

ON APPEAL FROM THE ONTARIO ADMIRALTY DISTRICT
 BETWEEN:

1939
 May 8.
 May 30.

STEAMSHIP *JAMES B. EADS* }
 (DEFENDANT) } APPELLANT;

AND

SARNIA STEAMSHIPS LIMITED }
 (PLAINTIFF) } RESPONDENT.

AND

NORRIS STEAMSHIPS LIMITED }
 (PLAINTIFF) } APPELLANT;

AND

STEAMSHIP *JOSEPH P. BURKE* }
 (DEFENDANT) } RESPONDENT;

Shipping—Appeal from District Judge in Admiralty—Collision—Rules 25, 30 and 32 of the Rules of the Road for the Great Lakes—Negligent operation of vessel—Appeal dismissed.

The SS. *Joseph P. Burke*, proceeding up Lake Ontario, and the SS. *James B. Eads*, on a voyage from Fort William to Toronto, collided immediately outside the entrance to the Welland Canal at Port Weller. The primary cause of the collision was the decision of the Master of the *James B. Eads* to cross from starboard to the port side of the channel when approaching the exit on Lake Ontario. The trial judge allowed an action brought by the *Joseph P. Burke* against the owners of the *James B. Eads* and dismissed an action brought by the *James B. Eads* against the owners of the *Joseph P. Burke*. On appeal the Court found that the collision was the result of the negligent operation of the *James B. Eads* and that there was no negligence on the part of the *Joseph P. Burke*.

Held: That the section of the Welland Canal where the collision occurred is not the type of narrow channel contemplated by Rule 25 of the Rules of the Road for the Great Lakes.

APPEAL from the decision of the District Judge in Admiralty for the Ontario Admiralty District allowing one action and dismissing the other, both actions having been consolidated for the purposes of trial.

The appeal was heard before the Honourable Mr. Justice Maclean, President of the Court, at Ottawa.

C. Russell McKenzie, K.C. and *F. H. Keefer* for appellant.

F. Wilkinson, K.C. for respondent.

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The facts and questions of law raised are stated in the reasons for judgment.

THE PRESIDENT, now (May 30, 1939) delivered the following judgment:

Maclean J. These two consolidated actions arose out of a collision between the ship *Joseph P. Burke*, hereinafter called "the *Burke*," and the ship *James B. Eads*, hereinafter called "the *Eads*," at 2.40 o'clock in the morning of November 30th, 1937, in Lake Ontario, just outside the entrance to the Welland Canal at Port Weller, and this is an appeal from the decision of Barlow D.J.A., for the Ontario Admiralty District, who found that the collision was due to the negligent operation of the *Eads*. The appeal was heard with the assistance of Captain J. W. Kerr, as nautical assessor.

The judgment appealed from contains an exhaustive statement of the relevant facts, and the reasons for the conclusion reached are so clearly stated, which conclusion I am satisfied is the correct one, that it will not be necessary to engage in any lengthy discussion of the matters in controversy here.

The *Burke* was proceeding up Lake Ontario on a voyage from Montreal to Port Colborne. The *Eads* was on a voyage from Fort William to Toronto. The *Burke* was running light and the *Eads* had a cargo of grain. The weather was clear with a strong forty mile an hour gale blowing west south west.

The primary cause of the collision between the *Burke* and the *Eads*, some 1,500 or 2,000 feet outside the Port Weller piers at the northern entrance to the Welland Canal—which piers may be visualized as extensions of the canal walls—was the decision of the master of the *Eads* to cross from the starboard to the port side of the channel when approaching the exit on Lake Ontario. The distance from the lowest lock to the end of the piers is approximately one mile and three-quarters. In justification of this manoeuvre the latter part of Rule 25 of the Rules of the Road for the Great Lakes was relied on. This rule deals with the situation when steamers are approaching each other head and head or nearly so, and the latter portion of the rule is as follows:

. . . Provided, however, that in all NARROW CHANNELS, where there is a current, and in the rivers Saint Mary, Saint Clair, Detroit,

Niagara, and Saint Lawrence, when two steamers are meeting, the descending steamer shall have the right of way, and shall, before the vessels shall have arrived within the distance of one-half mile of each other, give the signal necessary to indicate which side she elects to take.

