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## *The Starboard Hand Rule Under the 1972 Collision Regulations*

NICHOLAS J. HEALY\* AND JOSEPH C. SWEENEY\*\*

### I INTRODUCTION

Of the three basic navigational situations—head-on, overtaking and crossing—the crossing situation is the most inherently dangerous, and accounts for a substantially greater number of clear weather collisions than either of the others.<sup>1</sup> The basic starboard hand rule,<sup>2</sup> requiring a power-driven vessel on the port side in a crossing situation with another power-driven vessel to keep out of the way of the vessel on the starboard side, originated soon after steam propulsion became common. It was introduced in the 1863 United Kingdom Regulations, drawn up by the British Board of Trade in consultation with the French Government and was adopted by more than 30 maritime countries, including the United States, by the end of 1864.<sup>3</sup> In the United States the 1864 and 1885 Regulations required the starboard hand vessel to hold her course, but did not provide that she must maintain her speed, nor did they stipulate that the port hand vessel must avoid crossing ahead. Both vessels had the duty to slow, stop and reverse, if necessary.<sup>4</sup>

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<sup>1</sup>See F. Bassett and R. Smith, *Farwell's Rules of the Nautical Road* 255 (6th ed. 1982).

<sup>2</sup>Rule 15. For ready reference, Rules 15, 16 and 17 are reprinted at the end of this article.

<sup>3</sup>See Cockcroft & Lameijer, *Collision Avoidance Rules* 14 (3d ed. 1982); Marsden, *Collisions at Sea* 552 (K. McGuffie Ed., 11th ed. 1961).

<sup>4</sup>Rules 19, 21 and 23 of the 1864 Rules, as re-enacted in 1874. See Griffin, *The American Law of Collision* 809 (1949) (hereinafter cited as "Griffin"); Articles 16, 18 and 22 of the 1885 Rules, *id.* at 819-820.

Rule 19 of the 1897 International Regulations required the port hand vessel in a crossing situation involving risk of collision to keep out of the way; Rule 22 required her to avoid crossing ahead of the starboard hand vessel if the circumstances admitted; and Rule 21 required the latter to hold her speed as well as her course.<sup>5</sup> These rules were essentially left unchanged under the Regulations of 1910, 1948 and 1960, and their substance is now contained in Rules 15, 16, 17(a)(i) and 17(b) of COLREGS and the Inland Rules.

The starboard hand vessel was formerly called the "privileged" vessel and the port hand vessel the "burdened" vessel, and some judges so describe them even today.<sup>6</sup> The term "privileged," however, is a misnomer: both vessels are in fact "burdened," since the starboard hand vessel's primary obligation to hold course and speed is just as much a "burden" as is the port hand vessel's primary obligation to keep out of the other vessel's way. The COLREGS and Inland Rules designations, "stand-on" and "give-way," are much more appropriate than "privileged" and "burdened."

## II

### APPLICABILITY OF THE STARBOARD HAND RULE

For the starboard hand rule to apply, several conditions must exist:

(a) The vessels must be in visual sight of one another; as in head-on and overtaking situations, the steering and sailing rules do not apply in a crossing situation when the vessels can "see" each other only on their respective radar screens.<sup>7</sup> However, once they do become actually visible to each other, e.g., when a snow storm is over, or the vessels emerge from a fog bank, the starboard hand rule will apply, if the distance then separating the vessels is sufficient to permit navigation in accordance with the rule.<sup>8</sup> If the distance is not sufficient, the case is one of special circumstances and Rule 2 will apply.

<sup>5</sup>The 1897 Rules are reprinted in full in Griffin, *supra* note 4, at 645-680.

<sup>6</sup>See, e.g., *Trinidad Corp. v. The Keiyoh Maru*, 845 F.2d 818, 1989 AMC 627 (9th Cir. 1988); *American Employers Ins. Co. v. The Menelaus*, 1982 AMC 654 (E.D. La. 1980); *Zim Israel Nav. Co. v. Special Carriers Inc.*, 611 F. Supp. 581, 1986 AMC 2016 (E.D. La. 1985).

<sup>7</sup>COLREGS Rule 11 provides that "Rules in this Section [Rules 11-18] apply to vessels in sight of one another." Inland Rule 11 is identical, except that "Subpart" is used in place of "Section." Rule 3(j) of COLREGS and the Inland Rules provides that "Vessels shall be deemed in sight of one another only when one can be observed visually from the other." See *Borcich v. Ancich*, 191 F.2d 392, 1951 AMC 1701 (9th Cir. 1951); *The California—The Curlew*, 105 F. Supp. 428, 1952 AMC 508 (D. Mass. 1952).

<sup>8</sup>*The E.R. Wallonia*, [1987] 2 Lloyd's Rep. 485 (Q.B., Adm. Ct. 1987).

