lights about 6.30 or 6.45 p.m. and saw that they were burning properly and not smoking. He went off duty at 8 o'clock.

Peterson, one of the crew of the Yarra, says he was on the fo'c'sle head of the Yarra and saw a weak red light over the starboard side ^{of that side} about four minutes before the collision. *The vessels would then have been about a mile apart.*

Captain Wilvers, the master of the Muscoota, says that immediately after the collision he ran forward on the fo'c'sle head and looked at the side lights and they were both burning brightly, and in this he is corroborated by Fingarsen, Rantanen, Mackenzie, and Carlson. Horn, the second mate, says he saw the port light burning brightly after the co:

lision but did not notice the starboard light. Rothe, the first mate, and Andreassen, the helmsman of the Yarra depose to seeing the stern light of the Muscoota after the collision, and Andersen the second mate of the Yarra says that after the collision he saw a white light aft on the Muscoota but could not say what it was. On the other side Captain Sorensen the Master of the Yarra, Surraka the look-out man, Andreassen the helmsman, and Andersen the second mate say that neither before nor after the collision did they see any side lights on the Muscoota. It is common ground that a few minutes after the collision the vessels came into and thereafter retained positions in which the side lights of the Muscoota would not have been visible to those on

board the Yarra if they had heard been alight. Of the witnesses mentioned above Captain Wilvers, Mackenzie, Horn, and Petersen on the one side, and Captain Sorensen, Andreassen, and Surraka on the other gave their evidence before me - the others being examined on commission

Carlson was tendered by Mr Broomfield for ^{further} cross-examination but Mr Windeyer did not require him to be called. For the Yarra, evidence was also given by ^{J.S.} Cairns the head light keeper at the Promontory.

He said that about 9.15 p.m. on the evening of the collision he was called up by the Muscoota by flashlight signals, that he was in communication with her from that time till about 9.30, and that he did not see her side-lights although he looked for them with binoculars. He said also that he first saw the Yarra's lights about 9.20, but

that at times they were blurred owing to rain. Without casting any doubt on the veracity ~~for~~ ^{or} trustworthiness of this witness I do not think his evidence necessarily shows that the Muscoota was not exhibiting her sidelights. On the evidence I think it is clear that between 9.15 and 9.30 she was always more than two miles ^{and} ~~or~~ probably not less than two and one half miles from the signal station. Her lights were oil lamps "so constituted ^{the} as to show not less than two miles on a dark night with a clear atmosphere". On the evidence of Cairns himself the atmosphere was not clear and if the Yarra's lights which were electric were, as he says, "at times blurred" I think it is quite possible that the lights of the Muscoota though lit might not

have been visible to him. Admittedly electric lights would be seen more clearly and at a greater distance than oil lights. It does not appear exactly when Cairns first picked up the Yarra's lights but apparently it was not more than 20 minutes before the collision and at that time she would not have been much more than three miles distance^t from the signal station. On the other hand the fact that the Muscoota called up the Signal Station, reported her name and carried on a conversation for some time tends to show either that she was carrying her proper lights or ~~that~~ at any rate that those in charge of her thought she was doing so. For the Muscoota evidence was given by Mr Arnold, a journalist employed by the Melbourne Herald,

who was sent to interview the Master of the Yarra on his arrival in Melbourne. He states that in the course of the interview Captain Sorensen describing the incident of the collision said that he suddenly saw the lights of an approaching vessel coming on the starboard side, that he gave orders for the engines to be stopped but before he could do anything the collision occurred. He says further that he began to ask Captain Sorensen questions to amplify the statement when a voice came from the cabin at the door of which they were standing "Captain don't you be cross examined, this is not a trial" and that after that he got no further information from the Captain. He said further that he took a note in longhand of the interview which was published

in the Herald the same afternoon. The paper was produced and put in evidence. Admittedly three or four persons besides Captain Sorensen and the witness were within hearing while this conversation was taking place, including Mr Pascoe of Mollwraith McEacharn & Co., the ships agents, and a representative of the underwriters. None of these gentlemen ^{was} ~~xxxx~~ called to give evidence in rebuttal of that given by Mr Arnold, but Captain Sorensen denied having made the statement deposed to by ^{him} ~~Mr Arnold~~. At first he said that he refused to say anything to him - that he said "I cannot say anything, I have been in collision with a sailing ship and if I had been loaded I would have gone right down". On cross-examination Captain Sorensen admitted