The channel from the lowest or most northerly lock of the Welland Canal to the extremities of the Port Weller piers is undoubtedly narrow, but the current is negligible; there would be some flow of water from the canal into Lake Ontario, but that would have no appreciable effect on a ship departing from that lock and proceeding in the channel towards Lake Ontario, and it would not interfere with the control of the ship. Rule 25 appears to apply to channels and rivers where there is current sufficient to make it desirable to give the descending ship the right to choose on which side she will pass an upbound ship, after her intention is made known by whistle signal. The ascending steamer in such circumstances stems the current and is much better able to control her movements until the descending ship running with the current is clear. In my opinion the section of the Welland Canal with which we are concerned is not the type of narrow channel contemplated by Rule 25.

The initial fault of the *Eads* was in not keeping to the starboard side of the channel until well clear of the piers, and with this my assessor agrees, and the learned trial judge was of the same opinion. That seems to be the general practice of steamers emerging from the Welland Canal at Port Weller, and in fact the master of the *Eads* on some four or five previous voyages had always run for some five minutes straight out from between the piers before heading for Toronto, and my assessor advises me that this would be a precaution which ordinarily should be followed. To what distance a ship should proceed after passing the piers at Port Weller, and before her next course was set, would, of course, vary with circumstances. It is quite clear that had the *Eads* kept to the starboard side of the channel until well clear of the piers no accident would have occurred.

The *Burke* was apparently to the westward of a line bearing true north from the Port Weller piers when the *Eads* cleared the piers, admittedly on a course west of north in order to steer towards Toronto. In so doing her starboard light would be seen by the *Burke* which was steering west of south to keep to windward of the

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piers to allow for leeway or drift, as she was light and the wind was about west south west, and blowing with the velocity already mentioned.

The master of the *Eads* admitted in his evidence that he was aware that the *Burke* was a canal size ship and that it was proper for the *Burke* to go high, or to the westward of the piers, to allow for leeway or drift. The position of the ships just outside the piers is illustrated in the Fifth Situation as applied to Rule 30 for the Great Lakes, the left hand ship being the *Eads* and the other the *Burke*. As they approached each other at right angles or obliquely in such manner as to involve risk of collision, it was, in my opinion and that of my assessor, and as held by the trial judge, the duty of the *Eads* to keep out of the way. In the situation that developed, the *Burke* being on the starboard side of the *Eads*, the latter, after clearing the piers on a course towards Toronto and observing the *Burke* to starboard, should immediately have altered her course to starboard to pass astern of the *Burke*, or have stopped her engines, or reversed, in time to avoid collision. The *Eads* therefore offended against Rules 30 and 32, as found by the learned trial judge.

I concur fully in the conclusion of the learned trial judge, namely, that the collision was the result of the negligent operation of the *Eads*, and that there was no negligence on the part of the *Burke*, in all of which my assessor is in agreement with me.

The appeal is therefore dismissed and with costs.

Appeal dismissed.

REASONS FOR JUDGMENT OF BARLOW D.J.A.:

This action arises out of a collision between the ship *Joseph P. Burke* and the ship *James B. Eads* at 2.40 o'clock in the morning of the 30th day of November, 1937, in Lake Ontario just outside the entrance of the Welland Canal at Port Weller.

The *Burke* was proceeding up Lake Ontario on a voyage from Montreal to Port Colborne. The *Eads* was on a voyage from Fort William to Toronto. The *Burke* was running light and the *Eads* had a cargo of grain. The weather

was clear with a strong forty-mile-an-hour gale blowing west-south-west.

According to the evidence of Captain Norris, the captain of the *Burke*, the impact took place from 1,500 to 2,000 feet north-north-west of the west pier at Port Weller, the starboard bow of the *Eads* coming in contact with the port side of the *Burke* near the raised quarter deck between hatches numbers 5 and 6. The evidence of Captain Norris is that the mate, having sighted a ship known as