(b) A risk of collision must be involved. Thus, if the vessels are so far apart when they become visible to each other that there is no risk of collision, each is free to maneuver in such a way as to avoid a close quarters situation.<sup>9</sup>

(c) The vessels must be underway, and at least one of them must have way on. The starboard hand rule has been applied in several cases where the port hand vessel was drifting and the starboard hand vessel had way on.<sup>10</sup> It has likewise been applied where the starboard hand vessel was drifting and the port hand vessel had way on.<sup>11</sup>

(d) If the starboard hand vessel has way on she must be on a steady course and be maintaining a steady speed, so that the port hand vessel is able to ascertain her movements. However, this does not mean that there may not be changes in the starboard hand vessel's heading, or even in her engine speed. Thus, she may be on a "curved" course, in order to follow the curvature of a river or channel,<sup>12</sup> or the helmsman may have to make minor changes in heading to compensate for yawing in a rough sea. Likewise, when it is clear that the stand-on vessel is engaged in a maneuver which requires alterations in engine speed, it is not a violation of her obligation to maintain her speed if she continues to make such alterations. Thus, a ferryboat on the starboard hand in a crossing situation may follow her usual practice of slowing when entering her slip.<sup>13</sup>

As stated by Lord Alverstone in *The Roanoke*:<sup>14</sup>

In my judgment, "course and speed" in art. 21 [now Rule 17] mean course and speed in following the nautical manoeuvre in which, to the knowledge of the other vessel, the vessel is at the time engaged. It is not difficult to give many instances which support this view. The "course" certainly does not mean the actual compass direction of the heading of the vessel at the time the other is sighted.

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<sup>9</sup>The Plumleaf, 7 Ll. L. Rep. 207 (C.A. 1921).

<sup>10</sup>The Umbria, 153 F. 851 (2d Cir. 1907); The City of Camden, 44 F.2d 711, 1930 AMC 1822 (3d Cir. 1930); The Broomfield, 10 Asp. Mar. Cas. 194 (Prob. 1905). See Griffin at 113-114.

<sup>11</sup>The Cyclops, 45 F. 122 (S.D.N.Y. 1891); The N.Y.C. No. 18, 230 F. 299 (E.D.N.Y. 1916).

<sup>12</sup>Commonwealth & Dominion Line v. United States, 20 F.2d 729, 731, 1927 AMC 1690, 1692-93 (2d Cir. 1927), rev'd on other grounds, 278 U.S. 427, 1929 AMC 238 (1929); cf. The Alcoa Rambler, 82 Ll. L. Rep. 359 (P.C. 1948).

<sup>13</sup>The Bronx, 250 F. 843 (2d Cir. 1918). See also Griffin at 145, quoting Judge Learned Hand's statement in *The Napoli*, 1928 AMC 97 (2d Cir. 1920), that if the starboard hand vessel has been proceeding at a varied speed she should "keep varying that speed as before. . . . So I think that 'keeping her speed' means keeping the apparent variation of speed, not changing it to a constant velocity."

<sup>14</sup>(1908) Prob. Div. 231, 239. See also Commonwealth & Dominion Line, supra note 12; United States v. The Soya Atlantic, 330 F.2d 732, 737, 1964 AMC 898 (4th Cir. 1964).

. . . A vessel bound to keep her course and speed may be obliged to reduce her speed to avoid some danger of navigation, and the question must be in each case "Is the manoeuvre in which the vessel is engaged an ordinary and proper manoeuvre in the course of navigation which will require an alteration of course and speed; ought the other vessel to be aware of the manoeuvre which is being attempted to be carried out?"

A recent example of a case where the starboard hand rule was found inapplicable is *Trinidad Corp. v. The Keiyoh Maru*.<sup>15</sup> The S.S. *Fort Worth* was proceeding in the southbound coastal shipping lane, heading into Los Angeles, while the M.T. *Keiyoh Maru* was leaving the neighboring port of Long Beach. As the *Keiyoh Maru* passed through the Long Beach breakwater entrance the harbor pilot conning the ship radioed the pilot boat to come alongside to pick him up. This was done, and the *Keiyoh Maru* then sailed through a restricted anchorage and attempted to cut across the bow of the *Fort Worth*, from starboard to port. Unlike the *Keiyoh Maru*, under the applicable U.S. Coast Guard rules, the *Fort Worth* was entitled to be in the restricted area, since she was intending to enter Los Angeles harbor. The *Fort Worth* ordered full astern and sounded a five-blast warning signal. No evasive action was taken by the *Keiyoh Maru*, whose port bow tore into the bow of the *Fort Worth*.

The *Keiyoh Maru* contended that she was the stand-on vessel in a crossing situation, and that the *Fort Worth*, as the give-way vessel, was obliged to keep out of her way. The district court ruled, however, that the starboard hand rule was inapplicable, and the court of appeals affirmed, stating:

In order to be considered a privileged vessel in a crossing situation, it must be on a steady course. "A ship is on a steady course, not only when her heading does not change, but whenever her future positions are certainly ascertainable from her present position and movements." *Commonwealth & Dominion Line v. United States*, 20 F.2d 729, 731, 1927 AMC 1690, 1692 (2d Cir. 1927), rev'd on other grounds, 278 U.S. 427, 429, 1929 AMC 238, 239 (1929); see also *United States v. S.S. Soya Atlantic*, 330 F.2d 732, 737, 1964 AMC 898, 906 (4th Cir. 1964). The district court found that the *Keiyoh Maru's* navigation did not satisfy this test. The district court said: "Due to the constantly changing engine orders and constantly changing headings of the *Keiyoh Maru*, the *Keiyoh Maru* never established itself on a constant course and speed in a crossing situation with the *Fort Worth*." Moreover, the *Keiyoh Maru's* course could not possibly be characterized as "certain-

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<sup>15</sup>845 F.2d 818, 1989 AMC 627 (9th Cir. 1988).

ly ascertainable" because of her movement through the restricted anchorage area. The *Fort Worth* was entitled to assume that another vessel would not transgress a restricted area and embarrass its passage. The district court was correct in finding that no crossing situation existed. The *Fort Worth* had, therefore, no duty to stay clear of the *Keiyoh Maru*.

