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WORLD MARITIME UNIVERSITY
Malmö, Sweden

COLLISIONS
A LEGAL ANALYSIS

By

KERRY-ANN N. McKOY
JAMAICA

A dissertation submitted to the World maritime University in partial
Fulfilment of the requirements for the award of the degree of

MASTER OF SCIENCE

In

MARITIME SAFETY AND ENVIRONMENTAL PROTECTION
(Policy)

1999

DECLARATION

I certify that all the material in this dissertation that is not my own work has been identified, and that no material is included for which a degree has previously been conferred on me.

The contents of this dissertation reflect my own personal views, and are not necessarily endorsed by the University

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To my friends, your support will not be forgotten. I would like to single out Sydney Innis, and George Reynolds for not only providing much needed assistance in the preparation of this document, but also for being my sounding boards and reminding me that in order to work better, one needs to play.

Last, but not least, to my family, without whose support I would not be here, my love, affection and gratitude is extended, and to Loxley, my love, because he kept me sane.

Kerry-Ann N. Mckoy
August, 1999

ABSTRACT

Title of Dissertation: **Collisions : A Legal Analysis**

Degree: **MSc**

The Dissertation is detailed legal study of the Law of Collisions, with particular attention paid to the Collision Regulations.

A look is taken at jurisdiction in general, its application and scope, and then jurisdiction in a collision case. Issues such as forum non conveniens and choices of law are examined. Legal remedies such as arrest of vessels and Mareva Injunctions are also outlined.

Civil Liability is discussed, once again with direct reference to collisions. Thus, the civil duty of care is outlined, and the specific issues of fault, damages and causation are investigated. A brief overview of limitation of liability is also included.

Criminal liability is also discussed, with a very general outline of criminal law being given, including the elements of a crime and strict and vicarious liability. Specific crimes relative to collision cases are itemised and examined.

A detailed study is made of the Collision Regulations, with special emphasis on the steering and sailing rules. Case law is used to show the application of the rules, as well as the result of not following the rules.

The concluding chapter examines some of the arguments for the re-drafting of the rules, and makes an argument for the retention of the rules as they stand. The point is made about the necessity for more caution in applying the rules and in manoeuvring the vessel.

KEYWORDS: Civil Liability, Collisions, Collision Regulations, Criminal Liability, Jurisdiction, Law.

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1. INTRODUCTION

Man and the sea are interlinked. Not only has the sea provided food for him, but it has also been an agent of change and development. From the first tentative exploratory steps taken for adventure, treasure or trade, man has been exposed to her bounty and her might. Marine casualties are apparently inevitable. They are caused by a variety of factual situations, and evidentiary circumstances, and have varied (but always unpleasant) effects on man, his property and the environment.

In the early days of maritime exploration, the weather was man's greatest enemy. Setting to sea in flimsy crafts, with no way of predicting the weather or of knowing what lay ahead, it is astounding that as many of the vessels that were able to get through, did. As travel by sea became more common, however, man became his own worst enemy - particularly in the more travelled seas of the world: the Mediterranean, the Baltic and the Northern Seas. Whereas previously man merely battled the elements and fate to reach his destination in one piece, now man had to navigate with one eye on the stars and one on the sea for any approaching craft which might impede his travels. Thus, the man-made maritime casualty was born. The situation has not changed with time. In fact, it has gotten worse as more ships, which are larger, faster and more powerful, have begun to ply the world's waterways.

In an analysis of collisions by Richard Pilley¹, it is pointed out that between 1990 and 1996, a total of 123 collision claims were analysed and data was gathered showing the status of the vessel at the time the collision took place. Not surprisingly, the vast majority of accidents took place when the vessel was underway, with 20% of them occurring when the vessel was travelling at excessive speed. (See table 1)

¹ Pilley, R. (1996) 'Collisions: some facts and figures'. In *Maritime Collision and Prevention*. Edited by Zhao, J., Wilson, P.A., Hu, Z. and Wang, F.

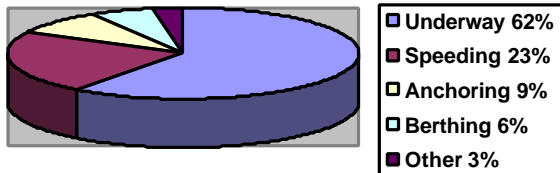


Table 1: Status of the Ship at the time of Collision

Table 2 shows where the majority of the claims took place. As is to be expected, the majority of collisions took place in coastal waters and in areas of restricted navigation. However, open water collisions accounted for a greater proportion of the total value of claims than those in coastal waters.

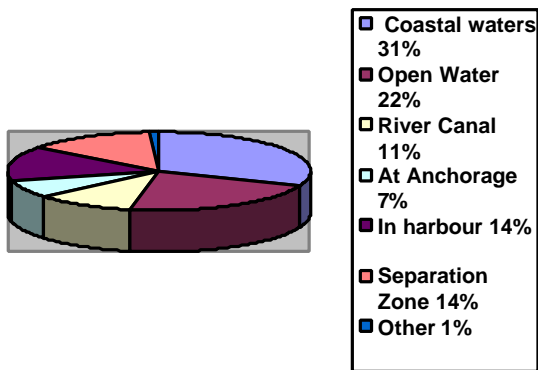


Table 2: Place of Occurrence

For comparative purposes, Table 3 shows the status of the other vessel involved in the collisions.

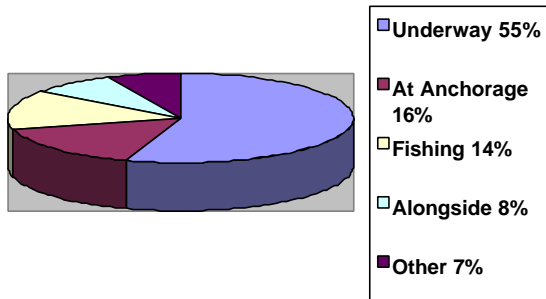


Table 3: Status of 'Other ship'

Of vital importance to this discussion are the figures on the type of collision: what type of manoeuvre was the vessel attempting when the collision took place? Table 4 shows that the majority of vessels involved in these collisions were in a crossing situation.

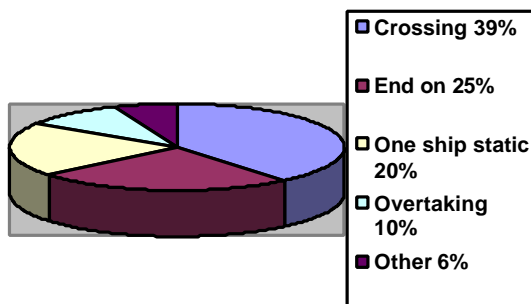


Table 4: Type of Collision

Finally, the condition of the sea and the degree of visibility are factors which are thought to play a vital role in such accidents. These factors undoubtedly contribute in some respect, but they are not the causative factors in the majority. In 62% of the cases, visibility was 'good' or 'fair', and in 76% of the cases the sea was 'calm' or 'slight', as shown in Tables 5 and 6.

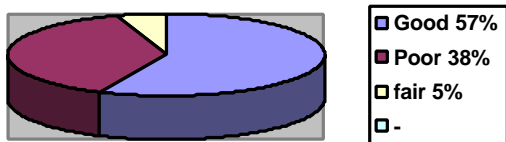


Table 5: Visibility



Table 6: Sea State

Having looked at the figures, it is clear that collisions are taking place for reasons other than force majeure. It is in order to minimise the amount of avoidable accidents by collisions that the maritime community has codified and implemented many of the customary laws of good seamanship into the 'Rules of the Road', or Collision Regulations, as they are more formally known. These rules form a major part of the body of law for safe navigation, and stringent adherence to them would indeed minimise the amount of collisions which occur. However, where collisions do occur, these rules also help to determine fault and liability and to provide a framework within which the casualty can be adjudicated.

These rules of navigation can be traced back over hundreds of years of customary practice, but were codified by the Brussels convention of 1910, which gave birth to the official Collision Regulations in the same year. These have helped significantly by introducing some consistency to the rules of navigation around the world, particularly in light of the introduction of traffic separation schemes and radar equipment. However, since the 1980's, maritime casualties have been rising and the statistical analysis suggests that about 80% of all shipping accidents are caused by human error. As far as collisions are concerned, the rate is actually higher. It is my thought that although the rules are excellent for creating a framework within which to operate, they are useless without the proper human application. In a survey taken at Shanghai Waters between 1990 and 1995², the vast majority of accidents were caused by either blatant disregard for the Collision Regulations, or a grave tactical error on the part of those attempting to apply them. Thus, in one way or another, blame for the vast majority of collisions can be laid at the feet of human error.

The purpose of this paper is to discuss the legal regime governing collisions at sea. Although the word collision seems simple, it in itself can lead to many other types of maritime disasters which result from it. Thus a collision may lead to marine pollution by oil or a noxious substance which can in itself have many repercussions on the marine environment and the liability of any responsible party. It is also possible for a party to collide with the sea bottom or a stationary object, which is in itself a collision. These groundings, collisions and other maritime casualties are beyond the scope of this paper which seeks to evaluate the law itself as it relates to collisions, and as such will be limited to collisions between vessels.

The paper seeks to first lay the foundation of the law of collision, by dealing with jurisdiction in collision cases. Once the juridical basis has been laid, a full and thorough

² Tianbing, H. and Shaohong, X. (1996) 'Variety of Human Error in Collision Accident'. In *Maritime Collision and Prevention*. Edited by Zhao, J.; Wilson, P.; Hu, Z.; and Wang, F.

discussion of the various liabilities will be made, including any civil and criminal liability which may accrue. Then the Collision regulations will be analysed, specifically the sailing and steering rules (rules 4-19). At the end of this discussion, it is hoped that the reader will have a full understanding of the law surrounding collisions, and will also see from the ongoing analysis of the cases, that the majority of these are caused by error on the part of man. In conclusion, I will outline some of the arguments for and against a dramatic revision of the Collision Regulations, and hope to emphasise my belief that blind revision of the regulations will do nothing if the attitude and approach of those who have to apply them is not improved. To take liberties with the words of Cairns, J. in *The Fogo*³,

'...It is on men that safety at sea depends, and they cannot make a greater mistake than to suppose that machines (*or the creation of rules*) can do their work for them.'

³ [1967] 2 Ll. Rep 208

2. JURISDICTION IN COLLISION CASES

2.1 JURISDICTION

The Admiralty Court is part of the High Court of Justice in the UK, and the Supreme Court in Jamaica. It has special powers in Admiralty matters and exercises jurisdiction in both *rem* and *personam*. A unique feature of the Court is the advice which the judge receives from some form of Nautical Assessors, (in the UK, usually the Elder Brethren of Trinity House). In view of the fact that collision actions are matters within the jurisdiction of the Court, it will be necessary to consider what is the jurisdiction of the Court, and examine the remedies available to a claimant - arrest and Mareva Injunction.

The statutory jurisdictional basis of the maritime claims is to be found in Section 20(2) of the UK Supreme Court Act 1981. Jamaica received her basis for maritime claims via reception of the UK Merchant Shipping Act, 1894, which had been revised by Parliament over the years. Among these claims is one concerned with collision, mainly for damage received or done to a ship. A liberal⁴ approach is adopted in interpreting the list, which is regarded as exhaustive⁵.

The word 'jurisdiction' has a number of different meanings, and in this sense may mean the power of the court to hear and determining proceedings, or it may mean the territorial venue or reach of the court in certain circumstances. In a maritime matter, the Admiralty court has the power to hear matters brought *in rem* or *in personam*.

⁴ Per Lord Wilberforce in *The 'Sandrina'* [1985] 1 Ll. Re. 181, 183

⁵ *Inter alia*, the following actions MUST be brought in the Admiralty Court

- Actions to enforce claims for loss of life, damage or personal injury arising out of a collision between ships.

An action in *personam* is against the defendant personally. An action *in rem* is an action brought against the *res* or 'the thing'. To be more precise, an action *in rem* is a claim brought against the thing in which an individual who has done wrong has an interest. Thus, some intangibles are given legal personality, and as such, ships and companies are two examples. In *The Henrich Bjorn*⁶, Lord Watson stated in his judgement that an action in *rem* is an action or proceeding against a ship or other chattel in order to satisfy some pecuniary claim by the plaintiff. It may seem that an action *in rem* is merely an alternative way of proceeding against a defendant, and that therefore actions *in rem* and *in personam* are essentially the same. In response to this, Moulton L.J.⁷ stated that an "...action in *rem* is an action against the ship itself. It is an action in which the owners may take part, if they think it is proper, in defence of their property, but whether or not they will do so is a matter for them to decide, and if they do not decide to make themselves parties to the suit in order to defend their property, no personal liability can be established against them in that action. It is perfectly true that the action affects them indirectly. So it would if it were an action against a person who they had indemnified." Where the defendant does not appear in such an action, judgement will then be enforceable only against the property or *res*. Where the defendant enters an appearance, he submits to the jurisdiction of the court personally, and from there on the action continues as an action both in *rem* and *in personam*. The danger here is that if the judgement cannot be fully satisfied by the *res*, execution proceedings can be initiated against the defendant personally.

The distinction between these two classes of maritime claim has a historical genesis, whereby a maritime lien existed in every case wherein the Admiralty court in the UK has jurisdiction against the *res*. However, since the jurisdiction of the admiralty court has been

- Actions to enforce claims for damage, loss of life or personal injury arising out of the non-compliance with the Collision Regulations by a ship.

⁶ (1886) L.R. 11 P.C. 220, 276, 277

⁷ *The Burns* [1907] P. 137

extended a number of times, at present not all claims enjoy a lien, and therefore in not all matters can proceedings be taken against the *res*. One of the great advantages with an action in *rem* is that it is attached to the property regardless of who is the owner, so the vessel cannot escape prosecution merely because it has changes hands.

2.2 CHOICE OF LAW AND *FORUM NON CONVENIENS*

Where parties have submitted to the jurisdiction of the court, the latter may have to decide on the applicable law to the dispute with a foreign element. It may have a choice between its own law – *lex fori*, the law of the flag ship – *lex patriae*, or the law of the country in whose waters the event has taken place – *lex loci*. The traditional standpoint under the law is that the act or omission must be actionable in the jurisdiction, and must not be justifiable under the law of the flag state. However, the situation is different for collision cases. This is because the collision regulations have created a general maritime law which is applicable by the forum. The status of the High Seas also gives some impetus to the application of the laws of the flag state.

The original concept of conflict of laws in any collision case was that if the ship was within the jurisdiction of a particular territory at the time of the collision, then that territory was to exercise jurisdiction over the vessel. A conflict of laws situations arises here, however. The difficulty is that if the collision occurs in Country A with a vessel flying the flag of country B which is manned by nationals of country C, all three countries may be said to have a valid interest in the vessel. Yet another example is what is the situation where a collision takes place in the territorial seas of Country A, but occurs between the vessels flying the flags of countries B and C. Presumptive jurisdiction lies in Country A, but what of Countries B and C? They too have a right to exercise some jurisdiction.

The 1952 Brussels Convention was an effort to state which courts would have jurisdiction. Not many states became parties to the convention, in part because any

convention on jurisdiction will minimise forum shopping, and also because of the difficulty of enforcement of judgement. The 1977 Convention for the Unification of Certain Rules concerning Civil Jurisdiction, Choice of Law, and Enforcement of Judgements in matters of Collision states in Article 4:

“Unless the parties otherwise agree, when a collision occurs in the internal waters or territorial sea of a State, the law of the state shall apply, and when a collision occurs in the waters beyond the territorial sea, the law of the court seized of the case shall apply, except that when all the vessels involved are registered or otherwise documented, or if not registered or otherwise documented, owned in the same State, the law of that State shall apply, wherever the collision occurs.”