ted his ground under cross-examination, and I think his first denial of the conversation was wanting in candour and misleading. With regard to the other witnesses called before me their demeanour in the witness-box threw no discredit on their evidence. Petersen, Surraka, and Andrasen gave their evidence through an interpreter and nothing ^{Substantive} was elicited to the discredit of any of them. Captain Wilvers, Mackenzie, and Horn gave their evidence fairly and I saw nothing either in the evidence they gave or in the way they gave it to lead me to believe that any of them was stating what he knew or believed to be untrue. The probabilities of the case tend to support their assertion that the Muscoota was carrying proper lights, for she was being navigated on a

having given some of the information said to have been furnished by

him but ^{denied} stoutly having said anything about lights. In this conflict

of evidence I accept the version given by Mr Arnold. He has no inter-

est in the matter and he gave his evidence quite fairly and well, and

was not shaken by cross-examination. There was no fault to be found

with his demeanour. If he was not speaking the truth he might, as to

one statement at least, have been contradicted by persons who, so far

as the evidence goes, were readily available, but they were not called.

On the other hand I was not favourably impressed with the manner in

which Captain Sorensen met the evidence given by Mr Arnold. He shif-

ted his ground under cross-examination, and I think his first denial of the conversation was wanting in candour and misleading. With regard to the other witnesses called before me their demeanour in the witness-box threw no discredit on their evidence. Petersen, Surraka, and Andrasen gave their evidence through an interpreter and nothing ^{Substantive} was elicited to the discredit of any of them. Captain Wilvers, Mackenzie, and Horn gave their evidence fairly and I saw nothing either in the evidence they gave or in the way they gave it to lead me to believe that any of them was stating what he knew or believed to be untrue. The probabilities of the case tend to support their assertion that the Muscoota was carrying proper lights, for she was being navigated on a

dark night in narrow waters frequented by shipping, and there was so far as I can see no reason for omitting to carry the usual lights.

On the whole of the evidence I find that the Muscoota was before and at the time of the collision exhibiting the lights required by the regulations.

2. The next question is whether a proper look-out was being kept on the Yarra before and at the time of the collision. It is admitted by the Master and second-officer of the Yarra that the Muscoota was not

seen until about two minutes before the collision. The vessels would then have been about half a mile apart having regard to the speed at which they were respectively moving. According to the evidence, ~~the~~ the Master, the second-mate, and the helmsman of the Yarra were on the bridge for a considerable time before the collision and the witness Surreka was ^{on duty} ~~sitting~~ as look-out on the fo'c'sle head. It appears however that a few minutes before the collision, probably at the time the course was said to have been changed, ^{off the Promontory} Surreka was sent aft to read the log and was off the fo'c'sle head for a short time - about two minutes. If his evidence is correct he returned to the fo'c'sle head about five minutes before the collision. The

vessels were then less than one and a half miles apart having drawn nearer to one another by half a mile during the time he was away. He said in cross-examination that he did not see the Muscoota until she was about two or three ships lengths away - about a quarter of a mile at the most. Petersen who was ~~on~~ the fo'c'sle head but not on duty says he saw a weak red light presumably the port light of the Muscoota, about four minutes before the collision. The ships would then have been at least a mile apart. I see no reason to doubt that his evidence is substantially true, for on the evidence the lights of the Muscoota ^{should} ~~to~~ have been visible on that night at a distance of ^{less than a mile} ~~one~~ and ^a ~~one~~ quarter ~~mile~~.

The rule as to keeping a look-out is stated in Marsden on collision (7th ed. p. 454) thus:- "In ordinary cases one or more hands should be specially stationed ^{on} as the lookout by day as well as by night. They should not be engaged on any other duty and they should be stationed in the bows, or in that part of the ship from which other vessels can best be seen."

I have no doubt that the withdrawal of Burraka from the fo'c'sle head of the Yarra for the purpose of reading the log was in the circumstances a very negligent act, but if he returned five minutes before the collision I cannot say that his absence from the lookout ^{caused or} contributed to the collision; for, on Mackenzie's evidence, it is

doubtful whether the red light of the Muscoota would have been visible to the Yarra more than five minutes before the collision, the ships being then a mile and a quarter apart. But whether it was five minutes or a less time before the collision that he returned I think the admitted fact that the Muscoota was not sighted at a greater distance than half a mile is strong evidence that no proper look-out was being kept. Adopting the language of the Judicial Committee in "The Batavier" 9 Mos.P.C.at p.361, the fact that she was not seen sooner shows "either that there was no look-out at all or that if there were proper persons on the look-out they neglected their duty and did not see what they might have seen. In either of these views the fault would be with the Master and crew."