### III HEAD-ON AND CROSSING DISTINGUISHED

Under Rule 14(b) a head-on situation is deemed to exist "when a vessel sees the other ahead or nearly ahead and by night could see the masthead lights of the other in a line or nearly in a line and/or both sidelights and by day she observes the corresponding aspect of the other vessel." Thus, under ordinary circumstances, when danger of collision exists, if at night both the red and green lights of a vessel ahead are visible, it is a head-on situation, whereas if only one side light can be seen, it is a crossing situation.

Paragraph (c) of Rule 14 provides that if in any doubt as to whether a head-on situation exists a vessel must assume that it does, and act accordingly. Therefore, if a vessel is not certain whether she is a starboard hand vessel required to hold course in a crossing situation or whether she should turn to starboard to effect a safe port to port passing as required of both vessels in a head-on situation, she should turn to starboard.

If two vessels were literally meeting head-on, their headings would of course be 180° apart. Several decisions have attempted to distinguish between head-on and crossing situations in terms of the difference in degrees between the reciprocal courses of the two vessels. These decisions have not been entirely consistent, but the weight of authority appears to be that if both side lights of each vessel are visible more than half a point, or about 6°, on the other's bow, it is a crossing, and not a head-on situation.

After citing *The Gulf Stream*<sup>16</sup> and *The Kaituna*<sup>17</sup> Griffin states:

While there is singularly little direct authority on the subject, the foregoing cases would seem to indicate that, if one has the other half a point on her starboard bow and is herself half a point on the other's port bow, the divergence is not sufficient to take the case out of Article 18 [corresponding to COLREGS Rule 14] (but cf. the *Koning Willem II*, (1908) Prob. Div. 125, 131), but that, if either has the other more than

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<sup>16</sup>43 F. 895 (S.D.N.Y. 1890) (Addison Brown J.).

<sup>17</sup>44 Ll. L. Rep. 71 (Adm. 1932), modified, 46 Ll. L. Rep. 200 (C.A. 1933).

half a point on the bow, the case is one of crossing vessels. This view would seem consistent with the rule for night, which depends on the sidelights (the *Grand Republic*, 16 Fed. 424, 426 (1883)). A properly screened sidelight should not show more than half a point across the bow (the *Edwin Slick*, 286 Fed. 43, 47 (1923); the *Thingvalla*, 48 Fed. 764, 769 (1891), and half a point is, therefore, the limit at which both sidelights would be displayed to the other vessel. If one vessel has the other more than half a point on the starboard bow, and therefore is showing her green light only to the other's red or red and green, it is a crossing situation. The same result should follow by day in similar situations.<sup>18</sup>

If one vessel is proceeding up, and another down a narrow channel at night, and each is keeping to starboard in accordance with Rule 9 (the narrow channel rule), in straight stretches each should of course see the other's red light, and not its green. But on a winding stretch it is possible that when one vessel first sights the other she will see the other's green light and not her red, because the curvature of the waterway results in the vessels' headings being temporarily at right angles to each other. This does not mean that the starboard hand rule will apply. Each vessel is keeping to the starboard side of the fairway, there is no risk of collision, and only when risk of collision is involved is the rule applicable. The principle was explained in *The Pekin*<sup>19</sup> as follows:

The cases of the *Velocity*, the *Ranger*, and the *Oceano* have explained and illustrated the distinction which exists in the effect of the crossing rule as regards vessels navigating the open sea and those passing along the winding channels of rivers. The crossing referred to is "crossing so as to involve a risk of collision" and it is obvious that while two vessels in certain positions and at certain distances in regard to each other in the open sea may be crossing so as to involve risk of collision it would be completely mistaken to take the same view of two vessels in the same positions and distances in the reaches of a winding river. The reason, of course, is that the vessels must follow, and must be known to intend to follow the curves of the river bank. But vessels may, no doubt, be crossing vessels in a river. It depends on their presumable courses. If, at any time, two vessels, not end on, are seen, keeping the courses to be expected with regard to them respectively, to be likely to arrive at the same point at or nearly at the same moment, they are vessels crossing so as to involve risk of collision; but they are not so crossing if the course which is reasonably to be attributed to either vessel would keep her clear of the other. The question therefore always

<sup>18</sup>Griffin, *supra* note 4, at 66-67. See also Cockcroft & Lameijer, *Collision Avoidance Rules*, *supra* note 3, at 109.

<sup>19</sup>(1897) A.C. 532 (P.C.) See also Farwell's *Rules of the Nautical Road*, *supra* note 1, at 213.

turns on the reasonable inference to be drawn as to a vessel's future course from her position at a particular moment, and this greatly depends on the nature of the locality where she is at that moment.