The jurisdiction of a State covers its internal and territorial waters. Collision occurring in those waters is subject to municipal law. If the municipal law applies the Collision Regulations, then is immaterial whether one ship is flying the flag of another state, or if both are foreign-flagged vessels. The Convention will be applicable to non-parties, not as international convention, but as municipal law⁸.

Where two vessels are involved in a collision on the high seas, the *lex fori* applies. The courts will apply the ‘general maritime law’ which consists of local law and the “International Shipping Rules approved by the IMO”⁹. Where the collision takes place in foreign waters, the rule laid down in *Phillips v. Eyre*¹⁰ will be applicable. In this case, it was held that to be actionable in English law, a foreign tort must be both actionable in England, and not justifiable under the *lex loci*. This rule was also applied in *The ‘Mary Moxham’*. Here, an action was brought in the English Courts by the owner of a pier in Spanish territorial waters, against British owners whose ship had collided with the pier. The Court of Appeal accepted the defence that the shipowners were not liable under

⁸ Shipping Act (1998), Jamaica, s. 230

⁹ Mankabady, pg. 507

¹⁰ (1870) L.R. 6 Q.B. 1

Spanish law for the negligence of their servants who were navigating the ship. It was therefore held that no tort was committed by the shipowners.

Another important point is that of *forum non conveniens*. A court may strike out a matter before it on the basis that it has been before an inappropriate forum. One must distinguish between choice of jurisdiction and choice of law. A court can decide questions of foreign law. The fact that it possesses jurisdiction does not mean that it is compelled to exercise it. There might be another forum in which the case might be tried more suitably for the interests of all the parties, and in the interests of justice. The doctrine of *forum non conveniens* could be used to decline jurisdiction in appropriate cases. The forum would thus be able to exercise some amount of discretion. As was stated by the House of Lords in the leading case on *forum non conveniens*, *The Spiliada*¹¹, “the basic principle is that a stay will only be granted on the ground of *forum non conveniens* where the court is satisfied that there is some other available forum, having competent jurisdiction, which is the appropriate forum for the trial of the action, i.e. in which the case may be tried more suitably for the interests of all the parties and the ends of justice.” The considerations taken into account by the court when deciding whether or not to exercise jurisdiction are

- 1) whether access to sources of proof is relatively easy;
- 2) the availability and costs of obtaining witnesses;
- 3) the question of the ease of enforceability of any possible judgements; and
- 4) any other matters which would have an influence on the expenses or the ease and speed of holding a trial.

This list is not exhaustive, however, and will vary depending upon the facts of each case.

Another case on the issue is *The Abidin Daver*¹², which has the position of having a judgement written by 2 authorities on Maritime law, Diplock and Branson. This case

¹¹ [1987] 1 Ll. Rep. 1

¹² [1984] 1 Ll. Rep. 339, 2 W.L.R. 196

concerned a collision in the Bosphorus (Turkish territorial waters) between a Turkish vessel and a Cuban vessel. The Turks arrested the Cuban vessel in Turkey, and instituted legal proceedings there. The Cubans arrested the sister ship of the Turkish vessel in a UK port. The problem here is that there were now two concurrent actions in two separate jurisdictions out of the same incident (Turkey and the UK). The trial judge stayed the English proceedings, but this was overturned by the Court of Appeal. The House of Lords finally restored the decision of the trial judge. The House of Lords used a formula which came from *The MacShannon v. Rockware Glass Limited*¹³, and framed the two basic prerequisites for granting the stay of a tort action. One was that there should be an alternative forum which was either the natural one, and so had a connection with the facts, or was one where there would be considerably less expense and inconvenience than in the one where the stay was being sought. The other was that there must be neither a personal or juridical advantage accruing to the plaintiff in the action which he stood to lose if the stay was granted. Once both of these are established, then the stay should be granted. However, there should also be a balancing of interests of the plaintiff and the defendant – a ‘critical equation’¹⁴. The court should involve itself in a balancing up of the factors which support either side of the case for and against a stay.

An example of a more recent case on *forum non conveniens* is the case of *The Lakhta*¹⁵, where there was a dispute as to ownership of the vessel between Latvian plaintiffs and Russian defendants. A Russian arbitration award decided that the vessel was owned by the defendants. Subsequently, the plaintiffs arrested the ‘Lakhta’ in England, claiming a declaration that they were the sole owners of the vessel. The defendants applied for an order staying the proceedings on the basis of *forum non conveniens*. It was held that the stay would be granted, because this case was in every respect connected with the Baltic states, and it had no connection with England. Also, all

¹³ [1978] A. C. 795

¹⁴ as per Lord Wilberforce in *The Atlantic Star* [1973] 2 Ll. Rep. 197, HL

¹⁵ [1992] 2 Ll. Rep. 269

witnesses would have to be come from these states, and all documents translated into English. All these factors indicated that a Russian forum would clearly and distinctly be more appropriate than an English court. The English action was therefore stayed.

2.3 ARREST

Since 1854, the Admiralty court had the power under the UK Merchant Shipping Act to order the arrest of any vessel for any injury which “had been caused in any part of the world to any property of the Crown or the Crown’s subjects by any foreign ship if at any time it was found in any port or river of the United Kingdom or within three miles thereof.”¹⁶ The Brussels Convention on the Arrest of Seagoing Ships, 1954 allows the arrest of seagoing vessels only in respect of the maritime claims stipulated in it. The convention deals with two separate kinds of jurisdiction¹⁷: Jurisdiction to arrest a ship or release it upon the provision of bail sufficient to satisfy a judgement for the claim; and jurisdiction to determine the claim on its merits, and to order judicial sale of the vessel if so determined. Thus, a plaintiff who has instituted an action *in rem* against a ship to enforce a lien is entitled to ask for the arrest of the ship in the same action, even after he has obtained judgement, provided that no bail has been put up for the ship. Arrests can be said to be an ‘incident’ in the proceedings *in rem*.

The arrest is a matter for the discretion of the court. It does not matter if the ownership of the vessel has changed between the time when a maritime lien attached to the ship and when it is arrested. However for some claims it is necessary to show an *in personam* link between the property and the defendant in the action.

It is possible to arrest, if not the ship involved in the incident which gave rise to the claim, then its ‘sister ship’. This is based upon whether the vessel in question is owned as

¹⁶ Mankabady, pg. 509

¹⁷ The ‘*Halcyon Isle*’, [1980] 2 Ll. Rep. 325, 332

respects all its shares by the person who would be liable on the claim. The original position in the law was that there was to be a common ownership link between the offending vessel and the alternative vessel selected for arrest.¹⁸ This was interpreted in a very restrictive manner, and placed a practical bar to arrest, particularly where a demise charterer was involved. Thus, in *The Eschersheim*¹⁹, Lord Diplock stated that both vessels had to be under the same beneficial ownership as respects all their shares. This gave rise to a spate of cases, wherein it was discussed whether or not the words 'beneficial owner' could include the demise charterer. In *The Andrea Ursula*²⁰, Brandon J. found that the demise charterer would fall under the *in rem* action. It was also stated by Glenn. J. in *The Aventicum*²¹ that the court should in all cases look behind the registered owner to determine the true beneficial ownership. It must be noted that a ship beneficially owned by a demise charterer is not a 'sister ship', per se, but is still liable under the law as it now stands.

Once the arrested ship is released on bail, she cannot be re-arrested for the same offence. As per Dr. Lushington in *The Kalamazoo*: "the bail represents the ship, and when the ship is released on bail, she is altogether released from that action"²². However, if the first arrest is treated as a nullity, and set aside, then the vessel can be re-arrested for the same action.

¹⁸ Hill, pg. 131

¹⁹ [1976] 2 Ll. Rep. 1, 6.

²⁰ [1971] 1 Ll. Rep. 145

²¹ [1978] 1 Ll. Rep. 84: See also *The 'Maritime Trader'* [1981] 1 Ll. Rep. 153

²² 15 Jur. 885, 886

2.4 MAREVA INJUNCTION

An alternative remedy to the arrest of a ship is the Mareva injunction. This is an *in personam* order, which prevents (by means of injunction) the defendant from removing his assets from the jurisdiction, particularly (but not exclusively) where he is not “domiciled, resident or present” in the jurisdiction²³. The purpose of the remedy is not to punish the defendant, nor is it to secure property for the Plaintiff. Rather, it is to prevent the Plaintiff from being cheated out of the proceeds of his actions should his claim be successful. It was used for the first time in *Nippon Yusen Kaisha v. Karageorgis*²⁴, where the charterers failed to pay their hire. Although they had disappeared, and were now untraceable, there was evidence that they had a substantial sum in a bank within the jurisdiction. An injunction was granted restraining the charterers from disposing of or removing any of the assets within the jurisdiction. This case was followed by the case from which the injunction received its name: *Mareva Compania Naviera S.A. v. International Bulk Carriers, S.A.*²⁵. The order may have very wide terms, and may restrain the defendant from removing any of his assets from the jurisdiction. This may include a specified asset, provided that the assets do not exceed the plaintiff’s claim in value. The order may be varied where necessary to allow the defendant to pay his debts and meet his ordinary living expenses.

Because the Mareva injunction is such a harsh remedy, the courts are very careful about their use of it, and have to this end laid down some ground rules. In *Searose v. Seatrain*,²⁶ Goff J. noted that if these principles are not observed, a weapon which was forged to prevent abuse may become an instrument of oppression. Thus, an order for Mareva injunction should not be sought in terms wider than are reasonably required for the case. Secondly, any asset to be restrained should be identified with as

²³ Mankabady, pg. 519

²⁴ [1975] 2 Ll. Rep. 137; 1 W.L.R. 1903

²⁵ [1975] 2 Ll. Rep. 509

much precision as possible. Where the asset has not been identified precisely, the applicant may be required to give an undertaking to pay reasonable costs to a third party who has to ascertain whether the asset is actually under his control.

²⁶ [1981] 1 Ll. Rep. 556

3. CIVIL LIABILITY

3.1 GENERAL

Liability may be based on fault where the wrongdoer intends to cause harm to others, or where his conduct falls well below a certain standard which is considered blameworthy. In both cases, the wrongdoer will be liable for the damage caused. The liability may be strict when it is concerned with damage irrespective of fault. The intention can only be inferred by conduct.

In incidents of collision, the basic principle is that the liability of the Master and the Shipowner is based on fault²⁷, but in a few cases, the liability is strict. Examples of such cases are contravention of a Traffic Separation Scheme (TSS) and personal injury. In collision cases, the word usually used to define liability is 'fault'²⁸. This is used to cover negligence, contributory negligence or breach of a statutory duty by an action or omission²⁹. It must be pointed out, that the mere presence of a fault will not necessarily make it actionable in law. The fault in question must have contributed in some way to the loss or damage³⁰. Thus, there must be present three elements for liability to occur, which will be discussed further. These are Fault, Damage and Causation.

²⁷ Collision Regulations, Rule 2(a)

²⁸ This definition of fault given in the Law Reform (Contributory Negligence) Act, 1945, s. 4

²⁹ See *The 'Arya Rokh'* [1980] 1 Ll. Rep. 68, where the collision was caused by indecision (omission) and wrong action.

³⁰ There must be the existence of *causative potency*.

3.2 FAULT

Fault may be described as an "omission to do something which a reasonable man, guided upon those considerations which ordinarily regulate the conduct of human affairs would do, or doing something which a prudent and reasonable man would not do"³¹. It therefore involves both Causative potency and blameworthiness or any navigational shortcomings. Thus, one should at all times be exercising a degree of skill and care which are ordinarily to be found in a competent seaman. If that degree is not met, then fault may be inferred.

The court may consider the actions taken by both vessels at an early stage even before the encounter led to the collision. In *The 'Auriga'*³², Brandon, J. said that there in "many cases in which a collision occurs between ships in a crossing situation, it is sufficient in order to assess responsibility for the collision, to consider only the faults of either ship after the crossing situation came into being. In the present case, however, I do not think it is sufficient to consider only the faults committed at that stage. On the contrary, I think it is necessary to go back to an earlier stage, and to consider how the crossing situation, which did not exist originally, and which led to all the trouble, came to be created at all." In fact, an error of judgement may not amount to fault at all. In *The 'Toluca'*³³, Sheen, J. remarked that although the action taken by the captain was not in hindsight the best possible action, he was still at the time in question exercising reasonable skill and care. Similar decisions have been held in the cases of *The 'Avance'*³⁴ and *The 'City of Leeds'*³⁵.

³¹ Per Alderson, B in *Blyth v. Birmingham Waterworks Co.* (1856) 11 Ex. 781

³² [1977] 1 Ll. Rep. 384, 395

³³ [1981] 2 Ll. Rep. 548, 554

³⁴ [1979] 1 Ll. Rep. 143

³⁵ [1978] 2 Ll. Rep. 346

However, a serious error of judgement may amount to fault. In *The 'Marimar'*³⁶ the court indicated that in a situation where one vessel was far less equipped than the other, the risks taken would be far more serious than in another better-equipped ship. The court decided that the navigational decisions of the ship indicated a misjudgement serious enough to amount to fault.

It is also possible to have fault arising without a collision. Fault can cause damage without a collision actually taking place. For example, a vessel may sustain damage as a result of the excessive swell raised by another ship. Thus, in *The 'Maid of Kent'*³⁷ a Trinity House pilot was killed while boarding another ship as a result of the wash from the *'Maid of Kent'*. The Court of Appeal held that the ship should have realised that if she passed another vessel at the distance and speed which she had, any subsequent wash could prove a danger to other smaller vessels.

It is also possible to have the faults of both vessels mixed in such a way that both vessels shall be liable. In fact, this is the usual case in collision cases, particularly where a breach of the collision regulations is involved.

3.2.1 Elements of Fault

Fault describes some human action or inaction which results in an undesired event³⁸. Legally, the Master owes a duty to any person on board his ship, and to other users of the sea to minimise or negate the risk of collision with his vessel. The Master is entitled to presume that all other users of the seaways will do the same. However, the fault of one vessel does not excuse the fault of another. Fault exists where 2 elements exist: A duty of care, and a breach of such duty.

³⁶ [1968] 2 Ll. Rep. 165

³⁷ [1973] 1 Ll. Rep. 49; on Appeal, [1974] 1 Ll. Rep. 434

³⁸ *The Law of Collision at Sea*, S. Mankabady, 275

3.2.2 Duty of care

It is the duty of the master to act with proper skill and care. This duty may derive from the common law, or may be imposed by statute.

The common law of good seamanship.