Holding as I do that the Muscoota was exhibiting ^{the} ~~a~~ proper light~~s~~, the fact that she was not sighted by those on duty on the Yarra until the vessels were no more than half a mile apart ~~establishes~~ in my opinion establishes that no proper look-out was being kept on board the Yarra at the relevant time. This conclusion is borne out by the evidence of Patersen that he saw from the fo'c'sle head of the Yarra, a red light which must have been ^{the} ~~a~~ port light ~~of~~ the Muscoota some four minutes before the collision.

- (3) Did the starboarding of the Yarra's helm cause or contribute to the collision?

According^{to} the evidence of Captain Sorensen the Yarra's helm was put hard-a-starboard about a minute before the collision - According to the evidence of Mackenzie the helm of the Muscoota was put hard-a-port at some time after the Yarra had begun to swing in answer to her starboard helm and when she was heading towards the Muscoota. This witness gave no estimate of the time which elapsed after his helm was ported until the collision but from his evidence as to the effect of this operation on the Muscoota I infer that her helm was ported about one and a half minutes before the collision. If his evidence be correct Captain Sorensen must have under-estimated the time which elapsed after the Yarra's helm was put to Starboard. The other alternative

is that Mackenzie ~~overestimated~~ the time which would elapse before the

Muscota began to fall off or the extent to which ^{she} ~~it~~ had fallen off at ^{might have been overestimated.}
the moment of impact. In the circumstances existing at the time of

these manoeuvres it would perhaps be unreasonable to expect the evidence as to the lapse of time to be quite consistent. On the whole I

infer that the alteration of the helm on the Yarra occurred between 1½ and 2 minutes before the collision, and the alteration of the Muscota's helm a very short time after the alteration of the Yarra's* .

But the question under discussion cannot be decided without first ascertaining the relative position of the two vessels before the course of either was altered.

On this point the evidence of those in charge of the ships, as is not unusual in cases of this kind, is in

direct conflict and impossible to reconcile. Captain Sorensen and Andersen the second mate of the Yarra say that when they sighted the Muscoota she was five degrees on the starboard bow of the Yarra.

The look-out man Surraka who was standing about 5 or 6 feet on the port side of the centre line of the Yarra close to her bows, signalled the Muscoota as being on the Yarra's port bow - he says in his evidence

that she was straight ahead. Petersen who was on the starboard side of the fo'c'sle head of the Yarra says that he saw the Muscoota's port-light across the starboard bow of the Yarra, but as his position on the fo'c'sle head is not definitely fixed his evidence does not assist in fixing the relative positions of the vessels beyond showing that the

Muscoota's portlight was open to the Yarra. ^{Andrasen} ~~Andrasen~~ the helmsman of

the Yarra says nothing as to the Muscoota's position. On the other

~~hand~~ ^{side} Mackenzie the first mate of the Muscoota~~azaymbx~~ says that when the Yarra was about half a mile to three quarters of a mile distant she was about four points (i.e. 45°) on the port bow of the Muscoota so that he could see her port light and that about one and a half to two minutes after that he lost the port light and saw her starboard light.

Captain Wilvers says that when he came on the poop the helm of the Muscoota was hard - a - port, and that at that moment the Yarra was "broad off my port bow". He did not observe her side lights but noticed from her masthead lights that she was swinging. Horn, the second mate, says that about two minutes before the collision he saw the Yarra "pretty broad on the port bow" of the Muscoota, and apparently

The Muscoota's
turning on her starboard helm to cross her bow. Rantanen's evidence

is very confused, but he says definitely that about 4 or 5 minutes

before the collision he lost the red light of the Yarra. It is clear

that at the moment of impact the Yarra was practically at right angles

to the Muscoota and across her bow. It is quite impossible to re-

concile the evidence of the witnesses on one side and on the other, and

one version or the other must be rejected. The difficulty in deciding

which version to accept is accentuated by the fact that Andersen ^{the} 2nd

mate of the Yarra was examined on commission and I had no opportunity

of estimating the value of his evidence. I have no reason to dis-

believe the witnesses called on behalf of the Muscoota and I cannot

regard Captain Sorensen's evidence as sufficient to displace that given by them. I have already commented on this witness in dealing with his contradiction of Mr Arnold's evidence. More-over I think it is extremely doubtful whether the collision could have occurred^r if the Muscoota had in/fact been on the starboard bow of the Yarra when the helm of the latter was put hard-a-starboard, in view of the facts

- (a) that the speed of the Yarra was greater than that of the Muscoota,
- (b) that the helm of the Yarra was starboarded before that of the Muscoota was ported, a n d
- (c) that in the circumstances the Yarra would probably answer her helm at least as readily as the Muscoota.