#### IV CROSSING AND OVERTAKING SITUATIONS DISTINGUISHED

Rule 13(b) provides that a vessel shall be deemed overtaking when coming up on another vessel from a direction more than 22.5° (two points) abaft the other vessel's beam, so that at night she would be able to see only her stern light, and neither of her side lights. It follows, conversely, that if a vessel is approaching from a direction abeam of the other vessel, or forward of her beam, or not more than 22.5° abaft her beam, so that at night she would be able to see either her red or her green side light, but not her stern light, the situation is a crossing, and not an overtaking one. Thus, if she is coming up on the other vessel's port side, so that at night she would be able to see the other vessel's red light, she is the port hand vessel in a crossing situation and must keep out of the way. Conversely, if she is coming up on the other vessel's starboard side, so that at night she would be able to see her green light, she is the starboard hand vessel, and has the primary obligation of holding course and speed.

If in doubt as to whether she is overtaking or crossing the vessel coming up on another must assume that she is overtaking the other, and must act accordingly.<sup>20</sup> If she is coming up on the port side of the other, it will make no difference whether it is an overtaking situation or a crossing one, as in either case she must keep out of the way, and the other must hold her course and speed. But even if she is coming up on the other's starboard side and is in doubt, she must keep out of the way, and not hold her course and speed, as she would be obliged to do as the starboard hand vessel if the situation were clearly a crossing one.

A vessel coming up from a position more than 22.5° abaft the beam vessel ahead remains an overtaking vessel even after she reaches a position forward of 22.5° abaft the beam.<sup>21</sup> Thus, if she is overtaking the vessel ahead on that vessel's starboard side, she remains a give-way vessel even after she reaches a point where, at night, she would be able to see the other vessel's green light and range lights on

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<sup>20</sup>Rule 13(c).

<sup>21</sup>Rule 13(d).



her port side, and would no longer be able to see the other vessel's stern light. This has been described as the "once an overtaking vessel, always an overtaking vessel" principle.<sup>22</sup>

It is important to note that this principle applies only when risk of collision is involved. This was vividly brought out in *The Auriga—The Manuel Campos*.<sup>23</sup> The *Auriga*, proceeding on a course of 212°, was observed about three miles away, bearing about 10° on the starboard quarter of the *Manuel Campos*, which was on a course of 205°.

The courses were thus diverging, and if the *Auriga* had maintained her course she would have passed about three miles abeam of the *Manuel Campos*. However, when the *Auriga* was bearing less than two points abaft the starboard beam of the *Manuel Campos*, and was about 2-1/2 miles distant, she altered to 181°, which brought her on to a course converging with that of the *Manuel Campos*, whose master and watch officer failed to notice the course change. Those on neither ship were aware of the danger until the *Auriga's* stern was on a line with that of the *Manuel Campos*, and avoiding action was then ineffectual to prevent a collision.

The *Auriga* argued that she was not a burdened vessel bound to keep out of the way under the overtaking rule because danger of collision did not exist until she altered course to 181°, and that as she was then less than two points abaft the beam of the *Manuel Campos*, she was a stand-on vessel under the crossing rule. Mr. Justice Brandon (now Lord Brandon of Oakbrook) agreed. He did, however, hold the *Auriga* 60% to blame for making the alteration of course to 181°, thereby creating a dangerous situation, and for her failing, as a stand-on vessel, to take sufficient action under Rule 17 when it became apparent that the *Manuel Campos* was not giving way.

Insofar as it holds that the *Auriga* became a stand-on vessel once she altered course to 181° the decision is severely criticized in S. Harley, *Overtaking or Crossing*,<sup>24</sup> wherein the author states:

An officer-of-the-watch is generally more concerned with looking-out ahead rather than astern; now it appears that he is required to carefully watch a vessel coming up astern in order to ascertain whether or not risk of collision exists, so that if the overtaking vessel is on his starboard side he will be ready to keep out of her way should risk of

<sup>22</sup>See Marsden, *Collisions at Sea*, supra note 3, at 553.

<sup>23</sup>[1977] 1 Lloyd's Rep. 384 (Q.B., Adm. Ct. 1976). Cf. *The Nowy Sacz*, [1976] 2 Lloyd's Rep. 682 (Q.B., Adm. Ct. 1976) modified [1977] 2 Lloyds Rep. 91 (C.A.). These decisions are discussed fully in Mukherjee, *Overtaking or Crossing: Judicial Interpretation and the Mariner's Dilemma*, in this issue of the Journal.

<sup>24</sup>Safety at Sea International, June 1977.

collision not be present until the overtaking vessel's bearing has decreased to less than two points abaft the beam of the overtaken vessel! Surely the draftsman of the overtaking rule did not intend such an (impractical) interpretation.

If the overtaking rule were intended to be so constrained then it is probable that words such as "so as to involve risk of collision" would have been expressly written into the rule, and the mariner would have been afforded guidance as to the ascertainment of risk of collision in an overtaking situation.

In the *Auriga* the court regarded the ordinary and natural meaning of the words "coming up with another" (in the definition of an overtaking vessel, Rule 13) as importing the concept of proximity in space or time or both. In other words the distance off and speed of approach of the overtaking vessel are relevant when considering the time of the application of the overtaking rule. (Now that the visibility distance of a stern light has been increased by one mile—from two to three miles—does this mean that Rule 13's radius of application has been increased?).

