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When Do Collision Regulations Begin to Apply?

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The fundamental approaches for preventing collisions at sea are based on interpreting and understanding the Collision Regulations correctly. Although the Regulations are the technical standards of collision avoidance conduct at sea, they are also the code for dividing liability[1]. When one tries to apportion the collision liability between two parties, the first question faced is whether the Rules apply and if so, when do they apply? In order to answer this question, this paper has reviewed most of the English, American and Canadian cases in the past hundred plus years, which are related to this topic and outlined briefly four special circumstances where collision avoidance rules do not apply, even if there is a risk of collision.

KEY WORDS

1. The Collision Regulations. 2. Risk of Collision. 3. Collision Avoidance. 4. Collision Liability.

1. INTRODUCTION. In the Collision Regulations, Rules 12, 14, 15, and 18 all request one vessel to give way to the other, or both shall turn to starboard, when they approach each other so near as to involve risk of collision. Moreover, Rules 7, 13, 16, 17 and 19 are also related to the concept of risk of collision[2]. In an earlier case, *The Banshee*[3], Lord Esher (Brett, M. R.), said that:

> *Now at what period of time is it that the Regulations begin to apply to two ships? It cannot be said that they are applicable however far off the ships may be. Nobody could seriously contend that, if two ships are six miles apart, the Regulations for Preventing Collisions are applicable to them.*[4]

This is a rather old question which has been discussed in many cases[5]. It is believed that there are two views on this question, *i.e.* the Rules begin to apply

a. when the risk of collision exists, or
b. just before the risk of collision exists.

[1] Si and Wu, 1995.
[2] Zhao and Xia, 1993.
[3] (1887) 6 Asp. M.L.C. 221; 57 L.T. 841, C.A.
[4] This case was heard in the last century when ships were relatively slow. … The distance at which risk of collision begins to apply might well be considered to be greater than 6 miles between vessels approaching one another at high speeds, in the open sea, on reciprocal or nearly reciprocal courses. The distance must depend very much on circumstances and particularly on the speed of approach. In rivers and harbours where vessels frequently have to change course risk of collision may only be considered to apply at relatively short distances. See Cockcroft and Lameijer, 1996, p. 38.
[5] Gault, 1998, p. 204.

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2. THE RULES BEGIN TO APPLY WHEN THE RISK OF COLLISION EXISTS. In *The Sylph*[6] in 1884, Dr. Lushington said that, "*We have never got to this and I hope never shall, that it* (the rule) *applies where two vessels are sailing properly, and there is no chance of a collision.*" Several years later, a vessel, which was being overtaken by another, was held not to blame within Art. 22 of the Regulations if she alters her course at such a distance ahead of the overtaking vessel as "*there was no risk of collision*"[7]. Sterndale, LJ held in the case of *The Plumleaf*[8] that, "*this porting and steadying was done at a time when there was no risk of collision, and that would seem to show there was no breach of the article.*"

In a later case, *The Auriga*[9] in 1977, Brandon, J. held that, "*The overtaking rules applied only where there was a risk of collision. On the facts of the case, no such risk existed until the defendants' ship altered course just before the collision. When the course of the two vessels became convergent the crossing rules applied*", with which Llana and Wisneskey (1991)[10] share the same opinion:

> *A vessel approaching from a direction more than 22.5 degrees aft of the beam of another vessel … is overtaking if there is risk of collision. If the approaching vessel is within the stern-light sector of another vessel but their courses will bring them no closer together than, say, three miles, then there is no risk of collision and no overtaking situation exists.*

All these comments seem of the opinion that the rules never apply until there is risk of collision; if one can not say that the risk of collision within the rules exists, the rules then do not apply to the scenario.

3. THE RULES BEGIN TO APPLY BEFORE THE RISK OF COLLISION EXISTS. However, there are also many authorities that suggest a totally different opinion, *i.e.* the rules are not designed to prevent collision only, although it named as regulations for preventing collisions; they are also constructed to prevent risk of collision, for the purpose to guarantee safety of navigation at sea.