The common law imposes on all persons a duty of care. In *Donoghue v. Stephenson*³⁹ Lord Atkin formulated the principle that "you must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour"⁴⁰. The 'neighbour' here has been defined as the person or persons in law who are closely and directly affected by one's actions⁴¹. This 'Neighbour Principle' has been expounded in all areas of law, and Maritime law is no exception. The common law imposes upon the master several duties arising from the concept of good seamanship. Thus, the Master is responsible for appraisal, planning and monitoring. It is the duty of the master to plan sufficiently for the voyage⁴². This includes the acquisition of charts, as well as obtaining details of the weather, currents, tides, and draft of the ship at various points of the intended passage. All navigational marks must be anticipated as well as traffic separation schemes and radio aides. Furthermore the Master and crew must ensure that steps are taken to ensure that all the navigation is planned with contingency plans, and that the bridge organisation provides for briefing of all concerned with navigation of the ship. There is also the need for information from other ports re traffic, as well as continuous monitoring of position, and cross-checking of human decisions to minimise

³⁹ [1932] A. C. 562

⁴⁰ *ibid.*, pg. 580

⁴¹ See also *Anns v. Merton London Borough* [1977] 2 W.L.R. 1024

⁴² See for example the UK M. Notice 854. Also, see the Code of Good Management in Safe Ship Operation issued under the International Chamber of Shipping (ICS), and the International Shipping Federation (ISF), where it is stated "Safety and efficiency are integral to good management."

human error. Mr. Justice Sheen in *The 'Roseline'*⁴³ summarised all the duties of the masters and owners of a vessel as follows:

" It is the duty of the owners to make sure that their Masters understand their duties and understand that they are expected to run an efficient ship. The other officers must be of adequate qualification and experience to enable the Master to carry out his duties.

In a well run ship the following precautions will be taken when navigating in reduced visibility:

1. The ship will be navigated at a safe speed, and in addition the engine room telegraph will be on 'stand-by' and the engine room will be manned for immediate response to orders unless the engines are operated by direct control from the bridge.
2. Navigation lights will be exhibited.
3. The appropriate sound signals will be sounded and, whenever possible, they will be sounded automatically.
4. An efficient radar watch will be maintained. An efficient watch includes long range scanning at regular intervals.
5. A lookout will be posted in a position where he can maintain good aural look out.
6. In waters in which safe navigation of the ship requires frequent and accurate fixing of her position and alterations of course, there will be on the bridge two competent officers, one of whom will be Master or a senior officer. This will enable one officer to concentrate on plotting the position of the ship while the other keeps radar watch."

⁴³ [1981] 2 Ll. Rep. 410, 411

Statutory Duties

Where a statutory duty is imposed on the Master or a member of the crew and that duty is broken, they are liable. In fact, some common law duties have been replaced by statute law in order to resolve some difficulty in the existing law. The US *Pennsylvania Rule*⁴⁴ was meant to apply to statutory fault. The actual nature of the liability and whether or not a remedy exists under the law will be outlined by the statute.

In a collision scenario, an example of a statutory duty is the requirement to proceed or attempt to proceed to sea with the required navigational equipment installations. Regulation 12 chapter V of the International Convention for the Safety of Life at Sea, 74/78 (SOLAS) requires that ships must carry certain types of equipment, such as a magnetic compass, a gyrocompass and an echo sounder. These requirements have been incorporated in some form in national legislation of member states⁴⁵. Another example is s. 233 of the Jamaica Shipping Act, which requires a Master to render assistance to a ship with which he has collided, once he is in a position to do so. Very specific circumstances exist wherein a Master may omit to perform this duty⁴⁶. If he fails to render such assistance in circumstances other than those outlined, he shall be guilty of an offence, and upon conviction will be liable to pay a fine or imprisonment, or to both such fine and imprisonment⁴⁷.

Standard of Care

The standard of care is that which can reasonably be demanded in the circumstances. Asquith, L.J. has summarised it by saying that it is necessary to balance

⁴⁴ *infra*, footnote 51

⁴⁵ Jamaica Shipping Act, 1998, Part IX Safety

⁴⁶ s.233(1)

⁴⁷ s.233(2)

the risk against the consequences of not taking one⁴⁸. In *Glasgow Corporation v. Muir*⁴⁹, Lord McMillian expressed that the standard of foresight of the reasonable man would be determined independently of the 'personal equation'. The Court would not be looking for extremes of nervousness nor overconfidence, but rather a reasonable man who is free from both over-confidence and over-apprehension. As Lord Reid put it, "a reasonable man does not mean a paragon of circumspection"⁵⁰. Rather, the reasonable man "is also cool and collected, and remembers to take precautions for his own safety, even in an emergency"⁵¹. Thus, as per Brandon J. in *The Boneslaw Chrosbry*⁵², " the standard of care to be applied by the court is that of the ordinary mariner, and not the extraordinary one, and seamen under criticism should be judged by reference to the situation as it reasonably appears to them at the time, and not with hindsight."

Thus, the standard for deciding whether there has been a breach of duty is objective. Too high a degree of skill is not demanded. A mariner must exercise such care as accords with the standards of a reasonably competent mariner at the time of the incident. Some of the considerations which must be balanced in order to establish the objectiveness of the test are the magnitude of the risk, the seriousness of the damage, the importance of the object to be attained, and the practicality of precautions.

3.2.3 Breach of Duty

In an action for breach of duty, the Plaintiff bears the burden of proving that a duty is in fact owed to him. Once that is done, he must then prove the existence of the link of causation between the breach of the duty, and the damage caused. Whereas the Master or crew are usually the persons guilty of fault, the ship owner may also be liable because

⁴⁸ Mankabady Pg. 284, footnote 1

⁴⁹ [1945] A.C. 448, 457

⁵⁰ *Billings & Son v. Riden* [1958] A.C. 240, 255

⁵¹ *Channan v. Glasgow Corporation* [1950] S.C. 23

⁵² [1974] 2 Ll. Rep. 308, 316

ha may negligently allow his ship to navigate in a defective state. Where the cause of the collision is the condition of the vessel, the ship owner is liable.

The 1911 UK Maritime Conventions Act abolished the statutory presumption of fault of a vessel infringing the Collision Regulations, because it was pointed out that the infringement of the Collision Regulations may not have caused the collision⁵³. Thus, the breach of the statutory duty may not be the cause of the collision. In the US, however, the *Pennsylvania* Rule, which was derived from *The Pennsylvania*⁵⁴ case, was the law until the 1970's. This rule stated that where a rule of statutory fault was violated, there was an automatic presumption of negligence. One therefore had to prove that the casualty which occurred was not in violation of a statute which was designed to prevent it⁵⁵. In *The Hellenic Carrier*⁵⁶ the Court found that Hellenic Lines had met its burden of proof under the Pennsylvania rule by showing that the absence of fog signals could not have contributed to the collision.

3.2.4 Inevitable Accident and Agony of the Moment

Inevitable accident is where two vessels are involved in a collision; the liability may fall on one vessel alone, or on the two vessels. In the latter case, the court will have to apportion the blame. Alternatively, both vessels are free from blame and will have to stand their own costs.

A vessel can escape liability in a few circumstances, for example where the accident is inevitable. Thus, where the vessels are taking all the proper precautions and

⁵³ See *The 'Estrella'* [1977] 1 Ll. Rep. 525

⁵⁴ 86 U.S. 125 (1873)

⁵⁵ Mankabady pg. 287, footnote 5: "Where...a ship at the time of a collision is in actual violation of a statutory rule intended to prevent collisions...the burden rests upon the ship of showing not merely that her fault might not have been one of the causes, or that it probably was not, but that it could not have been."

⁵⁶ [1984] AMC 2713

are obeying the Collision regulations, and collide in fog, this COULD be considered to be an inevitable accident. Inevitable accident describes a situation where the collision was not intended, and could not have been avoided by the exercise of reasonable care and skill. In order to succeed in this plea, three elements must be proven:

- 1) That the accident was caused by an Act of God, or 'force majeure';
- 2) That all reasonable precautions have been taken, and
- 3) There was no fault involved in getting into the situation where the collision was inevitable.

It is not sufficient to show that the accident was unavoidable at the moment of, or some moments before its occurrence. Rather, it is necessary to show that all precautions have been taken, and there was no fault in getting into such a position. In *The Alletta*⁵⁷ the plea of inevitable accident failed. In this case, a collision occurred at night between the vessel 'The England' and the smaller vessel, 'The Alletta', as a result of 'The Alletta' proceeding right across the main channel of the river to anchor. In so doing, she crossed the path of 'The England' which struck her on her starboard side. The master of 'The Alletta' performed all the necessary emergency procedures, but in spite of his actions the vessel sank. Not before, however, she had collided with a number of dumb barges, damaging both the vessels and their cargo. She also collided with another moored vessel, the 'Mare Librum'. A number of actions were brought against the vessels involved. On the issue of whether or not the collision with the barges was an inevitable consequence of the first collision, Hewton J. held that 'The Alletta's' movements after the first collision were proper and seamanlike. Secondly, the collision with the barges was as a direct consequence of the first collision.

Further, Sheen J. stated in *The Vysotsk*⁵⁸ that "...liability for this collision must be judged from a starting point when the vessels were four miles distant from each other and ready to pass safely if each maintained her course."

⁵⁷ [1969] 2 Ll. Rep. 479

⁵⁸ [1981] 1 Ll. Rep. 439, 449

The inevitable accident defence is usually used when a vessel has been caught in a storm and driven against another vessel or a shore structure. It must be shown that not only could the force not have been anticipated, but also that the vessel had been properly moored and that there was no negligence on the part of those in charge of her.

Another situation which is frequently cited is that of failure of machinery. Here, the defendant must prove that the defect was latent, and therefore could not be discovered by reasonable diligence or inspection. He must also prove that the collision was caused by the defect, and could not be corrected by navigation after the trouble developed.

Where the cause of the collision could not be determined, the plea of inevitable accident cannot be relied upon. In *The Merchant Prince*⁵⁹ a vessel collided with an anchored vessel as a result of the failure of her steering gear. The cause of the failure, and its latency, could not be established, and so the Court of Appeal held that so long as the cause of the accident was unknown, then the defendants were unable to claim that it was inevitable or unavoidable.

In a contrary situation, in the case of *Gleehong Harbour Trust Commissioners v. Gibbs Bright & Co. (The Octavian)*⁶⁰, the vessel was properly moored, when she was driven off her moorings by a sudden strong squall. She subsequently collided with a beacon owned by the Harbour. The latter claimed damages, but the defendants denied liability on the grounds of Act of God or inevitable accident. The High Court of Australia accepted this defence.

Where a vessel, without any fault, is placed in a position of great danger, she is not liable if the action which her crew takes to mitigate the emergency proves to be

⁵⁹ [1892] P. 179

⁶⁰ [1974] 1 LCMQ 90, 91

wrong. In *The Rywell Castle*⁶¹ James C.J. stated that "a ship has no right to put another ship into a situation of extreme peril, and then charge that other vessel with misconduct."

Again, when the Master is placed, through no fault of his own, in a real dilemma, and has to take one of two courses which both involve risk, he is not guilty of negligence if he chooses the option which has the least risk.

3.3 DAMAGES

Where fault results in no damages, or is not an effective cause of the damage, or damage occurs without fault, then no cause of action arises.

3.3.1 Division of damages

At common law, the rule was that where two vessels are at fault, damages would be equally divided regardless of the degree of fault. This rule found justification in the idea that it would induce care and vigilance on the part of both parties in the navigation of their vessels. If the plaintiff's damages have been caused partly by his own negligence, and partly by the negligence of the defendant, he cannot claim anything. This rule of contributory negligence caused hardships in certain circumstances. In order to mitigate this hardship, the Courts introduced the concept of 'last opportunity'⁶² by which a plaintiff could recover damages from the person who had the last opportunity to avoid the incident. However the test used to find out the last opportunity was not clear, and the situation became worse by the extension of the rule to cases of 'constructive last opportunity'.

⁶¹ [1879] 4 P.D. 219

⁶² Mankabady, pg. 301

In 1910 The International Convention for the Unification of Certain Rules of Law with respect to Collisions between Vessels was adopted. It replaced the common law rule by one which provides for the apportionment of damages according to the degree of blame. The provisions of this Convention were incorporated into the 1911 UK Maritime Conventions Act. The Act provides for damages to be apportioned according to the degree of fault of the vessels involved, and has gone far to mitigating the difficulties caused by the 'last opportunity' rule. In *Boy Andrew v. St. Rognvald (owners)*⁶³ the 'St. Rognvald' was at fault in overtaking too close, and the 'Boy Andrew' was also at fault for altering course while being overtaken. The question was whether the former was guilty of contributory negligence. Lord Simon answered in the affirmative, but stated "the suggested test of last opportunity seems to be inaptly phrased and likely in some cases to lead to error...in truth, there is no such rule - the question, as in all cases of liability for a tortious act, is not who had the last opportunity of avoiding the mischief, but whose action caused the wrong'." For contributory negligence, all that is required is that the plaintiff should have failed to take reasonable care for his own safety. The standard of care is in general the same as that in negligence, and is in the same manner objective and impersonal. Lord Denning in *Jones v. Livox Quarries Ltd.*⁶⁴ Stated that a "person is guilty of contributory negligence if he ought to have foreseen that if he did not act as a reasonable, prudent man, he might be hurt himself, and in his reckonings he must take into account the possibility of others being careless." Consequently, the courts are to take into account both culpability and causative potency when making such an evaluation.

In the US, the courts used to apply the major-minor fault. This rule provides that where the clear fault of one vessel is shown to have been sufficient alone to account for the disaster, there will be a presumption that the vessel is solely liable, unless rebuttable by clear and contrary proof of contributing fault. That rule was implicitly repudiated by the

⁶³ [1948] A. C. 140, 149

⁶⁴ [1952] 2 Q. B. 608, 615

Supreme Court in *United States v. Reliable Transport Co. Inc.*⁶⁵, where the court discarded the 'equally divided damages' rule in favour of a 'comparative negligence' rule. This rule provides that where two or more parties have contributed by their fault to cause property damage in a maritime collision, liability for such damage is to be allocated among the parties proportionately to the comparative degree of their fault. Under this rule, it is fault, and not the degree of causation on which the liability is apportioned. The 'major-minor fault' presumption is no longer good law in the US⁶⁶.

3.3.2 Apportionment

The court must also apportion the fault between the vessels involved in the collision, and this is not an easy matter. In *The Sea Star*⁶⁷, Brandon J. found that the situation of danger was caused by the 'Sea Star', but that the other vessel was also at fault in her failure to post a proper look out, and in not responding to the incident in a prudent manner. Thus, although the 'Sea Star' was held 75% to blame, the other vessel had to stand 25% of the loss, as damages are calculated proportionate to the degree of fault.

Similar factual scenarios took place in the *State of Himachal Pradesh*⁶⁸. Here the court explained the situation where part of the blameworthiness was in an 'agony of the moment' situation. In considering the blameworthiness of that failure, the Court took into account the actions of the Master of the vessel, who was taking into account the fact that his vessel, while large, has little manoeuvrability, and also had little water under her. He was reluctant to reduce speed, or reverse his engines as a result of the effective control he would lose. On the evaluation of the court, the vessel was only 15% to blame for the collision, and damages would be apportioned accordingly. In the US, the courts apply the

⁶⁵ [1975] AMC 541

⁶⁶ See *Neptune Maritime v. Essi Camilla* [1984] AMC 2983

⁶⁷ [1976] 1 Ll. Rep. 511; CA (dismissed) [1976] 2 Ll. Rep. 477

⁶⁸ [1985] 1 Ll. Rep. 341

comparative negligence standard set out in *United States v. Reliable Transport Co.*⁶⁹. This standard provides that when two or more parties have contributed by their fault to cause property damage in a maritime collision, liability for such damage is to be allocated among the parties proportionately to the comparative degree of their fault. Under this standard, it is the culpability, but the degree of causation on which liability is apportioned.