## V

### THE OBLIGATIONS OF THE PORT HAND VESSEL

The port hand vessel's obligations are set out in Rules 15 and 16 of COLREGS. Rule 16 of the Inland Rules is identical to COLREGS Rule 16, and Rule 15(a) of the Inland Rules is identical to COLREGS Rule 15. However, as stated in note 1, *supra*, Rule 15 of the Inland Rules includes a paragraph "(b)" which provides that notwithstanding Para. (a), on the Great Lakes, Western Rivers, or other waters specified by the Secretary of Transportation, a vessel crossing a river must keep out of the way of an ascending or descending vessel.

Rule 15 of COLREGS and Rule 15(a) of the Inland Rules prohibit the port hand vessel from crossing ahead under ordinary circumstances, but do not otherwise prescribe how she is to fulfill her obligation of keeping out of the starboard hand vessel's way. Guidelines are, however, to be found in Rule 8, which sets forth generally the actions to be taken to avoid collision: if the circumstances admit, the actions should be positive, timely and in accordance with good seamanship; alterations of course and speed should be large enough to be apparent to another vessel observing her visually or by radar; the action should be such as to result in passing at a safe distance, and should be carefully checked until the other vessel is past and clear; if necessary the vessel should slacken speed, or stop and reverse.

Rule 16 provides that the port hand vessel (or any vessel, such as an overtaking vessel, required to keep out of the way) must so far as possible take early and substantial action to keep well clear.

Finally, Rule 17, prescribing the duties of the starboard hand vessel, concludes with a paragraph "(d)," which makes it clear that the rule does not relieve the give-way vessel of her obligation to keep out of the way.

## VI

### THE OBLIGATIONS OF THE STARBOARD HAND VESSEL

Rule 17 specifies the stand-on vessel's obligations in a crossing situation. Another rule that frequently becomes applicable is 34(d), which requires a danger signal of at least five short and rapid blasts when one approaching vessel fails to understand the intentions or actions of the other, or is in doubt whether the other is taking sufficient action to avoid collision. The sound signal may be supplemented by a light signal of at least five short, rapid flashes.

In carrying out her primary obligation to hold her course and speed the starboard hand vessel has the right to assume at the outset that the give-way vessel will fulfill her statutory obligation of keeping out of the way. As stated by the Court of Appeals for the Second Circuit in *The Exmouth—The Hellenic Beach*:

Under ordinary circumstances *Hellenic*, as the privileged vessel, was entitled to maintain her course and speed. If *Hellenic* had to speculate that *Exmouth* would not obey the rules and engage in avoiding action on that assumption, the rules might as well be discarded. Navigation would be reduced to a game of bluff.<sup>25</sup>

The most significant change in the crossing rules effected by COLREGS was the addition of Para. (a)(ii) of Rule 17. Under the former rules, the stand-on vessel in a crossing situation was frequently placed in a very difficult position when the give-way vessel failed to take prompt steps to keep out of the way. If the stand-on vessel took avoiding action before reaching a point where collision could not be avoided by action on the part of the give-way vessel alone, she could be held in violation of the first part of old Rule 21, requiring her to keep her course and speed.<sup>26</sup> On the other hand, if

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<sup>25</sup>253 F.2d 473, 1958 AMC 1018, 1022 (2d Cir. 1958), citing *Wilson v. Pacific Mail S.S. Co.*, 276 U.S. 454, 1928 AMC 740 (1928); *The Delaware*, 161 U.S. 459 (1896); *National Bulk Carriers v. United States*, 183 F.2d 405, 1950 AMC 1293 (2d Cir. 1950); *Pacific-Atlantic S.S. Co. v. United States*, 175 F.2d 632, 1949 AMC 1120 (4th Cir. 1949); *The Nereus*, 23 F. 448 (S.D.N.Y. 1885).

<sup>26</sup>See *The Britannia*, 153 U.S. 130 (1894); *Pacific-Atlantic S.S. Co. v. United States (The Oregon—The New Mexico)*, 81 F. Supp. 777, 1948 AMC 1727 (E.D. Va. 1948), *aff'd*, 175 F.2d

she held course and speed beyond the point where the give-way vessel could not avoid collision by her own actions alone, the stand-on vessel could be held in violation of the second sentence of old Rule 21, requiring her to take action at that point.<sup>27</sup> When the old rules were in force, this meant that where United States or Liberian law was applicable, the stand-on vessel could be held liable for 50% of the total damages, no matter how grievous the faults of the give-way may have been.<sup>28</sup>

The old rule was unworkable: it presupposed that the stand-on vessel was familiar with the maneuvering ability of the give-way vessel.<sup>29</sup> An estimate of the give-way vessel's capabilities was of course difficult by day, but virtually impossible at night, when only the give-way vessel's lights could be seen, and not the vessel herself. In theory, the stand-on vessel might have inquired by radio about the give-way vessel's maneuverability, but of course in the brief period of time that might have been available, a radio message urging the give-way vessel to obey old Rule 19 and keep out of the way would have been far more practicable than one asking her to describe her characteristics.

This mandatory provision has been carried over into COLREGS by Rule 17(b). This may have been the result of a compromise between the views of those delegates to the COLREGS diplomatic conference who wanted to keep the obligations of the stand-on vessel as they were before COLREGS, and the views of those who wanted to replace the second part of old Rule 19 with mandatory language similar to the permissive language eventually included as Rule 17(a)(ii) of COLREGS with respect to action the stand-on vessel may take upon observing that the give-way vessel is not complying with the Rules.