In an early case, *The John McIntyre*[11] in 1884, Bowen, LJ said that, "*It was the duty of the* John McIntyre *to keep out of the way of the* Monica*, to slacken her speed or stop and reverse if necessary to prevent risk of collision*". In the same year, Lord Esher in the famous case of *The Beryl*[12] stated this idea much more clearly[13]:

> *I take it that the basis of the regulations for preventing collisions at sea is, that they are instructions to those in charge of ships as to their conduct; and the legislature has not thought it enough to say, "We will give you rules which shall prevent a collision"; they have gone further and said that for the safety of navigation we will give you rules which shall prevent risk of collision. It is not enough if you do only that which will apparently prevent a collision; we will*

[6] (1884) 5 L.T. 462; 2 Ecc.&Ad. 75; 2 Sp. 75, at 82 and 83.
[7] *The Banshee* (1887) 6 Asp. M.L.C. 221; 57 L.T. 841, C.A.
[8] (1921) 7 Ll.L.Rep. 207, at 209.
[9] [1977] 1 Lloyd's Rep. 384.
[10] Llana and Wisneskey, 1991, p.79.
[11] (1884) 9 P.D. 135, at 136; 53 L.J.Ad. 115; 51 L.T. 185; 33 W.R. 190; 5 Asp.M.C. 278, C.A.
[12] (1884) 9 P.D. 137, at 138, 139, and 140; 53 L.J.Ad. 75; 51 L.T. 554; 33 W.R. 191; 5 Asp.M.C. 321, C.A.
[13] See also Griffin, 1949; Lord Hailsham of St. Marylebone, 1983; McGuffie, 1961; *The Digest*: *Annotated British, Commonwealth and European Cases*, 1984 Reissue, vol. 42, Butterworths; and Sturt, 1991.

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give you rules which shall regulate your conduct, not merely for the purpose of preventing a collision, but for the purpose of preventing even a risk of collision.

Another rule of interpretation of these regulations is (*the object of them being to avoid risk of collision*) *that they are all applicable at a time when the risk of collision can be avoided — not that they are applicable when the risk of collision is already fixed and determined. We have always said that the right moment of time to be considered is that which exists at the moment before the risk of collision is constituted. The words are not "If two ships under steam are crossing with a risk of collision", but "are crossing so as to involve risk of collision", that is, the moment before there was a risk of collision.*

In the next year, the same judge in another case named *The Dordogne*[14] said that, "*As I said in* The Beryl, *the regulations are made not merely for the purpose of preventing collision, but of preventing danger of collision*". One year later, he delivered the same rule again in the case of *The Ebor*[15]:

The Regulations … as we have repeatedly pointed out … are not made only to prevent collisions, but to prevent the danger of collision; they must therefore be constructed strictly.

In the same year, *The Main*[16] approved the earlier decision in *The Franconia*[17] and considered the *Main* as an authority for the proposition that the overtaking rule came into effect before a risk of collision arose[18]. In *The Banshee*[19] in 1887, Lord Esher, M. R. stated that, "*They only apply at a time when, if either of them does anything contrary to the Regulations, it will cause danger of collision. None of the Regulations apply unless that period of time has arrived. It follows that anything done before the time arrives at which the Regulations apply is immaterial, because anything done before that time cannot produce risk of collision within the meaning of the Regulations.*"

In the early 20th century, Kennedy, LJ in *The Bellanoch*[20] held that, "*Nobody can dispute, in this court, the judgment which has been given in the case of* The Beryl, *which dealt authoritatively with the question of the time at which a vessel, with whom a duty to act lies, ought to take steps, in accordance with the rules, to fulfill her duty, and nobody disputes that the time is when it is, or ought to be, apparent that there will be risk if nothing is done to prevent it.*" In *The Gulf of Suez*[21] in 1921, Atkin, LJ said that, so as to involve risk of collision "*indicates a period before the risk has, so to speak, actually matured; it means a period at which there is a probability that there will be a risk of collision if precautions are not taken.*"

In a recent case, Sheen, J. confirmed this rule: "*The International Regulations for Preventing Collisions at Sea were designed to prevent the risk of collision by prescribing navigation which would avoid a close quarters situation.*"[22] And in 1993, he repeated the same principle again.[23]