Where it is impossible to apportion degrees of fault, the court must apportion the blame in equal degrees. In *The Sedulity*⁷⁰ Willmer J. explained the meaning of the words 'equally to blame' by stating that one "... (should) not read those words a meaning that both tortfeasors must necessarily be found to blame in equal degrees... both tortfeasors (must be) in equal case in the sense that the faults of each must be held to be contributory in some degree." Winn L. J. refers to this in the *Lucille Bloomfield*⁷¹ where he said: "When I look again at Section (1) of the Maritime Conventions Act, 1911, I observe... a perfectly clear indication that the primary task of the court is to apportion liability according to fault. This is followed by the proviso that if the court finds it is not possible to apportion different degrees of fault, the court is to declare an equal distribution of fault. It is therefore... a condition precedent to a declaration that liability be apportioned equally that the court has found it impossible to establish different degrees of fault."

Usually, the courts apportion the liability for the damage or loss by deciding separately, in reference to each vessel, what was the degree in which the fault of one caused the damage or loss. This process involves comparison and it requires an assessment of the interrelationship of the respective faults of each vessel. In *The 'Golden Mistral'*⁷², Sheen J. found that although the 'Golden Mistral' was not exhibiting an anchor light at the time of the collision, the other vessel should have seen her much earlier than she was seen.

⁶⁹ [1975] AMC 541

⁷⁰ [1956] 1 Ll. Rep. 510

⁷¹ [1967] 1 Ll. Rep. 341, 351

Blame for a collision is, however, not to be apportioned by counting or 'totting up'⁷³ the number of faults. The court has to consider qualitatively the navigational faults, and their interplay in contributing to the collision. As per Lord Denning in *The 'Koningin Juliana'*⁷⁴, the "degree of fault is not to be measured by counting the number of faults on each side. It is to be measured by assessing both their blameworthiness and their causative effect."

Apportionment of blame has a number of difficulties inherent in it. Firstly, it must be said that the trial judge who has the benefit of hearing the evidence for the first time is at an advantage to the appellate judge. In fact, since apportionment usually involves serious questions of fact, and almost none of law, then it is usually only in exceptional circumstances that the appeal tribunal will revise the apportionment decisions of the trial judge. It is commonplace that courts attribute greater blame to the ship which creates the position of difficulty. However, many courts find it difficult to assess the causative potency in terms of percentage. As per Lord Wright in *The McGregor*⁷⁵: "(Apportionment) is a question of the degree of fault, depending on a trained and expert judgement considering all the circumstances, and it is different in essence from a mere finding of fact in the ordinary sense. It is a question, not of principle or of positive findings of fact or law, but of proportion, balance and relative emphasis, and of weighting different considerations. It involves an individual choice of discretion, as to which there may well be differences of opinion by different minds." As has been indicated before, where it is impossible to say that there is any clear preponderance of blame on either side then liability must be apportioned equally.

⁷² [1986] 1 Ll. Rep. 407

⁷³ Mankabady, pg. 306

⁷⁴ [1974] 2 Ll. Rep. 353, 356

⁷⁵ [1943] A. C. 197

A more positive fault is not necessarily more blameworthy than negligent navigation. But, the fact that it may be so is apparent from comparing extreme cases - for example grossly negligent navigation as opposed to deliberate running down. The court is free to attach blame where it sees fit, but as Lord Simon of Glaisdale stated in *The Savinia*⁷⁶, whether the court should attach more blame to a deliberate breach of a rule as opposed to a fault or omission "...depends on all the circumstances, and in particular, the nature of the rule and the mode of its breach, on the one hand, and the degree of negligence in navigation on the other."

An interesting concept is the right of recovery against two negligent vessels. When an innocent vessel suffers damage through the combined negligence of two other vessels, the whole damage may be recovered from either wrongdoer. The rule is that where the separate tort of two independent actors cause damage, the Plaintiff may recover in full from either of them⁷⁷. Where one vessel is made to pay the entire damage resulting from a collision for which another vessel was similarly to blame, the former may recover a contribution from the other. In *The Cairnbahn*⁷⁸, the vessel collided with a barge being towed by a second vessel. The barge owners sued both vessels which were held equally to blame. The barge owners proceeded successfully against one 'The Cairnbahn', which in turn claimed to recover from the other defendant half of the money. It was held that they were entitled to do so, because the damages which she had paid were part of the damages caused by the combined acts of the vessels.

3.3.3 Remoteness

Remoteness of damage is concerned with the question of whether damages may be recovered for particular items of the plaintiff's loss. Measure of damages, on the other

⁷⁶ [1976] 2 Ll. Rep. 123, 134

⁷⁷ See *The S.S. Devonshire v. Barge Leslie* [1912] A. C. 634

⁷⁸ [1914] P. 25

hand, refers to the calculation of the amount of pecuniary compensation which the defendant must pay in respect of those items of the plaintiff's loss which are not too remote. The rule in respect of remoteness of damage is the defendant is not responsible for all the consequences of his wrongful act or omission. Damages which the court considers to be too remote cannot be recovered. Several decisions have in fact referred to the direct, immediate or last cause. In *Re Polemis*⁷⁹, Scrutton J. stated that damage is indirect if it is "due to the operation of independent causes having no connection with the negligent act, except that they could not avoid the results." In this case, a ship was hired under a charter which excepted both the ship owner and charterers from liability for fire. Among other cargo, there was a large amount of flammable material in tins. During the voyage, the tins leaked, filling the hold with vapour. Upon unloading, due to the negligent actions of the servants of the charterers, a spark was created, and flames engulfed the ship which was totally destroyed. The charterers were here held liable, because the damage was deemed to be direct. However, in *The Wagon Mound*⁸⁰ the Privy Council (PC) expressed its disapproval with the principle of *Re Polemis* and refused to follow it. The PC held that a plaintiff can recover damages for the negligence of a defendant only if that damage could not be foreseen by a reasonable man, It is not enough that the damage was a direct physical consequence of the negligent act. The PC laid much stress upon the difficulties of the directness test, which they felt was unfair. "It does not seem consonant with current ideas of justice or morality that for an act of negligence, however slight or venial, which results in some trivial foreseeable damage, the actor should be liable for all consequences, however unforeseeable, however grave, so long as they can be said to be 'direct'."⁸¹ Thus, it is the "foresight of the reasonable man alone that can determine responsibility." The word 'foreseeable' has a different meaning from 'probably' or 'likely'. Foreseeability is a relative concept, and as such is not absolute. It must be noted, however, that foresight as a test of remoteness is heavily qualified by the fact that

⁷⁹ [1921] K. B. 560, 577

⁸⁰ *Overseas Tankship (UK) Ltd. V. Morts Dock & Engineering Co. Ltd.* [1961] A. C. 388

⁸¹ *ibid.* pg. 424

neither the precise extent of the damage nor the precise manner of its inflection need be foreseeable. It just need be a consequence which the reasonable man would expect to flow from his actions.

3.4 CAUSATION

Where fault is not an effective cause of damage, or where damage is suffered without fault, no cause of action arises. Thus, the breach of duty must have caused or contributed to the collision and so there must be a link, a so-called 'chain' between the breach and the damage. In *The Empire Jamaica*⁸², a collision occurred, and it was subsequently discovered that the Officer of the watch did not possess a certificate of competence. The question before the courts was whether the lack of qualification was the cause of the accident. The evidence showed that the officer was fully competent, and it was held that there was no causal connection between the lack of certification and the collision.

Frequently, the court finds a number of faults on each ship such as bad lookout and excessive speed. Some of these may contribute to the collision, while others may not. The rule is that only the faults which are the 'proximate' cause are to be taken into account in the assessment of the blame. The proximate cause is the efficient cause and not merely an incidental cause which may be nearer in time to the event. Although it is convenient to use the word 'chain' when referring to causation, as per Lord Shaw⁸³, it may be more accurate to refer to causation as a 'net'. "Causation is not a chain, but a net. At each point influences, forces, events, and precedents meet, and the radiation from each point ends infinitely. At the point where these various influences meet, it is for the judgement as upon a matter of fact to declare which of the causes thus joined at the point

⁸² [1957] A. C. 386

⁸³ *Leyland Shipping Co. v. Norwich Union Fire Insurance Society* [1918] A. C. 350

of effect was the proximate and which the remote cause." Proximate" here therefore doesn't mean proximate in time, but rather "proximate in efficiency".

Where there are two concurrent or interacting causes of loss, the efficient or predominant cause is deemed to be the proximate cause. In *The Judith M*⁸⁴, both parties admitted blame for excessive speed, failing to reduce speed and bad radar look-out. It was held that although both were negligent, and both actions contributed to the collision, the actions of the 'Glaciar Azul' were more to blame than the 'Judith M', and so apportionment was forty percent to the 'Judith M', and sixty percent to the 'Glaciar Azul'.

Where one vessel is at fault for a considerable time apparent to the other, which could have avoided the collision, the latter may be the only vessel to blame. In *Admiralty Commissioners v. S. S. Volute*⁸⁵, the House of Lords stated that where the defendant's negligence is subsequent to that of the plaintiff, the plaintiff's negligence is still contributory to the collision if there is not "a sufficient separation of time, place, or circumstance between the plaintiff's negligence and the defendant's negligence to make the defendant's the sole cause of the collision". Thus, Lord Shaw has observed that there is "a period of time during which the causal function of the act or approach operates, and it is not legitimate to extend that cause backwards into an anterior situation."⁸⁶ There may therefore be a break in the chain of causation - A *nova causa interveniens*. This means that although the defendant's breach of duty is a cause of the plaintiff's damage, nevertheless some other intervening event is regarded as the sole cause of that damage. The intervening event could be a natural one, an act of a third party, or an act of the plaintiff himself. In *The Fogo*⁸⁷ Cairns J. said that the actions of the Plaintiffs in not making a tug available for the 'Trentbank' is what actually caused her to sink. "That omission was in fact a *nova causa interveniens*, and the 'Fogo' was not liable." Thus, the chain of

⁸⁴ [1968] 2 Ll. Rep. 474

⁸⁵ [1922] 1 A. C. 129

⁸⁶ See *Anglo-Newfoundland Development Co. v. Pacific Steam Navigation Co.* [1968] 2 Ll. Rep. 474

causation was broken. In contrast, in *The 'Calliope'*⁸⁸ the court found that the subsequent negligence of the plaintiffs did not break the chain of causation as this would have resulted in the resurrection of the last opportunity rule based upon the facts at hand.

An example of an intervening natural event was the *Carslogie Steamship Co. Ltd. v. Royal Norwegian Government*⁸⁹ where the Plaintiff's ship was damaged in a collision for which the other ship was wholly responsible. After temporary repairs, the ship went on a voyage to the US. Such a voyage would not have been made had the collision not occurred. During the Atlantic crossing, she suffered heavy damage due to bad weather. The House of Lords held that the heavy weather damage "was not in any way a consequence of the collision, and must be treated as a supervening natural event occurring in the course of a normal voyage."

3.5 LIMITATION OF LIABILITY

The concept of limitation of liability of the shipowner has existed in maritime law for a long time. In fact, European maritime law has long recognised the right of the shipowner to limit his liability in the case of collision to the value of the ship and any anticipated freight. This limitation action (which has been termed a kind of 'statutory insolvency') was introduced to the English legal system in 1733⁹⁰. This was through the Responsibilities of Shipowners' Act, which had the effect of limiting Shipowners' liability for theft by the Master or Crew to the value of the ship or freight. It was not until the 19th Century that the concept of limiting liability for collisions began to mitigate the previous stance of unlimited liability. The basic idea behind limitation was to give encouragement to shipowners in the pursuit of the Maritime adventure. It has been suggested that if a shipowner was to gamble all his assets in the adventure, only to be left open to the very

⁸⁷ [1967] 2 Ll. Rep. 208

⁸⁸ [1970] 1 Ll. Rep. 84

⁸⁹ [1952] A. C. 292

⁹⁰ Mankabady, pg. 328

real possibility that he could be faced with exposure to unlimited liability for occurrences over which he had no control, his adventurous spirit might be stifled⁹¹. Over the years, the rules on limitation were developed and eventually extended to cover loss of life and personal injury.

The criteria for fixing the value of limitation has differed over the years, and depending on the various legal systems different standards were in the past maintained. For example, in some legal systems, the maximum limitation was by reference to the value of the vessel and her impending freight. In others it was calculated on the tonnage of the vessel. This difference of approach was the main reason for the formulation of the 1924 Brussels Convention on the Unification of Certain Rules Relating to the Limitation of Liability of Owners of Sea-Going Vessels. This convention, however, did not solve the issue, and the provisions were based on compromise. In 1957, the Convention was revised, and a system which adopted the tonnage of the ship as the limit of liability. This convention also had its share of problems, and in 1976, a new convention on Limitation of Liability for Maritime Claims (LLMC) was agreed upon. This convention came into effect in 1986, and sets the present basis for liability⁹². Collision cases are covered by the convention on the basis of Article 2 (1) which includes damage arising in connection with the operation of a ship.

In the 1924 convention, in order to limit liability, one merely had to show the absence of fault on the part of the party who wished to limit his liability. This fault was described in *Lord v. Goodall S.S. Co.*⁹³, as "...a personal participation by the owner in some fault or act of negligence, causing or contributing to the loss, or a condition of things likely to produce or contribute to the loss, without appropriate means to prevent it." The

⁹¹ Hill, pg. 381

⁹² Although it must be remembered that there are actually 4 regimes for limiting liability on an international scale. There are those who still follow the 1924 and 1957 conventions, as well as those who follow none.

⁹³ 15 Fed. Cas. 884; No. 8506 C.C. Cal. 1877

amount of limitation here was determined by the value of the vessel, the freight and its accessories, provided that it did not exceed an aggregate sum.

The 1957 convention, however, introduced a limit of liability based upon the tonnage of the vessel. Thus, a new level of calculating the liability was determined. However, the basis under which one could limit one's liability had also changed. The person should not be guilty of 'fault or privity'. The latter word in this case means that it is necessary to prove knowledge on the part of the person⁹⁴. It must be pointed out, however, that privity means not only a positive knowledge, but a presumed or constructive knowledge⁹⁵. The tests used to describe whether the actual fault or privity rule comes into play with regard to certain persons (specifically, companies, and what could be said to be the controlling mind) is twofold. Firstly, who could be said to be 'in control' of the particular situation; and whether or not it is likely that if the person had performed and carried out his duties properly, the damage or loss would not have occurred⁹⁶.

The LLMC set a new amount of limitation. The amount set by the 1957 convention was adequate at the time, but the situation has changed, and the amount of loss caused by damage now is not adequately represented by the previous regime. The 1976 Convention has preserved the distinctions outlined in the 1957 convention, but now apportionment is set on a sliding scale. Thus, there is a different level of limitation for loss of life or personal injury as opposed to all other claims. Under the LLMC, a limitation fund is set up which is increased compared to the 1957 convention.

Under article 4 of the convention, a person may lose his right to limit his liability if 'it is proved that the loss resulted from his personal act or omission, committed with the intent to cause such loss, or recklessly and with knowledge that such loss would probably

⁹⁴ *The Eurysthenes* [1976] 2 Ll. Rep. 171

⁹⁵ *The Marine Sulphur Queen* [1973] 1 Ll. Rep. 88

result'. This Article reverses the burden of proof. Under the existing law, the burden of proof is on the party seeking to limit his liability. However, under Article 4, it is the person seeking to bar limitation who must prove it. Also, of importance here is that the language of the 1957 convention (actual fault or privity) does not appear. Under this regime, the person loses the right to limit his liability here there was intention to cause loss or recklessness as to the outcome of his actions.