In addition there is the fact that the look-out man on the Yarra signalled the Muscoota as being on the port bow of the Yarra. I therefore

conclude that when the Yarra's helm was put to starboard the Muscoota was on her port bow. In that position the effect of starboarding the Yarra's helm would be to bring her across the bows of the Muscoota, while if ~~h~~ she had kept her course or her helm had been ported the ~~maxim~~ vessels would have gone clear of one another.

I find therefore that the action of the Yarra ~~h~~ in starboarding her helm contributed to or caused the collision.

4. The question whether the porting of the Muscoota's helm caused or contributed to the collision may be stated in another form viz:- If the Muscoota's helm had not been ported would she at the moment of impact ^{to the northward of} have been at a point ~~2~~ 200 ft or more ~~at~~ the point of collision?

If she would not then the collision would have happened even if her helm had not been ported for the Yarra is 410 ft. long and the Muscoota struck her amidships practically at right angles.

The evidence on this point is scanty. Captain Wilvers says that at the moment of impact the Muscoota had fallen off in answer to her port helm about a point and that in his opinion if the helm had been put down instead of up the collision would not have been avoided.

Mackenzie says that it takes the Muscoota from a minute and half to two minutes before she would start to go off if the helm is put hard-
aport when she is close hauled. Andersen the second mate of the Yarra says that if the Muscoota had not ported he thinks these ships

would have gone clear. Andersen's evidence must be read in the light of his statement, which I find to be incorrect, that when the Yarra's ^{was} helm/starboarded the Muscoota was on her starboard bow. In this state of the evidence it is quite impossible to find affirmatively that the action of porting the helm of the Muscoota caused or contributed to the collision, My opinion is that it did not, having regard to the short time which elapsed between the helm being ported and the moment of impact, and I see no reason why I should not accept the evidence of Captain Wilvers on the question.

5. On the evidence I am satisfied that the Muscoota kept a proper look-out before the collision - indeed this was not contested.

The conclusions at which I have arrived on the questions of fact in issue are as follows :-

- (1) The Muscoota before and at the time of the collision was exhibiting the prescribed lights.
- (2) The porting of the Muscoota's helm shortly before the collision did not cause or contribute to the collision.
- (3) The Muscoota was not deficient in complement or defective in equipment and did not neglect to keep a proper look-out and was not navigated in an improper or unseamanlike manner.
- (4) The Muscoota did not show a flare-up or pyrotechnic light.
- (5) No proper look-out was being kept on the Yarra before the collision.

- (6) The Yarra altered her course shortly before the collision by starboarding her helm and such alteration was the cause of the collision.
- (7) Before the Yarra so altered her course she was on the Muscoota's port bow for some minutes and directed her course to port across the Muscoota's bows.
- (8) The Yarra failed to reduce speed or stop or go astern when approaching the Muscoota.

I find therefore that the Yarra committed a breach of Article 20 in not keeping out of the way of the Muscoota, of Article 22 in not avoiding crossing ahead of the Muscoota, and of Article 23

in not slackening her speed or stopping or reversing on approaching the Muscoota if she was uncertain as to the course of that vessel, that those in charge of the Yarra were negligent in not keeping a ~~prop~~ proper look-out, that the collision was caused by her negligence in omitting to observe the provisions of the Articles abovementioned, and that her negligence in not keeping a proper look-out contributed to the collision. I find that the Muscoota altered her course shortly before the collision by porting her helm and so failed to observe the provisions of Article 21 but that such alteration did not cause or contribute to the collision and was made in the agony of the collision.

At the time when the helm was ported the fault of the Yarra had

made a collision so imminent and put the Muscoota in such a position of peril that the failure of the Muscoota to keep her course did not in my opinion amount to negligence/ so as to make the Muscoota to blame. The Seaton 9 P.D.1, The Sisters 1P.D.at p.120, The Bywell Castle 4 P.D.219.

In my opinion the position created by the action of the Yarra in starboarding her helm was such that in the circumstances those in charge of the Muscoota could not, by the exercise of such skill care and nerve as are ordinarily to be found in a competent seaman, have avoided the collision.

I find further that the omission of the Muscoota to show a flare

up or pyrotechnic light did not cause or contribute to the collision.

It follows that in my opinion the Yarra was solely to blame for the collision.

In the action against the Yarra there will be judgment for the plaintiff with costs and a reference to the ^{District} Registrar ^{Sydney} under part 9 of the Rules to assess the damages.

In the action against the Muscoota there will be judgment for the defendant with costs.

The order as to costs ~~in each case~~ will include the costs of examination of witnesses on commission and the costs of the shorthand notes. The costs of the reference to the Registrar will be dealt with

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in accordance with ~~the~~ part 9 of the Admiralty Rules of the High Court.

Liberty to apply.

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22.5.1923

Reasons for Judgment
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