[14] (1885) 10 P.D. 6, at 10; 54 L.J.Ad. 29; 51 L.T. 650; 33 W.R. 360; 5 Asp.M.C. 328, C.A.
[15] (1886) 11 P.D. 25, at 29; 54 L.T. 200; 34 W.R. 448; 5 Asp.M.C. 560, C.A.
[16] (1886) 11 P.D. 132; 55 L.J.Ad. 70; 55 L.T. 15; 34 W.R. 678; 6 Asp.M.C. 37, C.A.
[17] (1876) 7 P.D. 8; (1877) 7 P.D. 163.
[18] See also Mukherjee, 1992.
[19] (1887) 6 Asp.M.C. 221; 57 L.T. 841, C.A.
[20] [1907] A.C. 269; 76 L.J.P. 160; 97 L.T. 315; 10 Asp.M.C. 483, H.L., affirming P. 170, at 192, C.A.
[21] [1921] P. 318; 90 L.J.P. 321; 125 L.T. 653; 37 T.L.R. 704; 7 Ll.L.Rep. 159, C.A.
[22] *The Pulkovo and Oden* [1989] 1 Lloyd's Rep. 280, at 287; cf. Cahill, 1983, p.62: "*the objective of the Rules is to prevent the development of close quarters.*"
[23] *The Maloja II and John M* [1993] 1 Lloyd's Rep. 48.

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The same principle also applies in American and Canadian case laws. A classic statement is that of Mr. Justice Clifford in *New York & Liverpool Co.* v. *Rumball*[24]:

> *Rules of navigation … are obligatory upon vessels approaching each other, from the time the necessity for precaution begins, and continue to be applicable as the vessels advance, so long as the means and opportunity to avoid the danger remain. They do not apply to a vessel required to keep her course after the approach is so near that the collision is inevitable, and are equally inapplicable to vessels of every description, while they are yet so distant from each other that measures of precaution have not become necessary to avoid a collision.*

The same judge repeated the same principle in 1870[25] as follows:

> *But precautions, in order to be effectual, must be seasonable; and if they are not so, and collision ensues because they were not adopted earlier, it is no defence to show that they were adopted as soon as the necessity for the precaution was perceived, nor to prove that at the moment of the collision it was too late to render such a precaution of any service. Unless precautions are seasonable, they are of little or no use, as it will seldom or never happen that a collision could be avoided at the time when it occurred.*

In 1912, Waddill, DJ emphasized that the overtaking rule applied before the risk of collision exists: "*the collision was brought about as the result of the failure of the steamer Kirnwood, the overtaking vessel, to take timely and precautionary steps to avoid either the collision, or the risk of collision.*"[26] Similarly, L. Hand in the Circuit Court of Appeal held that[27]: "*Being an overtaking vessel, her duty was to keep out of the way and to avoid the risk of collision. A constant bearing is a sure sign of danger, made so by the rules at their very outset; a danger which should put every mariner on guard. To be sure, it may not call for an immediate change of course or speed, but it must always be remembered that it is the risk of collision, not the collision itself, that masters must avoid*". In 1946, the same Judge delivered the same rule again in another case[28]:

> *The vessels were already so situated as "to involve risk of collision", although they would not have collided, had each other kept her course and speed. But "risk of collision" does not mean certainty of collision, but only that prudence demands that navigators shall watch each other's navigation and be prepared to do whatever safety may demand. No change of heading is therefore open to the privileged vessel, except such as the burdened vessel could foretell before the "risk of collision" arose.*

In a later case, *Ocean Marine Limited* v. *U. S. Lines Co.*[29] in 1962, Clark, CtJ said that: "*Since the rules are designed to prevent the risk of collision as well as collision*

[24] (1859) 16 L.Ed. 144, at 148; 21 How. 372, at 384. See also cases: *The Nichols* (1869) 19 L.Ed. 157, at 159; 7 Wall. 656, at 663; *The Cayuga* (1872) 14 Wall. 270; *Fraser* v. *The Wenona* (1873) 22 L.Ed. 52, at 58; 19 Wall. 41, at 52; *The Dexter* (1874) 23 L.Ed. 84 at 85; 23 Wall. 69, at 75; *The Breakwater* (1894) 39 L.Ed. 139; 155 U.S. 252; 15 S.Ct. 99; *U. S.* v. *Shaw, Savill & Albion Co.* (1949) 178 F.2d 849, at 852; and books: Griffin, 1949; Ludes and Gilbert, 1967; Smith, 1993; and Zhao *et al*, 1996a.

[25] *The Johnson* (1870) 9 Wall. 146, at 153. See also *The America* (1876) 92 U.S. 432, at 437; 23 L.Ed. 724, at 726; *Belden* v. *Chase* (1893) 150 U.S. 674, at 698.

[26] *The Kirnwood* (1912) 201 Fed. 428, at 430.