⁹⁶ See *The Lady Gwendolyn* [1965] 1 Ll. Rep. 335

4. CRIMINAL LIABILITY

A crime is an act or omission which is considered by Parliament to cause harm to the public. Where Parliament wishes such an act or omission to be considered as a crime, it is so stated by legislation, and is punishable in a manner related directly to the seriousness of the offence. Thus, an offence is a transgression of the local law. It therefore gives the criminal courts jurisdiction over the matter in question, which can be tried in the local courts, as in section 236 of the Shipping Act 1998 (Jamaica). Not every breach of a statutory duty creates an offence, but rather, it must be expressly stated, and depends upon whether or not the duty is mandatory, and if another means exists for its enforcement. A breach of the Collision Regulations gives rise to a number of criminal offences, which differ from civil offences in that criminal procedures are applied to deal with them.

Criminal procedure is beyond the scope of this paper, but for the purposes of clarification, crimes are classified as summary or indictable offences. Summary offences are those which are tried by a judge, sitting without a jury, by courts having summary jurisdiction. On the other hand, indictable offences are brought before the Supreme Court and are heard by a judge sitting with a jury. The classification of crimes as summary or indictable reflects the seriousness of the matter, with indictable offences being the more serious. They therefore have more stringent penal provisions.

4.1 ELEMENTS OF A CRIME

A crime consists of two elements: *mens rea*, which is the mental element, and *actus reus*, which is the act itself. A crime exists when both elements coincide⁹⁷. *Mens rea* refers to the moral blameworthiness of the individual. That is, the mental state of the individual who has committed the act. There are differing standards of *mens rea* required for different crimes. Broadly categorised, these may be wilful default, recklessness or negligence. Wilful default is where an individual, with intent, performs an act or omission which he knows will have a particular result, and commits the act indifferent to its outcome. Thus, in the case of *Bradshaw v. Ewart-James (The "N.F. Tiger")*⁹⁸, the question was whether the master of a ship could be guilty of an offence of contravention of the collision regulations which occurred after he has left the bridge. The court determined that the word 'wilful' was synonymous with the word 'conscious', and in this case the Master was didn't consciously or wilfully allow the default to happen.

Recklessness on the other hand in the deliberate taking of an unjustifiable risk. The element of foreseeability is important here in that the individual foresees that the event will probably result from his action. Recklessness with respect to circumstances means realisation that they may exist without either knowing or hoping that they do.

It has been a question of debate whether negligence fits into the discussion of *mens rea*, but in this situation negligence could be the central cause of a collision, and as such it shall be discussed here⁹⁹. A man acts negligently when he brings about a consequence which a reasonable or prudent man could have foreseen and avoided. The nature of negligence is an objective standard, but it does not rule out the possibility of

⁹⁷ Although there is the type of liability called strict liability which accrues whether or not there was any intention to perform the act. Liability accrues once the action is done, regardless of the mental state of the individual.

⁹⁸ [1982] 2 Ll. Rep. 562

⁹⁹ *Hodge v. Higgins (The Harcourt)* [1980] 2 Ll. Rep. 589

subjective evaluation. As with everything else, all the fact must be taken into account. Negligence on the part of the Master is not by itself criminal, but it may be relied upon in criminal proceedings to establish liability.

The *actus reus*, on the other hand, covers the actual act, conduct or omission. The *actus reus* can only be established by looking at the specific definition of the crime. Thus, under section 236 of the Shipping Act (Jamaica), a Master is guilty of an offence where he fails to report an accident¹⁰⁰. An offence may also be committed where there is no 'act' or 'omission', but merely a state of affairs. For example, if the master is drunk, as long as this 'state of affairs' continues, the *actus reus* of the crime continues. Such an offence is called a 'status' or 'situation offence'.

4.2 STRICT LIABILITY

In offences of strict liability, it is not necessary for evidence of knowledge to be adduced. Thus, the defendant's honest and reasonable beliefs could not afford a defence. Offences of strict liability are exceptions to the general rule of *mens rea*. This element need not be proven, and the justification for this lies in the special nature of the crimes themselves. These are almost all the creation of statute, and reflect the desire of Parliament to make certain acts, once committed, criminal. These acts are usually not criminal in and of themselves, but contrary to the public interests¹⁰¹.

4.3 VICARIOUS LIABILITY

This concept means that the master is liable for the acts of his servants, performed in the course of his employment. The phrase 'course of his employment' should be interpreted in light of the contract of employment, and all circumstances

¹⁰⁰ See *Harding v. Price* [1948] 1 K. B. 695

¹⁰¹ *Sherras v. De Rutzen* [1895] 1 Q. B. 918

connected thereto. This concept, which is well established in tort law, is not applicable in criminal law. This is because of the general principle that one cannot be liable for the crimes of another. There are three circumstances in which this may occur. First, the master may be held liable for the acts of his servant that he has delegated to him. Secondly, the acts may be performed by the servant, but are in law the master's acts. Thirdly, the master and the servant may both be liable.

The officer of the watch is responsible for the safe conduct of the ship in accordance with his orders. The presence of the master on the bridge does not relieve the officer of his duties until he has been formally relieved. The master may delegate some of his duties, but not the responsibility for it, since it would become impossible to enforce a breach of the regulations if an escape route was via delegation. In the second scenario, command of the ship is entrusted to the master alone. Thus, he enjoys power over all persons on board the vessel. Since command rests with the master, then the acts of other seamen on board the vessel may be regarded as the master's acts. Thus, there is a distinction between delegation of matters of seamanship, and delegation in matters of law. This situation is applicable especially where command is a central feature of the *actus reus*¹⁰².

4.4 DEFENCES

When one pleads no guilt to a charge, the defence is often based upon mistake, drunkenness or intoxication, necessity or superior orders.

Mistake will excuse an act where the law requires some element of wilful default or recklessness relative to some part of the *actus reus*. The leading case on mistake is *Tolson*¹⁰³, where the defendant, on reasonable grounds believed that her husband had

¹⁰² See *Slater v. Reed and McGrath (The Varos)* [1980] 2 Ll. Rep. 581

¹⁰³ (1889) 23 QBD 168

been drowned at sea. When she married again five years later, the court found that she had genuinely made an error in believing that her husband was deceased, and she was not guilty of bigamy. The mistake, whether reasonable or not, will not be accepted as a defence where the crime is one of strict liability¹⁰⁴. Also, mistake or ignorance of the law is no defence. The limits of this defence were discussed in *The Nordic Clansman*¹⁰⁵ where it was determined that a reasonable mistake as to fact, such as the ship's position or course, was a good defence, but a mistake as to the meaning or scope of words in the law will not suffice. Intoxication is not a good defence, and rarely works. In fact, it is an offence to be in charge of the ship while under the influence of drugs or alcohol. The *actus reus* of this offence is the Master being in command with a particular level of drugs or alcohol in his system. Necessity is an ambiguous and very subjective defence. If the Master is faced with limited choices, all of which will either break the criminal law or will cause harm to himself and others, he may be forced to select the least damaging one on the spur of the moment, and plead 'agony of the moment'. This has to be decided on a case by case basis, and in not all instances will it succeed. It may however have a mitigating effect upon the penalty imposed for contravention of the law.

4.5 PARTICULAR OFFENCES

An example of a specific offence is the failure to observe the collision regulations. Section 229 of the Shipping Act, 1998 (Jamaica), requires all owners and masters of vessels to comply with the collision regulations, and to carry all lights and sounds as are required by the regulations¹⁰⁶. The Act goes on in subsection (2) to state that where "contravention of the collision regulations is caused by the wilful default of the Master or owner of a vessel, he shall be guilty of an offence, and upon conviction thereof, shall be liable to a fine not exceeding five hundred thousand dollars."

¹⁰⁴ in the *Tolson* case, the minority took the view that the offence of bigamy was one of strict liability.

¹⁰⁵ [1980] 1 Ll. Rep. 31, 36

¹⁰⁶ s. 299(1)

Yet another example of a specific offence is the failure to assist a vessel in distress. It is the duty of the master to assist vessels in distress and such a duty is provided for in a number of different international conventions¹⁰⁷. Article 11 of the Convention for the Unification of Certain Rules of Law Relating to Assistance and Salvage at Sea, 1910 states that every master, so far as he can do so without serious danger to his vessel, her crew or her passengers, render assistance to everyone found at sea in need of such assistance. This was further entrenched in the Maritime Conventions Act of the UK in 1911, and the same principle exists today in a narrower form in the Jamaica Shipping Act, 1998 in section 233, where the Master is obligated to render assistance to any vessel with whom he has collided. The principle exists in its traditional manner in section 236, and the failure for acting in the required manner is a fine not exceeding two hundred and fifty thousand dollars (or imprisonment for a term of not more than 2 years in s. 223).

¹⁰⁷ See UNCLOS article 98

5. COLLISION REGULATIONS

The rules of the road have been developed over centuries of use of the seaways. A set of practices which seemed to be the most logical way to deal with a particular set of circumstances became concretised into customary international law. These customary rules have codified in a number of countries as far back as 1863.¹⁰⁸ These regulations have been modified over the intervening years, and have been replaced by successive sets. They were first codified Internationally by the Brussels Convention, 1910. They have been updated and redrafted by the Safety of Life at Sea Conventions and new regulations were annexed to the Final Draft of the 1960 Conference.

The Collision regulations (COLREGS) are comprised of 38 rules, which are divided into 5 parts, followed by 4 annexes. Part A deals with the application of the rules, Part B deals with steering and sailing rules, while Parts C and D deal with lights and shapes, and sound signals respectively. The exemption provisions are dealt with in Part E. The Annexes, on the other hand, deal with the details of placement of lights (Annex I), additional signals for fishing vessels (Annex II), technical details on sound signal appliances (Annex III) and distress signals (Annex IV).

5.1 INTERPRETATION

The COLREGS are designed for the practical use of mariners. Their primary task is to “avoid collision or even the risk of collision from happening and their secondary objective is to set up standards of conduct for navigating officers.”¹⁰⁹ In order to achieve these objectives, uniform interpretation is needed. This will lead to consistency in action taken with regards to various maritime Encounters. Thus, the parameters are set so that

¹⁰⁸ See Mankabady, pg. 47. Order in Council of Jan 9, 1863, London Gazette, Jan. 13.

¹⁰⁹ Mankabady, pg. 71

in any number of potential accident situations, the parties will know what to do in order to minimise and mitigate loss or damage. Thus, the COLREGS take into account a wide range of different factors and considerations, and “due regard shall be had to all dangers of navigation... and to any special circumstances, including limitations of the vessels involved...to avoid immediate danger.”¹¹⁰ It is clear that in construing the rules, attention must be given to the perils of navigation, collisions and their effect upon the marine environment¹¹¹. However, nothing in the rules shall excuse the owner, master or crew of the vessel from complying with the rules¹¹². This rule must however be interpreted in a liberal fashion. Since the rules are in some cases “loose-textured”, the law of collision has been judiciously interpreted in a liberal way based upon the facts of each case and the purpose of the law. When applying the rules and concept of ‘good seamanship’ to individual cases, judges enjoy a discretion to determine the scope, and therefor mould the law of collision based upon certain circumstances. This sort of judgement is necessary because of the difficulties of evidence, and therefore there is some degree of speculation as to how the collision actually happened. Thus, in *The Sea Star*¹¹³, the CA judge remarked upon the necessity of sometimes speculating upon how the collision in question could have taken place. Although not a discretion to be used lightly, in some instances it may be of great help in making a cloudy issue more clear. A similar thing occurred in *The Adolf Leonhardt*¹¹⁴ where the learned judge went further, and then speculated upon what the ship SHOULD have done.

A number of rules have arisen with respect therefore to the interpretation of the collision rules and the collisions themselves. Thus, manoeuvrability or limitations on manoeuvrability are important factors in the interpretation of the rules. However, vessel size and type of cargo are not usually relevant. Since the rules are instructions to

¹¹⁰ International Regulations for Preventing Collisions at Sea, (COLREGS) 1972, Rule 2(b)

¹¹¹ *The Ontario* [1931] A. C. 194

¹¹² COLREGS, Rule 2(a)

¹¹³ [1976] 2 Ll. Rep. 477, 487

¹¹⁴ [1971] 2 Ll. Rep. 318

mariners, the actions described in them must be taken in ample time to carry out their purpose. The rules are designed to prevent collisions and imminent risk of collisions as well. In deciding whether the Master is at fault, it must be borne in mind that where one is placed into difficulty as a result of the negligent actions of another person, his actions cannot be judged too harshly. When judging actions, they must be looked at from the point of view of the person involved at the time, and not with hindsight. It must also be borne in mind that the rules have been read and interpreted by seamen, therefore they should be interpreted from the point of view of mariners. In *The Koningen Juliana*¹¹⁵, Lord Denning stated that the collision rules “should be interpreted by the courts in the same way as a seaman would interpret them.” Another point is that in making decisions, it can be helpful to take note of decisions and opinions of foreign courts¹¹⁶, and make use of ‘travaux préparatoire’. This more so because the COLREGS are based upon international convention, and a fundamental desire of the law is uniformity of application¹¹⁷.

5.2 THE RULES

5.2.1 Part A

The first rules (1-3) are general, and lay the foundation for the COLREGS.

Rule 1 deals with application of the rules. It states that the rules shall apply to all vessels upon the high seas and in all waters connected therewith navigable by seagoing vessels. The word ‘vessel’ is defined in rule 3(a) and includes “every description of water craft, including non-displacement craft and seaplanes, used, or capable of being used, as a means of transportation on water”. However, this definition does not include a wreck. The definition also limits the application of the rule to certain geographical areas, which are the high seas, and all waters connected therewith which are navigable by seagoing

¹¹⁵ [1974] 2 Ll. Rep. 353, 354

¹¹⁶ See *Stag Line Ltd. v. Foscolo, Mango & Co.* [1932] A. C. 328

vessels. The High Seas are defined in section 86 of the United Nations Convention on the Law of the Sea, 1982, (UNCLOS) as all parts of the sea that are not included in the internal waters of a state (here including territorial waters) or in the archipelagic waters of an archipelagic state. Article 3 of UNCLOS gives every state the right to establish the breadth of its territorial sea, up to a limit of 12 miles from the baselines. Navigable by sea-going ships means waters that are used or capable of being used by vessels. A dry-dock was held to fall within this definition in the case of *Rankin v. De Coster*¹¹⁸. Nothing in the rules, however, shall interfere with the right of the lawmakers to create their own regime within inland waters and territorial sea (subsection (b)). In order to ensure that there is uniformity, however, the subsection goes on to state that the local rules should adhere as closely as possible to the collision rules. Subsections (c), (d) and (e) continue to state that the local authority has the right to give exemption to ships of special design, or to create special regimes for certain circumstances, and to create traffic separation schemes.