the *Diamond Alkali*, called him. At this time he could see the Port Weller lights and the *Diamond Alkali*, which was four points on the starboard side. He hauled southerly and paralleled the *Diamond Alkali* which was also proceeding to the entrance to the canal. He then saw the *Diamond Alkali* had slowed up and he hauled back 245°, which took the *Burke* up to the line of the blinker on the west pier at Port Weller. He then hauled to port and kept the light a point on the port bow. Shortly after he saw the *Eads* and altered his course on the west lights. At this time the *Eads* was well up in the harbour. He saw the two mast head lights of the *Eads* and later her red and green lights came into view. At that time the green light of the *Burke* was not visible to the *Eads*. He kept on coming in the same course until the *Eads* was just in the piers. He then pulled the *Burke* out two points on the port bow so as not to get her up too high, but the head of the boat never changed. At 1,500 to 2,000 feet he saw the *Eads*' red light shut out and the *Eads* altered her course to port. There was no signal by any boat up to this time. Sensing danger by reason of the course of the *Eads*, he ordered the wheel hard to starboard and blew five or more blasts. The *Eads* kept on coming out and blew two short blasts when it just cleared the piers. The *Eads* was heading somewhat west of north. The *Burke* then blew another alarm and the *Eads* blew an alarm and kept coming out. The *Burke* was swinging well around to the north-north-west and the captain saw that the *Eads* was coming into the *Burke*, and just before the impact he ordered the rudder of the *Burke* hard to port to swing the stern away.

The evidence of Captain Harpell, the captain of the *Eads*, is that he first saw the *Burke* when he was abreast of the main light

at Port Weller, which light is about 3,000 feet from the piers, and that he then blew two blasts to indicate that he wished to proceed out of the entrance on the port side. He states that the *Burke* was about 2,000 feet from the piers in a north-east direction when the first two-blast signal was given. When 500 feet inside the pier he gave a second two-blast signal. Both boats were making about the same speed; the *Eads* about eight miles an hour and the *Burke* about seven miles an hour. The captain states that he gave the second two-blast signal because the *Burke* had altered her course to starboard. He heard no signals from the *Burke* but saw the green light from the *Burke* for a minute or a minute and a half between the time of the first and the second signal, and he states he gave the second two-blast signal when the *Burke* closed out her green light. His evidence is that the *Burke* answered the second two-blast signal with a danger signal. He then ordered the wheel hard to starboard, ordered full speed astern and dropped the starboard anchor, and that when the contact took place the *Eads*, which is 400 feet long, was 50 feet clear of the west pier. He states that the *Eads* was practically stopped at the moment of contact.

John A. Clague, the first mate on the *Diamond Alkali*, was called as a witness. He first saw the *Burke* when she was about one and a half points on the port bow of the *Diamond Alkali* and about four miles from Port Weller. The *Diamond Alkali* was on her way from Toronto and was heading for the end of the west pier at Port Weller. He states that the *Diamond Alkali* was running half speed to permit the *Burke* to enter the canal first as she could proceed much faster through the canal than the *Diamond Alkali*. He saw the *Eads* coming out from the Port Weller harbour when she

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was about half way from the lock to the pier. He heard two blasts which he understood was from the *Eads*, when the *Eads* was just clear of the piers. The *Eads* was heading to the westward on her course out of the harbour. The *Burke* at this time was in line with the *Eads*.

The captain of the *Eads* stated that his usual course was to keep sharply to port on coming out between the piers and that this is what he proposed to do, he being on his way to Toronto. But his log book shows that on some four or five previous voyages he had always run for some five minutes straight out from between the piers before heading for Toronto. If he had followed this course this time, there would undoubtedly have been no collision. Just why the *Eads* should blow a two-blast signal when the *Burke* undoubtedly was too far out in the lake to hear her, cannot be understood. The captain of the *Eads* states that he blew a second two-blast signal when he was 500 feet inside the piers.

The first mate of the *Diamond Alkali* says that the two-blast signal he heard from the *Eads* was when the *Eads* was just outside the piers. The *Diamond Alkali* answered this signal believing it was for their ship. The first mate of the *Diamond Alkali* is an independent witness and I prefer his evidence to that of Captain Harpell. If the story of Captain Harpell is to be believed to the effect that after an alarm was blown by the *Burke*, that he put his wheel hard to starboard, reversed his engines and let go the starboard anchor, it would have the effect of swinging the stern to port and the bow to starboard, and if this was done inside the piers, as is sworn by Captain Harpell, it is hard to understand how the *Eads* came into contact with the *Burke* off the west pier, the *Burke* at the time going full speed away from him. I think it must be found that the