In any case, as finally formulated, COLREGS contain two theoretically distinct provisions regarding the rights and obligations of a stand-on vessel in a crossing situation when confronted with the failure of a give-way vessel to take prompt steps to keep out of her way: (1) under Para. (a)(ii) of Rule 17 she *may* take action to avoid

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632, 1949 AMC 1120 (4th Cir. 1949). The courts were, however, generally unwilling to judge too strictly the conduct of a stand-on vessel confronted with the failure of a give-way vessel to fulfill her obligation of keeping out of the way. See, e.g., the court of appeals decision in *The Oregon—The New Mexico*.

<sup>27</sup>*Yangtze Ins. Ass'n v. Furness*, 215 F. 859 (2d Cir. 1914).

<sup>28</sup>*The Catherine v. Dickinson*, 58 U.S. 170 (1855), overruled in *United States v. Reliable Transfer Co.*, 421 U.S. 397, 1975 AMC 541 (1975).

<sup>29</sup>See *Cockcroft & Lameijer, Collision Avoidance Rules*, supra note 3, at 119.

collision by her maneuver alone, as soon as it becomes apparent to her that the give-way vessel is not taking appropriate action; (2) under Para. (b) of Rule 17 she *shall* take such action as will best aid in avoiding collision when she finds herself so close to the give-way vessel that collision cannot be avoided by the action of that vessel alone.

The new rules thus give a stand-on vessel a decided benefit, in permitting her to take action before waiting for the moment to arrive when a give-way vessel that is failing to give way can no longer avoid collision by her own action alone. On the other hand, COLREGS, at least as interpreted by the American and British courts, impose a correspondingly greater obligation on the stand-on vessel to take appropriate action to avoid collision with a give-way vessel that is failing to fulfill her obligation to give way.

Para. (c) of Rule 17 provides that a starboard hand vessel which takes action under Para. (a)(ii) to avoid collision with the port hand vessel "shall, if the circumstances of the case admit, not alter course to port for a vessel on her own port side." No corresponding provision was contained in the former rules, although good seamanship would dictate avoidance of an alteration of course toward the port hand vessel, except in extraordinary circumstances. Other than this, and the general guidelines contained in Rule 8 concerning actions to be taken to avoid collision, the rules do not prescribe the type of action which should be taken by the starboard hand vessel in accordance with Para. (a)(ii) of Rule 17.

By its terms Para. (c) of Rule 17 applies only to the action which may be taken under Para. (a)(ii) when it appears that the port hand vessel is not taking appropriate action. No similar provision is made with respect to the mandatory action the stand-on vessel must take under Para. (b), presumably because that paragraph applies only when the vessels are so close that an unorthodox maneuver—conceivably even an alteration to port toward a give-way vessel on the port side—may be necessary to avoid collision.

The first reported American decision under the new crossing rules appears to be *American Employers Ins. Co. v. The Menelaus*,<sup>30</sup> a case involving factual issues almost exclusively, where, in holding the give-way vessel solely at fault, the court simply stated:

The only possible negligence which could be attributed to the *Menelaus* would be the failure to take evasive action sooner, considering that her

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<sup>30</sup>Supra note 6.

attempts to contact the *Ann Bonney* by radio and by whistle and light signal went unanswered. We conclude that, considering her duty as a privileged vessel to maintain course and speed, the *Menelaus* was not negligent in failing to alter either course or speed until the collision seemed imminent. [Citing *Gilmore & Black* at 504.]

In *Matter of Shaun Fisheries, Inc.*,<sup>31</sup> the Fishing Vessel *Shaun* collided with the Barge *Bandon*, in tow of the Tug *Mary Catherine*. The court found that the tug's ability to maneuver was not restricted within the meaning of COLREGS Rule 18,<sup>32</sup> and that as the port hand vessel in a crossing situation she should have given way to the *Shaun*, and was at fault for failing to do so. In holding the *Shaun* equally to blame, the court stated:

Even though *Shaun* did have the right of way, she had the duty to avoid collision when it became apparent that *Mary Catherine* was not obeying the rules of the road. *Shaun* had ample warning of that fact in *Mary Catherine's* steady course and speed throughout the time the vessels were in sight of each other. As collision became more and more probable, *Shaun* could have radioed *Mary Catherine* and asked her intentions, or, as the vessels came still closer, have sounded a warning signal to alert the other ship. Even after *Shaun* passed abeam of the tug, she could have turned to port and avoided the collision. COLREG Rule 17 did not require her to hold course until collision became practically inevitable.

I find that both ships were at fault in failure to give way. *Mary Catherine* was obliged to give way under the rules of the road. *Shaun* was obliged to avoid collision when *Mary Catherine* failed to give way.

It will be noted that the court did not rest its decision holding the stand-on vessel to blame on a violation of the mandatory provisions of Para. (b) of Rule 17, but rather on her failure to act when it became apparent that the tug was not obeying the rules of the road. It is implicit in the court's language that under the circumstances it considered a failure to act under Para. 17 (a)(ii) a fault, despite the permissive wording of that subparagraph.

In *Matter of Sieriki Kisen Kaisha*,<sup>33</sup> the *Seiryu*, the give-way vessel in a crossing situation, failed to take any steps to keep out of the way of the *Stena Freighter*, the stand-on vessel, until very shortly before the collision, when she turned to port across the *Stena's* bow, which

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<sup>31</sup>1984 AMC 2650 (D. Ore. 1983).