Rule 2 deals with the responsibility of the Owner, master and crew in applying the rules. Subsection (a) states that nothing in the rules will exonerate the relevant parties from complying with the rules “or the neglect of any precaution which may be required by the ordinary practice of seamen or the circumstances of the case”. The obligation on the part of these parties is imperative. Not only must they carry out the duties stipulated by the rules, they must also take precautions required by the ordinary practice of seamen. Failure to do so will result in fault, which, if it causes damage, will create civil liability in the offender. If the transgression is a criminal offence, then criminal liability will attach. There is no rigid test of ‘ordinary practice of seamen’ or ‘good seamanship’. This is a question of fact to be determined in light of the relevant circumstances¹¹⁹. One view states that ‘good seamanship’ is a fundamental principle from which all other rules, (including the collision regulations) spring¹²⁰. According to another view, good seamanship principally

¹¹⁷ Mankabady, pg. 75

¹¹⁸ [1975] 2 Ll. Rep. 84

¹¹⁹ See *The British Aviator* [1964] 2 Ll. Rep. 403

¹²⁰ See *The Roseline* [1981] 2 Ll. Rep. 410, 411

fills the gaps left in the rules. The rules “...do not contain the whole wisdom of the sea...”¹²¹, and discretion must be tempered by common sense in a nautical manner. It is clear that whatever the case, this requirement for ‘good seamanship’ provides for sensible behaviour. The section also goes on to state in subsection (b) that only where absolutely necessary may the rules be departed from. If the strict adherence to the rules places a vessel in a potential collision situation, the Master is allowed to deviate from the rules under this ‘general prudential’ rule¹²². The departure from the rules is allowed once four conditions are fulfilled. It must be absolutely necessary; it must be adopted to avoid extreme danger; it must only be exercised to the extent that the danger requires; and the adopted course must be reasonable in the prevailing situation¹²³.

Rule 3 deals with the definitions particular to the convention, and consists of twelve paragraphs. The use of this paragraph is more to assist mariners to apply the rules, and spell out the accepted meanings of terms. A few of the more interesting definitions will be dealt with here. Rule 3(f) defines a vessel “not under command” and means a vessel which, through some exceptional circumstance, is unable to manoeuvre in the required manner. A vessel is considered ‘not under command’ if she is unable to get out of the way of another vessel¹²⁴ because of faulty steering gear, or by an accident, for example. Another interesting definition is the one following this, rule 3(g), which speaks to vessels “restricted in her ability to manoeuvre”. This differed from paragraph (f) in that it applies to vessels which are restricted by nature of the work that they are doing. The list attached to the definition is not exhaustive, but merely an example of the situations like a dredger, or a tug.

Rule 3(j) deals with a vessel which is “underway”. This situation occurs when a vessel is no longer constrained by an anchor. Thus, if a vessel is drifting, she is

¹²¹ *The Hardwick Grange* (1940) 67 Ll. Rep. 359

¹²² *The Vysotsk* [1981] 1 Ll. Rep. 139

¹²³ *The Agra* [1866] L. R. 1 P. C. 501

¹²⁴ as in *The Albion* [1952] 1 Ll. Rep. 38

considered to be “underway”. However, if the vessel is fixed to another object which is moored or to any fixed object, she is not considered “underway”, as in *The Devotion II*¹²⁵. Another important definition is rule 3(k), which deals with vessels deemed to be “in sight of” one another. This is when the vessel can be confirmed visually by each other by the human eye.

5.2.2 Part B

Rule 4 merely defines the application of rules 5 to 10, which comprise section 2. These rules apply in any condition of visibility, both clear and restricted.

Rule 5 requires that every vessel is to maintain a lookout at all times “by sight and hearing”, as well as by any other appropriate means. This duty to maintain a lookout is part of the general practice of seamen, and is also a rule of prudence. Thus, the rule requires vigilance at all times. “Look-out”, as per Wilmer. L.J., in *The Santander*¹²⁶, means “an appreciation of what is taking place”. The words “all available means “ in the definition embraces radar, and other tools, and the intelligent interpretation thereof. The look out rule does not, however, do away with the need for vigilant watch by “sight and hearing” when radar is in use¹²⁷. The person on look out duty must be a competent seaman of the adequate age and experience. There is no specific place of lookout, but the person so doing must have an unobstructed view. The usual place is on the bridge. The person on look out should not leave his post, or have his attention diverted. In many different cases, bad look out is the overriding cause behind, or at least contributory to, many accidents which were otherwise avoidable. In *The Statue of Liberty*¹²⁸, the collision occurred on a fine moonlit night with excellent visibility. The only recourse of the court was to find that the look out was faulty, and contributed in a large way to the collision.

¹²⁵ [1979] 1 Ll. Rep. 509

¹²⁶ [1966] 2 ll. Rep. 77

¹²⁷ See *The Esso Wandsworth* [1970] 2 Ll. Rep. 303

¹²⁸ [1970] 2 Ll. Rep. 271

Rule 6 states that every vessel shall at all times proceed at a safe speed, in order to take proper and effective action and have enough stoppage room to avoid a collision. Violation of this rule in conjunction with Rule 5 is the usual cause of collisions. The term “safe speed” replaces the term previously used of “moderate speed”, and refers to a speed which would not result in risk to the vessel or to other vessels. Since a vessel can be travelling quickly, and still be navigating in a safe way, this cannot be determined in terms of knots. It must rather be evaluated on the basis of the circumstances at the time. These circumstances are outlined in the section. Thus, one must consider, *inter alia*, the state of visibility, the density of traffic, the ease of manoeuvrability, the condition of the sea and the draft of the vessel¹²⁹. This was done in *The Sanchin Victory*¹³⁰ where Sheen, J. questioned the Trinity Masters on what a true safe speed would have been for the vessels involved taking into account the circumstances at the time.

The speed referred to in rule 6 is the speed through the water, and not the engine speed. If the vessels are travelling at excessive speed, then they may be unable to take timely action to avoid a collision because of insufficient time to do so at short range. In *The Gilda*¹³¹, the court found that *The Gilda* was guilty of excessive speed and bad look out, and was therefore held two-thirds to blame for the resulting collision. In *The Roseline*¹³², both vessels were at fault for proceeding at excessive speed and allowing a close-quarters situation to develop. A close-quarters situation is one whose existence depends on many different circumstances, but has been said to arise when it ‘is no longer possible for one ship, acting alone, to avoid the other ship by making a substantial alteration of course.’ Sheen, J. stated in *The Talouca*¹³³, that “there is no regulation restricting the speed of the vessel in the channel. The speed of each ship is limited by the

¹²⁹ See *The George H. Jones* [1928] AMC 1504

¹³⁰ [1980] 2 Ll. Rep. 359, 363

¹³¹ [1961] 2 Ll. Rep. 268

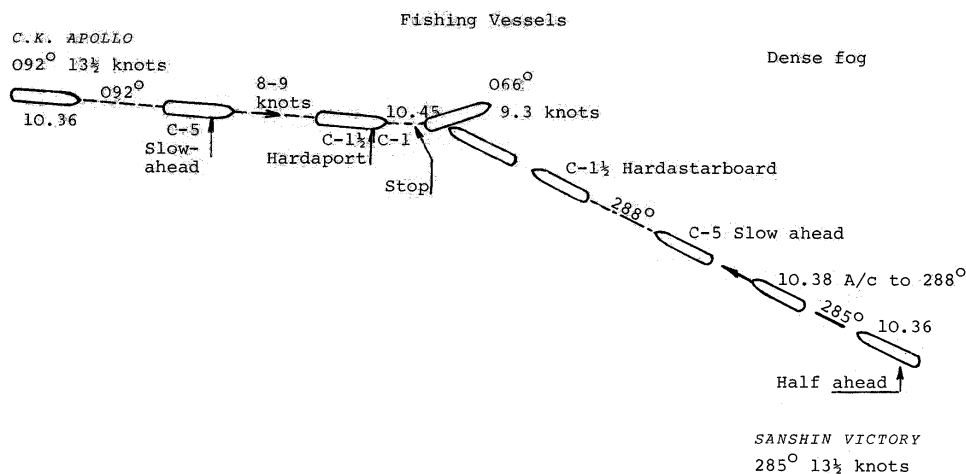
¹³² [1981] 2 Ll. Rep. 410

¹³³ [1981] 2 Ll. Rep. 548

forces of nature created by the movement of the vessel...and by the dictates of prudent navigation. Each vessel is under an obligation to proceed no faster than the speed at which it would respond readily to its rudder.”

Figure 1: Rule 6 (*The Sanshin Victory*)

It is rare for slow speed to cause a collision, but in some instances, it may be an imprudent activity to run the vessel at a slow speed. In *The Whitehurst and Hoyanger*¹³⁴, although the vessel's engines had been stopped and she had not been moving of her own power, her speed fell to such a level that she was at the mercy of a five-knot current which carried her into the path of another vessel.



Rule 7 states that every vessel shall use all means necessary to determine the risk of collisions. This includes the use of radar equipment. The rule continues to state that such decisions or assumptions cannot be made on the basis of scanty information.

Emphasis is placed on the words “all available means”, which indicates that the use of radar to determine the risk may not be necessary. However, when the radar is used, it must be used in a proper manner to ensure that the risk of collision is minimised. In *The Sedgemoor*¹³⁵ it was said that “(a)n instrument such as radar is supplied to be used, and ...its very possession does impose some additional duty on the vessel fortunate enough to be equipped with it”. The responsibility inherent with its possession was succinctly summarised in *The Nora*¹³⁶, where Willmer, J. stated “For unto whomsoever such is given, of him shall much be required. The possession of the radar equipment gives the ‘*Westerdam*’ a great advantage over other vessels which are not similarly equipped, but it brings with it...a concurrent duty to see that intelligent and reasonable use is made of the equipment provided.” In many cases, however, the collision is caused by an excessive reliance on the radar itself. This leads to a collision which has been ‘radar-assisted’ However, if the radar is properly used, then this equipment can help ascertain whether or not a collision is at risk or likely to develop. This was the situation in *The Linde*¹³⁷, where the vessels, *inter alia*, failed to make proper use of the radar. The judge here stated that both vessels were at fault in respect of their radar, and their look out. The vessels altered their courses blind, and as a result caused a collision.

¹³⁴ [1967] AMC 1047

¹³⁵ [1956] 1 Ll. Rep. 668, 679

¹³⁶ [1956] 1 Ll. Rep. 617

¹³⁷ [1969] 2 Ll. Rep. 556

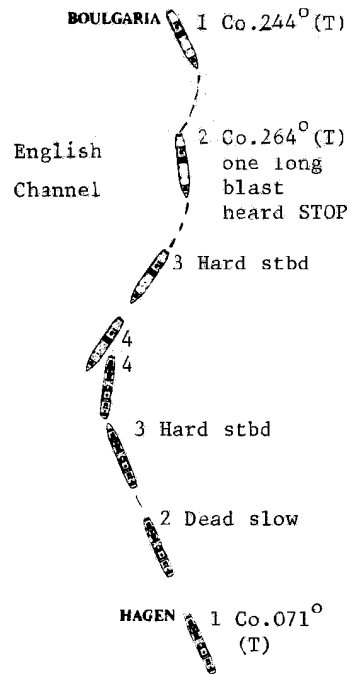


Figure 2: Rule 7 (*The Hagen*)

Rule 8 deals with action to avoid a collision. It states that any action taken to avoid a collision shall be “positive, made in ample time and with due regard to the observance of good seamanship.” The general words used means that the action or inaction can only be judged by the concept of good seamanship, and the rule of ordinary care and prudence. Thus, in *The Golden Mistral*¹³⁸, the court found that each ship had ample opportunity to see the other, and had plenty of time to make a proper avoiding action. There was no excuse for not seeing each other until it was too late. This violation of rule 8 by lack of action was the overriding cause of the collision.

¹³⁸ [1986] 1 Ll. Rep. 407, 413

Rule 9 states how a vessel must proceed when travelling through a narrow passage. The definition of a narrow passage is one which is a question of law, and a channel shall only be considered as such if the State declares it to be so. It is also to be published so as to give notice to any mariners using the channel. Under paragraph (a), vessels are required to keep as near as possible to the starboard outer limit of the channel or fairway so as not to impede the passage of vessels able to use only the deep water, or vessels in the process of overtaking. Thus, in *The Mersey No. 30*¹³⁹ Wilmer, J. stated that “each vessel shall keep to her own starboard side of the channel.” In a number of cases, the collision occurred because either one or the other of the vessels failed to remain on her side of the channel. In *The Adolf Leonhardt*¹⁴⁰, the collision took place in clear conditions in the Port of Rotterdam. It was held that the *Adolf Leonhardt* was to blame for failing to get to and remain on her side of the channel.

Paragraphs (b) and (c) of this rule deal with sailing and fishing vessels respectively, and paragraph (d) prohibits vessels from entering narrow channels if they will impede the passage of other vessels. The rule implies that there may be circumstances where it will be permissible to cross a narrow channel, notwithstanding that this impedes a vessel in the channel, providing that such vessel is able to navigate safely outside the channel. Such circumstances are, however, rare.

¹³⁹ [1952] 2 Ll. Rep, 183, 190

¹⁴⁰ [1973] 2 L. Rep 218

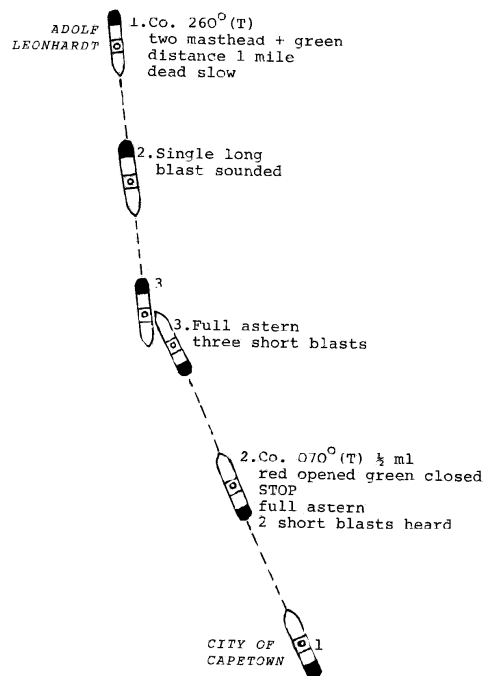


Figure 3: Rule 9 (*The Adolf Leonhardt*)

Paragraph (e) deals with vessels overtaking in a narrow channel. It stipulates that such activity may only take place when the vessels are in sight of one another. There are no provisions for overtaking in a narrow channel in conditions of restricted visibility. Paragraph (f) refers to vessels approaching a bend in a narrow channel, and similar to paragraph (e) has requirements for the use of sound signals. The vessels are required to proceed with 'particular alertness and caution'. In *The Talouca*¹⁴¹, a collision took place on a bend in the Mae Chow Phraya River. The Trial Judge held that the Master of the *Visahakit I* had exercised reasonable skill and care to avoid the collision, and the *Talouca* was to blame. On appeal, the court agreed with the trial judge and upheld the decision. Lord Justice Waller stated that in his opinion, since there is no dispute that the *Talouca*

¹⁴¹ [1981] 2 Ll. Rep. 584, on appeal [1984] 1 Ll. Rep. 131

would have had to go to the centre of the bend to turn, she should have reduced her speed and stood off until both vessels could cross on the straight. The fact that she did not put the other vessel into an untenable position, and so the *Talouca* is to blame. Paragraph (g) deals with anchoring in a narrow channel, which is to be avoided¹⁴².