[27] *City of Roma* v. *S—51* (1930) A.M.C. 524, at 527 and 528; 38 F.(2d) 782. See also *Esso Seattle* v. *Guam Bear* (1970) A.M.C. 1592, at 1602, *per* Honorable William T. Beeks.

[28] *Socony Vacuum Tr. Co.* v. *Gypsum Packet Co.* (1946) 153 F.(2d) 773, at 776.

[29] (1962) 300 F.2d 496, at 498 and 499.

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itself[30], *it is not necessary for a collision to be imminent or even probable before the obligation imposed by them accrues*''.

4. WHEN DO THE RULES APPLY? Having reviewed the cases related to the time when the rules apply, it still seems difficult to answer the question: when do the rules begin to apply?

Griffin's (1949) answer to this question is that, probably no precise time can be fixed at which the rules of navigation, whether statutory or not, begin to govern the navigation of vessels in a particular situation.[31] The principle delivered in some cases in Section 2 of this paper amounts to little more than saying that a navigator should exercise care as soon as care should be exercised. Yet the nature of the cases preclude any mechanical test, it is merely the requirement, so often made by the law, of reasonable care under the existing circumstances. When the obligation of a privileged vessel to hold her course begins to attach or when meeting vessels should alter course depends not only on the distance between the vessels, but on the relation of their courses to each other, on their speed, at night on the range of visibility of their lights, on the character of the waters which they are navigating, and on other infinitely varying conditions. Proper measures must be taken as soon as a competent and alert navigator ought to perceive that they are called for. In *McWilliams* v. *The Vim*[32], it was suggested that, on a night such that the visible distance of side lights ''*ought also by necessary implication to be taken as the distance, if the lights are seen, within which vessels should be required to keep their course, and deviation from it held to be at their own peril*,'' and therefore a sailing vessel was held in fault, as against a steam vessel, for changing course within that distance. Obviously, this rule would not be practicable in confined waters; also the speeds of the vessels must be taken into consideration. The distance might be unreasonably great, if they were moving very slowly, or unreasonably short as applied to very fast vessels. In the 19th century, Judge Hough held that, when lights were actually seen more than the visible distance, the ''*necessity for precaution*'', under the circumstances of that case, had begun and the rules of navigation were applicable, in particular the requirement of a whistle signal upon a change of course when within sight.[33] Conclusively, there can be no hard and fast rule which determines when the necessity for precaution begins.[34]

Before comparing these different views in the above two sections on the time when the rules begin to apply, it may be necessary to consider for a while the difference between the risk of collision and the danger of collision.

In the Collision Regulations, two rules relate to the danger of collision:

> Rule 2(b). In construing and complying with these Rules due regard shall be had to all dangers of navigation and collision and to any special circumstances, including the limitations of the vessels involved, which may make a departure from these Rules necessary to avoid immediate danger.

[30] *The Beryl* (1884) 9 P.D. 137, at 138, 138, and 140; 53 L.J.Ad. 75; 51 L.T. 554; 33 W.R. 191; 5 Asp.M.C. 321, C.A.

[31] Griffin, 1949.

[32] (1882) 12 Fed. 906.

[33] *McWilliams* v. *The Vim* (1882) 12 Fed. 906. See also: *The Steel Inventor* (1930) 43 F.2d 958; A.M.C. 1468, at 1530.

[34] Lord Hailsham of St. Marylebone, 1983.

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Rule 19(e). Except where it has been determined that a risk of collision does not exist, every vessel which hears apparently forward of her beam the fog signal of another vessel, or which cannot avoid a close-quarters situation with another vessel forward of her beam, shall reduce her speed to the minimum at which she can be kept on her course. She shall if necessary take all her way off and in any event navigate with extreme caution until danger of collision is over.

In respect to the Rule 2(b), it has been viewed that "*a departure from the Rules may be required due to dangers of navigation or to dangers of collision*"[35]. Thus, the danger of collision in this rule means that the vessels approach each other so near as to collision, rather than just risk of collision; it is this danger which may make a departure from the Regulations necessary and needed,[36] which has been defined as follows[37]:

> *Danger of collision is, of course, included in risk of collision, but it is not all there is of it. There is never danger of collision other than by inevitable or inscrutable accident, where all fully and completely obey the law. Danger of collision begins only when one vessel or the other begins departure from the rules established by law.*

Since departure from the rules is only lawful when there is an immediate danger,[38] the danger of collision in the Rule 2(b) is at least almost the same as the immediate danger, if they are not exactly the same; but definitely a much more dangerous situation than that merely with a risk of collision.