Eads continued her course and that if the anchor was dropped and the engines ordered full speed astern, that it must have been done very shortly before the contact because it is quite evident that the *Eads* had not stopped her way to any appreciable extent at the time of the contact. I cannot accept Captain Harpell's story as to this; nor that of his mate and wheelman, whose stories are in almost the same words. Counsel for the *Eads* contends that the *Burke* failed to give a one-blast signal. Captain Norris states that he was about to do this when he saw the possibility of danger and preferred to blow an alarm. In the light of what subsequently happened, I cannot see wherein the failure to blow a one-blast signal contributed in any way to the collision. In any event, the captain of the *Eads* had every opportunity to avoid the collision. If he had followed his usual custom of running straight out for five minutes, it would have been avoided. If he did what he claims to have done, namely, ordered the *Eads* hard to starboard, reversed his engines, and dropped his anchor no collision would have taken place.

Counsel for the *Eads* contends that a loaded down going vessel has the right of way in narrow channels and with the current, and contends that the *Eads* had the right to pass out through between the piers and that the *Burke* should have waited for her. The entrance is 400 feet wide. The *Burke* has a 43-foot beam and the *Eads* about a 40-foot beam. The only current would be that caused by the west-south-west wind which would carry the *Eads* the way which she should have gone. There is, therefore, in my opinion no reason why they would not have been able to meet safely between the piers. The fact is, however, that the *Eads* passed out through the piers and the line of crossing of the two vessels was some 1,500

or 2,000 feet out from the entrance in the open lake. According to the evidence which I prefer to accept, the two vessels met and the contact took place some 1,500 or some 2,000 feet out from the piers in the open lake. Captain Harpell and his mate both swore that the contact took place when the stern of the *Eads* was 50 feet from the west pier. The wheelman of the *Eads* placed this distance at 25 feet. I was not impressed with their evidence. It appeared too much as though it had been rehearsed. I prefer to believe the evidence of Captain Norris, his mate, and of Clague, the mate of the *Diamond Alkali*, an independent witness, which would place the point of contact between 1,500 and 2,000 feet from the piers.

Counsel for the *Eads* contends that Rule 25 of the Rules of the Road is applicable. This rule, however, deals with the situation when steamers are approaching each other head and head or nearly so, and further says: "In the night steamers will be considered as meeting head and head so long as both the coloured lights on each are in view of the other." That was not this situation. Here the steamers were meeting at right angles, and it is sworn that the green light of the *Burke* was never at any time visible to the *Eads*. The captain of the *Eads* states that he saw the green light of the *Burke* for a minute or a minute and a half. I am of the opinion that he must be mistaken. There is a green light on the east pier at Port Weller and it may be that he saw this light. I prefer to accept the evidence of Captain Norris as to the course of the *Burke* and that his green light was never visible. It therefore follows that Rule 25 is not applicable.

Rule 30 deals with the situation when two steamers are approaching each other at right angles or obliquely so as to involve risk of collision. This rule provides that

the steamer which has the other on her own starboard side, shall keep out of the way of the other by directing her course to starboard so as to cross the stern of the other steamer. Or if necessary to do so, slacken her speed or stop or reverse. This is the situation here. The *Burke* was on the starboard side of the *Eads*.

Rule 32 is also applicable and is as follows: "When two steam vessels are crossing so as to involve risk of collision, the vessel which has the other on her own starboard side shall keep on out of the way of the other."

The fifth situation following Rule 38 is also applicable: "The steamer which has the other on her own port side shall hold her course and speed and the other shall keep clear by crossing the stern of the steamer that is holding course and speed, or if necessary to do so shall slacken her speed or stop or reverse."

The *Burke* here quite properly held her course and speed, but the *Eads* did not do what was necessary and which in my opinion she had every opportunity to do to keep clear by crossing the stern of the *Burke*.

Counsel agree that the doctrine of the last chance is applicable, and this being so, it is quite evident to me that the *Eads* had the last chance to avoid the accident.

I had the assistance at the trial of Captain R. F. Wilson as assessor, a captain of wide experience.

After having carefully considered the evidence and having regard to the advice of my Assessor, I have come to the conclusion that the collision was the result of the negligent operation of the *Eads*. I cannot find that there was any negligence on the part of the *Burke* or those in charge of her.

Judgment will, therefore, go for the plaintiff in the first action with costs, with a reference to the Registrar to assess the damages. The second action will be dismissed with costs.

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