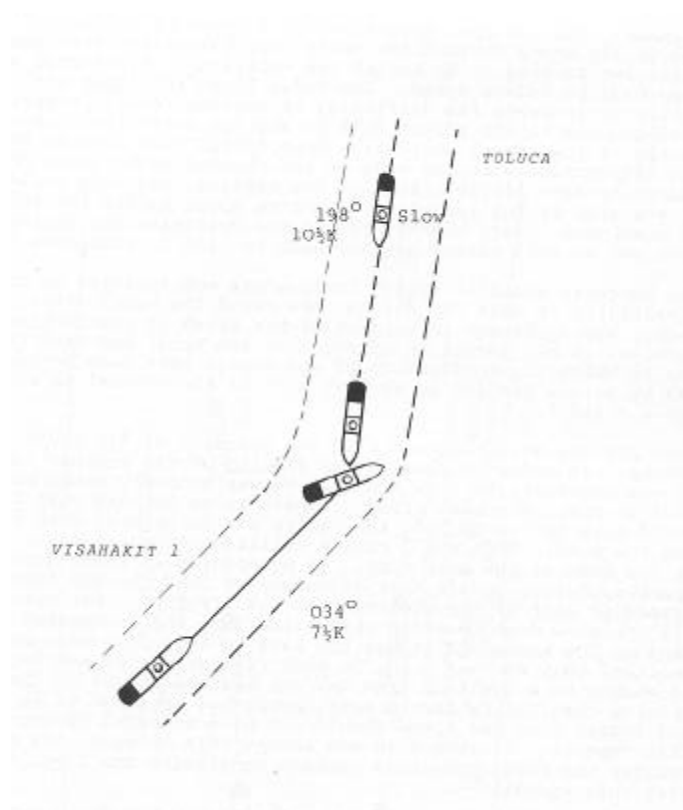


Figure 4: Rule 9 (*The Toluca*)

Rule 10 applies to traffic separation schemes which have been adopted by the International Maritime Organization (IMO). Since 1898, shipowners operating in the North Atlantic have adopted recommended routes. Eventually, particularly in high traffic narrow areas, traffic separation schemes were developed. At first these were recommended to mariners with a warning, but in 1971 the situation occurred where one ship sank and

¹⁴² see *The 'Esso Brussels'* [1972] 1 Ll. Rep. 286

became a wreck, and another other ship ploughed into the wreck (although marked) and also subsequently sank¹⁴³. This led to the IMO to request from its member states to make such schemes mandatory, and to prescribe travelling in the wrong direction in such schemes an offence.

The purpose of ships' routing is to improve the safety of navigation in converging areas, and where the volume of traffic is great. This includes, *inter alia*, traffic separation schemes, two-way routes and recommended tracks. Traffic separation schemes (TSS) separate the opposing streams of traffic by appropriate means, including the establishment of inbound and outbound traffic lanes. A TSS may lie on the high seas. Where this is the case, it will be binding only on vessels flying the flag of a state party. But, where a whole or a part of the TSS lies within Territorial waters, all vessels must obey it. This is because the coastal state exercises its territorial rights on all vessels using the waterway, not only those flying its flag. It must be pointed out that where a TSS lies partly on the high seas and partly in the territorial waters of a State, the situation could be complicated, and agreement with the coastal state is necessary to enforce the scheme. According to paragraph (a) Rule 10 only applies to a TSS which has been adopted by the IMO. All vessels using the scheme must conform to the essential principles of routing. If they are following the traffic flow, they must proceed in the correct lane, and if they are crossing, they must do so as near to right angles to the general traffic flow as possible.

¹⁴³ This was *The Brandenburg*, which struck the *Texaco Caribbean* and sank. A few weeks later, another vessel, *The Niki*, struck the wreckage of the other 2 vessels and sank. All told, 51 lives were lost.

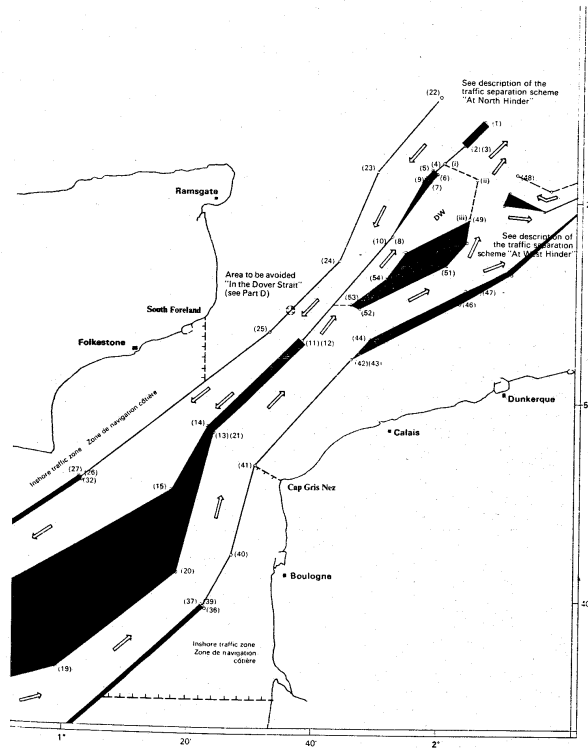


Figure 5: Rule 10 (UK Traffic Separation Scheme)

Rule 11 states the application of rules 11-18. These sections deal with the conduct of vessels progressing in sight of one another and in restricted visibility.

Rule 12 applies to sailing vessels. It stipulates all the procedures which a prudent sailor would use to ensure that the vessel is not involved in a collision. It stipulates the rules to be followed by two sailing vessel, and states which one should keep out of the way of the other. If a sailing vessel is approaching a power driven vessel, rule 18 would be applicable (responsibilities between vessels).

Rule 13 applies to an overtaking situation, and states clearly that while overtaking vessels must stay well clear of each other. The test which was used for a long time to determine whether or not a vessel was crossing or overtaking was whether the 'hinder ship' could see 'any part of the side lights of the forward ship'¹⁴⁴. If so, it is a crossing situation. If not, it is overtaking. This rule is concerned with a vessel proceeding in the same general direction as the other, and in sight of one another. It requires the overtaking vessel to keep out of the way, and the overtaken vessel to hold course and speed. The overtaking vessel apparently has the option of passing on either side of the vessel, but this is subject to the rule on narrow channels which stipulates the right hand side of the channel for the overtaken vessel.

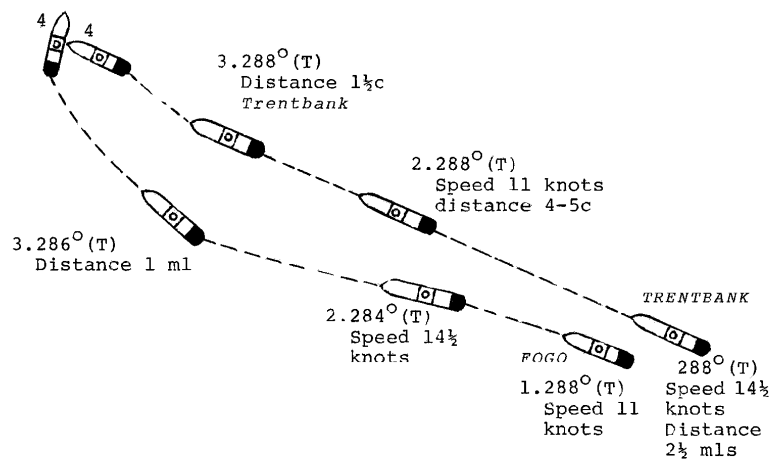


Figure 6: Rule 13 (*The Fogo*)

¹⁴⁴ *The Franconia* [1876] 2 P.D. 8

The duty of the overtaking vessel is to keep out of the way of the vessel being overtaken. No special signals are required (except in a narrow channel). The overtaking vessel must stay a safe distance away. Thus, in *The Fogo*¹⁴⁵ the *Trentbank* overtook the *Fogo*, but then altered her course a total of four degrees to port. The *Trentbank* was held responsible for having bad look out and for passing too close to the *Fogo* when the collision occurred.

Rule 14 deals with a head-on situation, where vessels are approaching each other from the opposite direction. It states clearly that each is to alter her course to starboard so that each can pass on the port side of the other. The alteration of the course must be timely and sufficient to give safe clearance. Here, neither vessel has the right of way over the other. The head-on situation exists where two power driven vessels in sight of each other are meeting on reciprocal or nearly reciprocal courses. Thus in *The Ballyleson*¹⁴⁶, the *Ballyleson* had crossed from her starboard side of the channel, and was making for a channel entrance when she spotted the masthead lights of another vessel. Although the *Ballyleson* made certain evasive manoeuvres, and sounded all her signals, the other vessel remained oblivious of her until the last minute. It was held that the *Belgulf Union* was at fault in not seeing the *Ballyleson* earlier, and not altering to starboard thereafter. However, the *Ballyleson* was in breach of the local rules of navigation and the head-on rule. Apportionment of fault was *Belgulf Union*, two-thirds and the *Ballyleson*, one-third.

¹⁴⁵ [1967] 2 Ll. Rep. 208

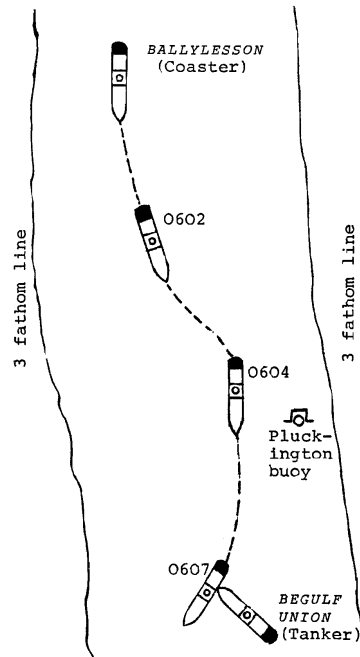


Figure 7: Rule 14 (*The Ballyleson*)

Rule 15 deals with the crossing situation. Where two vessels are crossing each other in a situation which may involve the risk of collision, the vessel which has the other on her starboard is to “give way”. Thus, the duty of this ‘give way’ vessel is to keep clear of the other vessel. She may keep clear without crossing ahead in three ways: by altering course to starboard so as to pass astern of the other ship; by reducing speed, allowing the other ship to cross ahead; or by altering to port and turning some 360 degrees. Whichever action is adopted, early and positive response is necessary in all such situations. In *The Aracelio Iglesias*¹⁴⁷, the collision took place in good visibility in the Panama Bay. The *Nidareid* saw the *Aracelio Iglesias* leaving the canal and showing a

¹⁴⁶ [1968] 1 Ll. Rep. 69

green light. Her engines were stopped soon after. Although she was the 'stand on' vessel, the *Nidareid* was correct in altering her course and assuming the risk of collision.

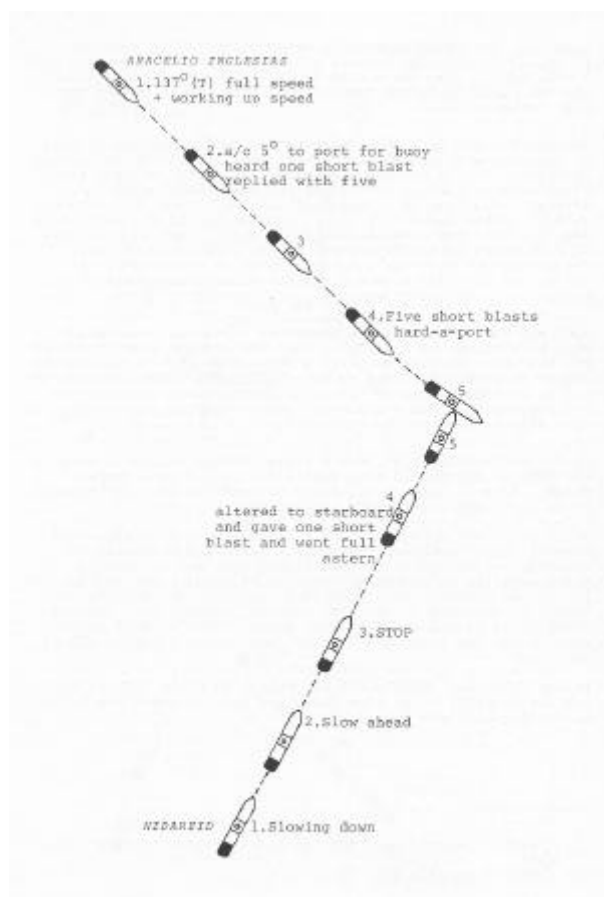


Figure 8 (Rule 15) (*Aracello Iglecias*)

Rule 16 goes into further detail about the action of the give-way vessel mentioned in rules 14 and 15. The requirement is that this vessel is to take “early and substantial action to keep well clear”. The give-way vessel may take different actions such as reducing her speed, stopping and reversing. However, any and all actions undertaken by the vessel must be in accordance with the practice of good seamanship, timely and

¹⁴⁷ [1968] 1 Ll. Rep 131

substantial, and should leave the 'stand-on' vessel in no doubt as to what her actions are¹⁴⁸.

Rule 17 outlines the rights and duties of the "stand on" vessel. It is the duty of the stand-on vessel to maintain her course and speed. She is not entitled to alter her course and speed in a moment if there is ample time for the ship which is bound to give way to discharge her duty. In *The Reanoke*¹⁴⁹, Lord Alverstone, C.J. elaborated on the meaning of 'course and speed', which he defined as that 'following the nautical manner'. He went on to state that the question of whether the manoeuvre is necessary and proper in terms of seamanship should always be asked. In this case the vessel (the stand-on vessel) reduced her speed to pick up a pilot. It was held that where a stand on ship was, to the knowledge of the give way ship, properly engaged in an ordinary nautical manoeuvre of that type, she was entitled to carry it out even though it involved a reduction of speed. In many cases, the stand-on ship will be judged with some degree of leniency if she does take the wrong action when put in a position of difficulty.

The theme behind the collision regulations points to three different situations. One where there is a head-on situation, both vessels must take some action to change the existing situation. They are both required to alter course to starboard, and neither can claim that the other should have taken any action first. In the second situation, there is the overtaking situation. Here one vessel shall maintain the status quo, and the other will take the positive action. Thus, the collision will be avoided if one vessel continues with what she was doing. The third situation takes place where the stand on vessel realises that the expected circumstances are not going to be fulfilled. Thus, if this is the case, the stand on vessel is now given the right to take an evasive action.

¹⁴⁸ See *The Billings Victory* (1949) 82 Ll. L. Rep. 877, 881 as per Wilmer, J.

¹⁴⁹ [1908] P. 231, 239

Rule 18 outlines the responsibilities that vessels owe to each other in various circumstances. This rule opens by stating that it does not apply in three situations: Where there is a narrow channel, a traffic separation scheme and in an overtaking situation. Thus paragraphs (a) to (c) outlines which vessels shall keep out of the way of other vessels. Manoeuvrability is the test for priority among the various categories of vessels. Thus, the right of way is based upon the ability to deviate from course. Paragraph (d), on the other hand, speaks to the situation where a vessel is constrained by her draught, and states that she must navigate with particular caution, having full regard to her special condition. Thus, a vessel constrained by her draught enjoys a special privilege when exhibiting signals as stipulated under rule 28. Other vessels with lesser privilege will therefore be under a duty to avoid impeding her safe passage.

Rule 19 states the required conduct of vessels in situations of limited or restricted visibility. The word 'navigating' is considered germane to the application of the rule, and the rule would not apply to a vessel lying dead in the water with her engines stopped. However, a vessel which has stopped in order to allow the passage of traffic may not be considered innocent if a collision followed, depending on the circumstances in the case. Paragraph (b) refers to safe speed as provided for in rule 6, which applies in any type of visibility. It also reiterates the fact that restricted visibility has to be taken into account when determining safe speed. Paragraph (d) requires a vessel which detects by radar alone to use the radar for determining whether or not a close quarters situation develops or the risk of collision is likely. It also states certain manoeuvres which should be avoided at all costs¹⁵⁰.

¹⁵⁰ See the *Hellenic Carrier* [1984] AMC 57, which states that the use of the words 'as far as possible' in rule 19(d) makes it advisory instead of mandatory.