However, there is no dispute that the rules apply when the risk of collision actually exists or still exists. The danger of collision in Rule 19(e), therefore, ought to be the risk of collision, in which case it is reasonable to say that the rules do not apply when the two vessels pass each other clearly without any risk of collision, which is different from the danger of collision in Rule 2(b).

Now, the question arising is: what is the meaning of danger of collision in the definitions reviewed in the above two sections? It is interesting to note that in *The Beryl*[39] Brett, M.R. defined the purpose of the rules as preventing the risk of collision.[40] In another case, however, when he confirmed his opinion he said that the purpose was preventing danger of collision.[41] In *The Banshee*[42] these two terms have been used in the same expression of the time when the rules apply with obviously the same meaning. A similar thing happened again in *City of Roma* v. *S—51*[43] in America. Furthermore, it was held that "*there is danger or risk of collision whenever it is not clearly safe to go on*"[44]. Having noted these and compared with those definitions in Section 3 of this paper, it is not difficult to reach the conclusion that the meaning of

[35] Cockcroft and Lameijer, 1996, p.7.

[36] McGuffie, 1961.

[37] *The Comus* (1927) 19 F.2d 774; A.M.C. 860. See also: *The Milwaukee* (1871) Brown Adm. 313; Fed. Cas. 9, 626.

[38] See Cockcroft and Lameijer, 1996, and Smith, 1993.

[39] n. 12 above.

[40] *The Beryl* (1884) 9 P.D. 137, at 138, 138, and 140; 53 L.J.Ad. 75; 51 L.T. 554; 33 W.R. 191; 5 Asp.M.C. 321, C.A.

[41] *The Dordogne* (1885) 10 P.D. 6, at 10; 54 L.J.Ad. 29; 51 L.T. 650; 33 W.R. 360; 5 Asp.M.C. 328, C.A.

[42] (1887) 6 Asp.M.C. 221; 57 L.T. 841, C.A.

[43] See n. 27 above.

[44] See *The Aurania* (1886) 29 Fed. 98, at 123; and *The Philadelphia* (1912) 199 Fed. 299.

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danger of collision and risk of collision is the same here as in Rule 19(e). Having arrived at such a conclusion, the definitions in Section 2 can be discussed one by one as follows.

The first one delivered by Dr. Lushington should not be used as grounds to say that he believed the rules apply only after the risk of collision is still there. Taking this with all his other judgments on the meaning of risk of collision in Section 5.1 below, one will be satisfied that what he said in *The Sylph*[45] solely means that the rules do not apply "*where two vessels are sailing properly, and there is no chance of a collision*", no matter what kind of manoeuvres adopted, the risk of collision will not be involved immediately.

Based on the same principle, the second judgment in Section 3 above held by Lord Esher, expressed a similar idea[46]:

> *They* (*the Regulations*) *only apply at a time when, if either of them does anything contrary to the Regulations, it will cause danger of collision. None of the Regulations apply until that time has arrived. It follows that anything done before the time arrives at which the Regulations apply is immaterial, because anything done before that time cannot produce risk of collision.*

and that is the reason beyond doubt why the porting and steadying was held as that "*there was no breach of the article*"[47].

Before any further conclusion can be reached, it seems of necessity to discuss two important cases in this issue. One of them is *The Manchester Regiment*[48], in which the conclusion is that the rules, including the overtaking rule, only apply when there is risk of collision, "*although at one period of time the vessels were on overtaking courses, at* '*the right moment of time to be considered*', *i.e.*, '*the moment before the risk of collision was constituted*' — *in this case at the time when the vessels were about one mile from each other, with five or six minutes to spare — the vessels were on crossing courses, the Manchester Regiment being the give-way vessel.*"

Because of its importance, it will be reviewed in detail. The situation at 02:10, 10 minutes before the collision was as follows. One of the encountered vessels, the *Clan Mackenzie*, steaming at 10 knots, was 1·5 miles from the point of collision. They were approximately at a right angle, the distance between them was a little, but not much, under two miles. In this position the *Manchester Regiment* would bear about 30 deg. on the *Clan Mackenzie*'s port bow; but by this time at any rate the *Clan Mackenzie* was doing fully 10 knots and the *Manchester Regiment* may not have been doing more than 5·5 knots; and so, allowing for the fact that the angle was not exactly a right angle, the *Manchester Regiment* was probably in fact only a little over 1800 yards, while the *Clan Mackenzie* was 1·5 miles, from the point of intersection, and the bearings were nearer 5·5 and 2·5 points respectively, the ships being at a distance of little less than two miles apart; and the judge, Sir Boyd Merriman, the President, found this to be roughly the position at 02:10.