<sup>32</sup>Rule 18 provides, in part, that except as otherwise required by Rules 9, 10 and 13, a power-driven vessel underway, a sailing vessel underway, and a vessel engaged in fishing, when underway, shall keep out of the way of a vessel restricted in her ability to maneuver.

<sup>33</sup>629 F. Supp. 1374, 1986 AMC 913 (S.D.N.Y. 1986).

struck the *Seiryu's* starboard side at a right angle and almost cut her in two. The *Seiryu* sank the moment the *Stena* pulled away, but fortunately there were no deaths or injuries, the master and crew having meanwhile climbed aboard the *Stena*.

The *Stena's* watch officer testified that he had concluded from plotting successive positions of the *Seiryu* on the *Stena's* radar reflection plotter that the *Seiryu* would pass astern of his vessel. He then busied himself with taking a fix and plotting it on the chart. About three minutes before the collision he permitted the helmsman-lookout—the only other person on the bridge—to go below to call the next watch. (The vessel's automatic pilot was in operation.) After plotting the fix he saw the *Seiryu* dead ahead, and the vessels collided as he ran to the controls and put the *Stena's* variable pitch propeller levers on "STOP."

The *Seiryu* confessed fault, but argued that the *Stena* was also to blame, because of her failure to maintain a proper lookout, to sound a danger signal, and to take the avoiding action permitted under Para. (a)(ii) of Rule 17 and required under Para. 17(b). Pointing to the *Stena's* maneuverability, the *Seiryu* argued that her watch officer could have stopped his vessel dead in the water in two or three minutes if he had sounded a danger signal and received no response, and that in the last minutes before collision would otherwise have occurred he could have turned the *Stena* to starboard and passed astern of the *Seiryu*. In determining that the *Stena* was 40% to blame for the collision the court placed "primary emphasis on her failure to give a whistle warning signal rather than her failure to make any specific maneuver."

The court concluded that the *Stena's* fault in having both the helmsman-lookout and the watch officer engage in other activities, although admittedly aware of the *Seiryu's* close proximity, was a violation of COLREGS, and that the *Stena's* failure to give a warning signal was a contributing cause of the collision.

The court did not attempt to differentiate between the *right* to take avoiding action under Rule 17(a)(ii) and the *obligation* to take such action under Rule 17(b). But again, it seems implicit from the court's discussion of the *Stena's* faults that had the *Stena* been maintaining a proper look-out she should, at the very least, have sounded a danger signal as soon as it became apparent that the *Seiryu*, as the port hand vessel, was not complying with her obligation under COLREGS to keep out of the *Stena's* way.

*The Achilleus*<sup>34</sup> involved a night-time collision between a vessel of that name and the *Cinderella*, in the approaches to Kieler Forde, while the *Achilleus* was en route from Finland to Calais and the *Cinderella* was on a voyage from Piraeus to Stockholm. At the material times the vessels were on crossing courses, the *Cinderella* being the starboard hand vessel, and the *Achilleus* the port hand vessel.

The *Achilleus* was held 70% to blame, for crossing a traffic separation zone and for failing to keep out of the way. Both faults were found to have resulted from her failure to maintain a proper lookout. The *Cinderella* had sounded a warning signal, but it was not heard on the *Achilleus*, apparently because a proper lookout was not being maintained. The *Cinderella* was held 30% to blame, for failing to take avoiding action, because, if she had been maintaining a proper look-out, it should have been apparent to those on board that the *Achilleus* was not turning to starboard, but was going to cross ahead of the starboard hand vessel.

Mr. Justice Sheen quoted Paras. (a)(i), (a)(ii), and (b) of Rule 17. While in charging the *Cinderella* with fault he did not specify which paragraphs of Rule 17 he considered the *Cinderella* had violated, he stated:

No one on the bridge of *Cinderella* appears to have appreciated that *Achilleus* had headway and was apparently going to cross ahead of *Cinderella*.

Whether Mr. Ohlsson [the *Cinderella's* mate on watch] was looking at the radar or keeping a visual lookout, he ought to have observed what *Achilleus* was doing. His failure to observe *Achilleus* shows a complete lack of a sense of responsibility. When the propeller of *Cinderella* was put to full astern mode *Achilleus* cannot have been more than half a cable distant. Long before that moment it should have been apparent that *Achilleus* was not taking appropriate action to comply with r. 15.

Again, it will be observed that Sheen, J. did not charge the *Cinderella* with fault on the basis of a failure to take avoiding action when the vessels were so close that action by the *Achilleus* alone could not have prevented the collision. Rather, he noted the advice of the experts that long before the *Cinderella's* propeller was put to full astern mode it should have been apparent that the *Achilleus* was not complying with her Rule 15 obligation to keep out of the way, and that the *Cinderella* should then have taken off her headway. It is therefore

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<sup>34</sup>[1985] 2 Lloyd's Rep. 338 (Q.B., Adm. Ct. 1985).



clear that he considered the *Cinderella* at fault for failure to take avoiding action in accordance with Para. (a)(ii) of Rule 17, even though that paragraph is worded as permitting such action, rather than as requiring it.