5.2.3 Parts C, D and E

These parts deal with the various light and sound signals to be used or exhibited in various conditions. Although in themselves very important to navigation and the avoidance of collisions, they will not be discussed in detail here. In brief, however, Part C deals with lights and shapes (rules 20-31) to be exhibited in different situations. Part D deals with sound and light signals, and part E deals with the possible exemptions from compliance with the regulations regarding such sounds and lights.

The majority of changes brought about by the introduction of the 1972 Collision Regulations are centred in Part B, which are the steering and sailing rules. The other three parts have not changed significantly in any way, but the various lights, sounds and shapes are equally important for the avoidance of collisions. In fact, the 1983 and 1989 revisions to the COLREGS have indeed changed some aspects of Part C. Parts D and E will not be dealt with here. They are both straightforward and can be taken as they stand. However, some consideration of Part C (Lights and Shapes) will be made.

The opening rule (rule 20) describes the application of the Part. It applies to ALL weather conditions. No light may be exhibited which could be mistaken for the lights specifically mentioned in the rules, and the period of applicability is (understandably) sunset to sunrise, except in periods of restricted visibility. Thus, in *The Ouro Fino*¹⁵¹, where the *Rimac* collided with a dumb barge in the care of the *Ouro Fino*, it was held that the barge was anchored improperly, and better care should have been paid to advertising her presence with anchor lights.

Rule 21 contains the definition and description for each type of light. Each one is specified with respect to colour, position and arc of visibility. The current rules define the arc in terms of degrees, and not the points of the compass as the older rules did. Rule 22

deals with the range of visibility, which is determined in meters. Paragraph (d) requires that an inconspicuous, partly submerged vessel or object being towed should have white all round lights visible from a distance of three miles.

Rule 24 has the requirements for vessels involved in pushing or towing, and Rule 25 and 26 lay down the requirements for vessels under oar, sailing and fishing vessels. Rule 27 lays down the expected lights to be displayed by vessels not under command, or restricted in their ability to manoeuvre. Included here is a vessel involved in a towing operation which may be unable to deviate from her course. The meaning of the words 'not under command' is extended by the inclusion of the words 'through some exceptional circumstances is unable to manoeuvre as required by these rules...' In fact, dredgers engaged in underwater operation are mentioned specifically in these rules. Paragraph (g) exempts vessels of less than 12 metres in length from exhibiting lights and shapes prescribed by the rule (unless the vessel is involved in diving operations). Rule 28 permits a vessel constrained by her draught to exhibit a special additional identification sign.

Thus, these 'Rule of the Road', evolved over centuries of sea usage and common sense, have in their own way brought an element of sanity to navigation, particularly in the case of specific or trying circumstances. However, no matter how clear, detailed and comprehensive the regulations may be, human weakness is a factor which can override them. That, more than anything else, is what will eventually determine whether or not an accident will occur.

¹⁵¹ [1988] 2 Ll. Rep. 325

6. CONCLUSION

Collisions provide a wealth of fascinating legal fodder which could be used to illustrate various issues, but closure is necessary. During the course of this paper, the legal regime surrounding marine casualties, specifically collisions, has been outlined and evaluated. The jurisdiction to try a collision case has been examined, and the various types of liability which one may face have been discussed. Most importantly, the Collision Regulations themselves, specifically the Steering and Sailing Rules of Part B have been detailed. Why then do collisions still occur, not as an occasional unlucky encounter, but with alarming frequency?

There are those who believe that the answer to this all -important question lies in the Collisions Regulations themselves. In fact, recent proposals have been made concerning the need to review the Collision Regulations. These arguments revolve around the form that the new rules would take, rather than any matters of 'concept and philosophy', but I believe that this will not in essence assist the reduction of the number of collisions which are taking place.

Roger Syms, from the Australian Maritime College, has written a number of papers on the reform of the COLREGS¹⁵². His main arguments for the reform of the COLREGS are, firstly, that the rules are not sufficiently understood, particularly Rule 17. Secondly, there is the complaint that there are too many rules, and the roles have become blurred because of the change in 'social imperatives'. Thus, the rules must not only mitigate to prevent loss of life and damage to property, but must also prevent ecological damage. Thirdly, there is the argument that the change in technology has made it necessary to completely revamp the rules.

Although no body of rules is perfect, and as such there is always room for improvement, one must act with considered moderation at all times. I disagree with all of the above arguments on the grounds that they fail to take into account the realities of shipping and attempt to paint a gloss over the real difficulties which have caused collisions.

The first argument, that the rules are not sufficiently understood, has some merit in the sense that it is possible that a mariner may, either through ignorance or a language difficulty, be unable to fully understand the rules as they stand. The judicial interpretation of the COLREGS has been notoriously complex and fraught with 'legalese'. However, the additional argument that the rules are written in language that is too technical does a disservice not only to mariners themselves, but also to the various training institutions around the world. The language is neither too technical nor out of the grasp of a technical person who is familiar with and uses all the equipment and terms incorporated in the COLREGS on a regular basis. The mariner is also not required to quote the rules verbatim at any or all times. He must, however, understand that in a certain situation, specific action is required. It is admitted that in some occasions a misunderstanding of a technical point may lead to a rash and incorrect reaction on the part of a mariner faced with a difficult situation, but I believe that no matter the phrasing, there will always be room for error on the part of man in such a situation.

The specific attack of Rule 17 speaks to the actions of the 'stand-on' vessel in any encounter. Arguments have revolved around the fact that this concept has sprung from the 19th Century ships, and that present circumstances have changed. It also attacks the requirement that a 'stand-on' vessel maintain her course initially. This argument does not seem to take account of the requirement in rule 17(a)(ii) which then permits the vessel to take action if she sees that the 'give way' vessel is not 'giving way'. The fact remains that

¹⁵² Syms, R. 'The Fundamental Argument for Reform - the Underlying Philosophy and Impact of Future Technology.' In *Maritime Collision and Prevention* (1886). Edited by Zhao, J.; Wilson, P.; Hu, Z.; and

all circumstances cannot be factored into the regulations, and it is necessary to allow the person actually faced with each circumstance some amount of discretion to handle the situation based on the facts. Thus, if the circumstances are such that both incidents of draft, speed and proximity make it prudent, then the stand-on vessel should, perhaps, act as soon as the incident requires. The Rule is necessary, however, to outline some of the necessary courtesies and prevent a grand free-for-all in the face of impending danger.

The next argument is that there are too many rules, many of which have become blurred as a result of the changing social imperative. The specific example cited was that of now having to consider ecological disaster as well as protection of life and property when applying the rules. This is the most spurious argument of the lot. Whereas I can find some viability in the other arguments, this one is devoid of all value. The reason for my opinion is that the Collision Regulations were formulated to prevent collisions. That is all. The question of the carriage of certain cargoes and the actions or clean-up activities to be pursued in the event of a collision are not covered by the Collision Regulations, but rather are covered by many other conventions and agreements on specific subjects. This point is a non-issue in my mind.

The last argument that I will discuss is the belief that the Collision Regulations need to be changed to take into account new technology. It is true that changes in technology will make it necessary at intervals to effect some change to the Rules. This is what was done in the case of the use of Radar, and also philosophically with the development and adoption of Traffic Separation Schemes. However, at this point, it is not necessary to formulate a full scale revamping of the Regulations without having the technology to include. The revisions which have been made to the COLREGS in 1983, 1989 and 1991 have ensured that developing technology has been included, but at the same time the spirit of the COLREGS has been unaffected. Hence, the actual COLREGS,

although amended to incorporate the technological advances, have not needed to be changed significantly.

It is my opinion that, having said all of the above, and having spent the majority of the paper outlining liability and fault in collision cases, human error is largely to blame for the majority of collisions that take place across the world. The Collision Regulations, as with almost regulations, set a standard of behaviour for those travelling the waterways of the earth. It is important to note that these rules are necessary for consistency of action, and that there is room for discretion in situations where it is necessary to avoid a collision. It is important to point out that although advances have been made in addressing the problem of human error through other conventions dealing with manning, and certification and hours of work, this is not the end of the problem. Many of these accidents take place not because of fatigue or confusion vis-à-vis language and instructions (although that can play a major role in both the fore and aftermath), but rather because of awkward manoeuvring, bad look out, ignoring the regulations, speeding and violation of port rules. I feel that until such time as the individuals manning these vessels come to some sort of emotional and psychological agreement and begin to exercise more care in their manoeuvres, collisions will continue to be a major problem in the shipping world, costing billions of dollars in lost revenues, property damage, clean up operations and, of course, legal fees.

It is my belief that the Collision Regulations are a good guide for courteous and prudent shipping. Change is inevitable, but not for the reasons given. Too often do well educated, intelligent people swallow the placebo that a change in a rule will cure all ills. This can never be so. What need to be done is to change the outlook and attitude of those who apply the rules. The vast majority of mariners are responsible, experienced people, but as with land travel, even the most experienced individual can allow his attention to waver or his judgement to be clouded. The amount of reaction time needed to affect a proper evasive manoeuvre on the sea is far greater than on land, and a simple

omission can have grave consequences. All is not lost, however. Once we address the attitude of those who need to apply the rules, then their effectiveness can be truly evaluated. It is my hope that those who advocate a radical change to the COLREGS take heed of the true reasons behind many incidents, and perform their study and amendment objectively.

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LEGISLATION

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APPENDIX

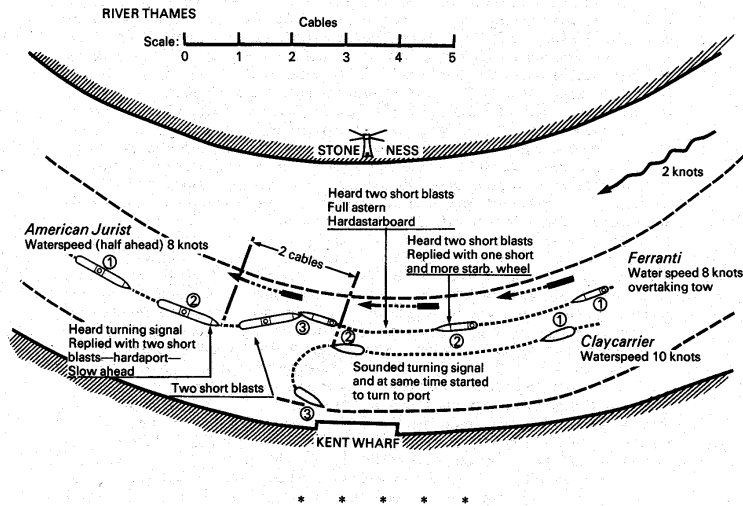


Figure 9: *The American Jurist*

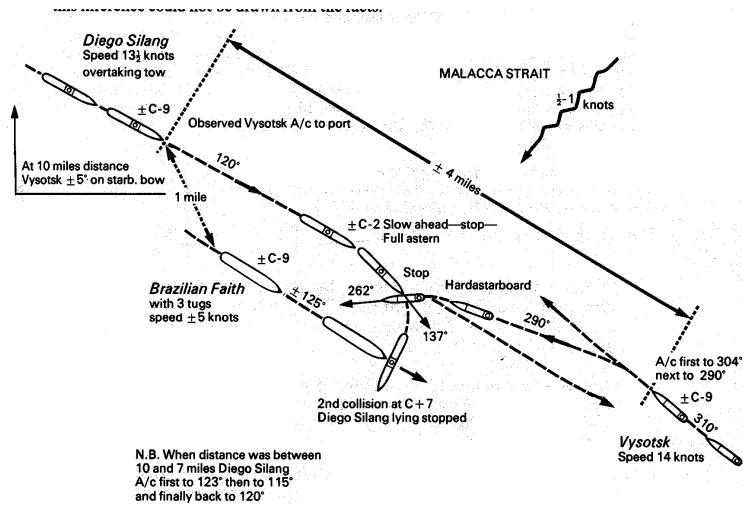


Figure 10: *The Vysotsk*

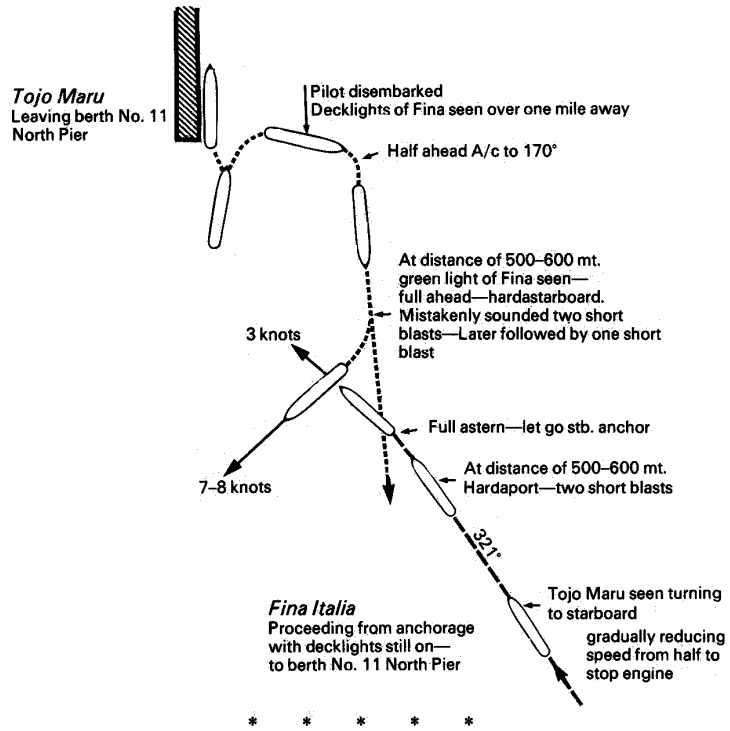


Figure 11: *The Tojo Maru*

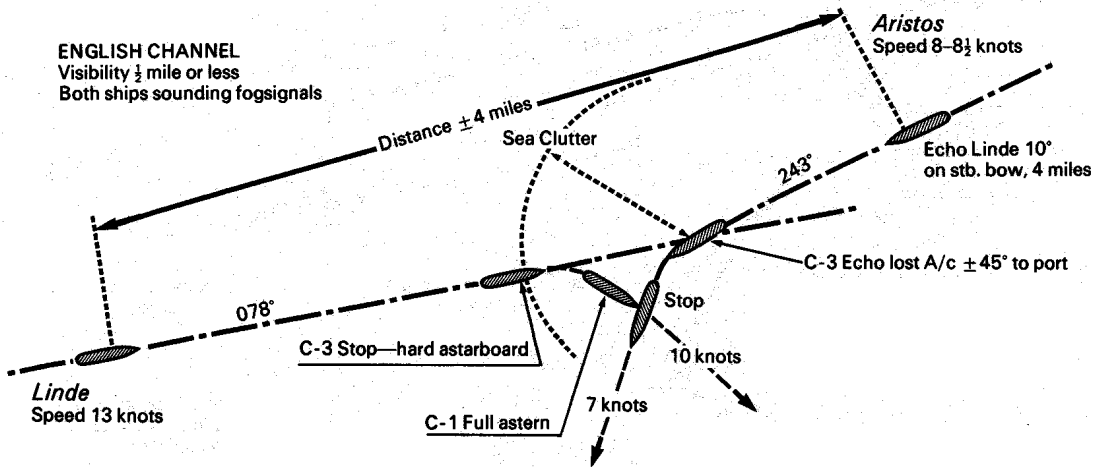


Figure 12: *The Linde*