Still another decision treating a stand-on vessel's failure to take the avoiding action permitted under Rule 17(a)(ii) as a fault is *In re Ocean Foods Boat Co.*<sup>35</sup> The Fishing Vessel *McKinley*, the give-way vessel in a crossing situation, collided with the *M/V Tosca*. Both vessels were held at fault, the *McKinley* for failing to give way and for attempting to cross the *Tosca's* bow, and the *Tosca* for failing to take avoiding action. In charging the *Tosca* with 35% of the blame, the court quoted both Para. (a)(ii) and Para. (b) of Rule 17, and continued:

Rule 17 allowed the *Tosca* to take unilateral action to avoid the collision once it became apparent that the *McKinley* was not following the rules and that the *Tosca's* maneuver was necessary to avoid collision. The *Tosca* failed to take such action. She must accept some responsibility for the collision.

## CONCLUSION

From the American and British decisions concerning the rights and obligations of the stand-on vessel in a crossing situation handed down since COLREGS entered into force in 1977, three principles may be deduced:

1. As soon as it becomes apparent that the port hand vessel is not taking prompt steps to keep out of the way, the starboard hand vessel *must* sound the warning signal of five or more short, rapid blasts which Rule 34 (d) requires a vessel approaching another to sound if from any cause she fails to understand the intentions or actions of the other, or is in doubt whether sufficient action is being taken by the other to avoid collision.

2. While Para. (a)(ii) of Rule 17 is worded permissively, a stand-on vessel will be chargeable with some degree of blame if she stubbornly persists in holding course and speed after it has, or should have become apparent to her that the give-way vessel is not taking

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<sup>35</sup>692 F. Supp. 1253, 1989 AMC 580 (D. Ore. 1988).

See also *Rich Ocean Car Carriers, S.A. v. The Sanko Diamond*, 1989 AMC 220 (M.D. Fla. 1988), where the court found the stand-on vessel 15% to blame for failing to sound the danger signal required by Rule 34(d) when it appeared that sufficient action was not being taken by the give-way vessel to avoid collision, and for failing to take avoiding action "in ample time," as required by Rule 8.

appropriate action, even if it is possible to demonstrate that the vessels were not then so close that action by the give-way vessel alone could not avoid collision, and that the mandatory provisions of Para. (b) of Rule 17 were therefore not yet applicable.

3. The stand-on vessel will of course be held at least partially to blame for a collision contributed to by her violation of Para. (b) of Rule 17, in failing to take appropriate avoiding action when the vessels are so close that the give-way vessel cannot avoid collision by her own action alone.

Cockcroft & Lameijer's analysis of the four stages in a collision situation is particularly appropriate as an outline of the respective rights and obligations of vessels on crossing courses:

When two vessels in sight of each other are approaching with no change of compass bearing, so that when there is risk of collision one of them is required to keep out of the way by a Rule from Section II, there may be four stages relating to the permitted or required action for each vessel:

1. At long range, before risk of collision exists, both vessels are free to take any action.

2. When risk of collision first begins to apply the give-way vessel is required to take early and substantial action to achieve a safe passing distance and the other vessel must keep her course and speed.

3. When it becomes apparent that the give-way vessel is not taking appropriate action in compliance with the Rules the stand-on vessel is required to give the whistle signal prescribed in Rule 34(d) and is permitted to take action to avoid collision by her manoeuvre alone, but a power-driven vessel must not alter course to port to avoid another power-driven vessel crossing from her own port side. The give-way vessel is not relieved of her obligation to keep out of the way.

4. When collision cannot be avoided by the give-way vessel alone the stand-on vessel is required to take such action as will best aid to avoid collision.

The distances at which the various stages begin to apply will vary considerably. They will be much greater for high speed vessels involved in a meeting or fine crossing situation than for vessels involved in an overtaking situation. For a crossing situation involving two power-driven vessels in the open sea it is suggested that the outer limit of the second stage might be of the order of 5 to 8 miles and that the outer limit for the third stage would be about 2 to 3 miles.<sup>36</sup>

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<sup>36</sup>Cockcroft & Lameijer, *Collision Avoidance Rules*, supra note 3, at 124–125.

*Rules Relating to the Crossing Situation***Rule 15. Crossing situation**

When two power-driven vessels are crossing so as to involve risk of collision, the vessel which has the other on her own starboard side shall keep out of the way and shall, if the circumstances of the case admit, avoid crossing ahead of the other vessel.

**Rule 16. Action by give-way vessel**

Every vessel which is directed to keep out of the way of another vessel shall, so far as possible, take early and substantial action to keep well clear.

**Rule 17. Action by stand-on vessel**

(a)(i) Where one of two vessels is to keep out of the way the other shall keep her course and speed.

(ii) The latter vessel may however take action to avoid collision by her manoeuvre alone, as soon as it becomes apparent to her that the vessel required to keep out of the way is not taking appropriate action in compliance with these Rules.

(b) When, from any cause, the vessel required to keep her course and speed finds herself so close that collision cannot be avoided by the action of the give-way vessel alone, she shall take such action as will best aid to avoid collision.

(c) A power-driven vessel which takes action in a crossing situation in accordance with subparagraph (a)(ii) of this Rule to avoid collision with another power-driven vessel shall, if the circumstances of the case admit, not alter course to port for a vessel on her own port side.

(d) This Rule does not relieve the give-way vessel of her obligation to keep out of the way.