[45] *The Sylph* (1854) 5 L.T. 462; 2 Ecc. & Ad. 75; 2 Sp. 75, at 82 and 83.

[46] *The Banshee* (1887) 6 Asp.M.C. 221; 57 L.T. 841, C.A. See also Griffin, 1949, p.22 and *The Digest*: *Annotated British, Commonwealth and European Cases*, 1984 Reissue, vol. 42, no. 3607, Butterworths, in which the quotation of "*it will cause danger of collision*" has been changed as "*it will cause risk of collision*".

[47] *The Plumleaf* (1921) 7 Ll.L.Rep. 207, at 209.

[48] (1938) 60 Ll.L.Rep. 279.

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After reviewing the judgment in *The Beryl*[49], *The Banshee*[50] and *The Bellanoch*[51], the President commented that[52]:

(*1*) *There is nothing in any of these observations, by which I am bound, which hints at any difference between the overtaking rule and the other rules as to the moment at which they apply. The test is stated in different forms, but with no difference in substance, and it is applied universally; nor is there anything in the case of the Banshee itself to give the slightest warrant for Mr. Carpmael's contention*[53] *that mere visibility is the test for the applicability of Art. 24.*

(*2*) *Now, if it is assumed that vessels are on exactly parallel courses, that the hindmost vessel is 2·5 miles from the point at which she would be opposite the leading vessel, and that the lateral interval is a mile, she has the leading vessel about two points on her port bow. The distance between the two ships is, of course, considerably more than 2.5 miles. At the supposed speeds of ten and six knots respectively … (30 minutes later) she has the leading vessel just under six points on her port bow and they are still over a mile apart. Even in this last position I am advised, as a matter of seamanship, that the two vessels would have no concern with each other at all, and that from the seaman's point of view it would be absurd, in the original position half–an–hour earlier, to treat them as being affected by any of the Steering or Sailing Rules.*

(*3*) *But when some minutes later the Clan Mackenzie took up her course S.88W true, her magnetic heading is stated to have been N.77W. Had these vessels continued on these respective headings they would have been not on parallel courses, but on courses diverging by about a point, so that the lateral interval would be increasing all the time and the vessels would be by that much the less concerned with each other.*

(*4*) *In none of these positions, (as respects the situation at 10 minutes before the collision) as a matter of seamanship, that they would have any concern with each other at the beginning, or for the major part, of that 10 minutes.*

On the first point of view, it is absolutely right, in the judgment delivered by Lord Esher, *et al*[54], that there is nothing "*which hints at any difference between the overtaking rule and the other rules as to the moment at which they apply*". However, it is highly instructive to notice that the reason these judgments were delivered in those

[49] (1884) 9 P.D. 137, at 138, 138, and 140; 53 L.J.Ad. 75; 51 L.T. 554; 33 W.R. 191; 5 Asp.M.C. 321, C.A.

[50] (1887) 6 Asp.M.C. 221; 57 L.T. 841, C.A.

[51] [1907] A.C. 269; 76 L.J.P. 160; 97 L.T. 315; 10 Asp.M.C. 483, H.L., affirming P. 170, at 192, C.A.

[52] The quotation is numbered for the sake of discussion.

[53] Mr. Carpmael was counsel representing the defendants, the owners of the steamship *Manchester Regiment*, whose contentions included that the situation should be governed by the overtaking rule (Art. 24), which should have applied before there was risk of collision; if he could not maintain that Art. 24 applied in all circumstances independently of risk of collision, there was in this case risk of collision even when the *Manchester Regiment* was 2.5 to 3 miles away on a westerly heading, because the fact that she was flying the "J.I." signal indicated that she would shortly be turning on to a northerly heading; that risk of collision was, therefore, established in the overtaking position and that the *Clan Mackenzie* being once an overtaking vessel remained always an overtaking vessel. He also reserved the point that the "J.I." signal itself, apart from the Regulations, obliged the *Clan Mackenzie* to keep out of the way. Since he had no authority in support of the proposition, and that what authority there was was held by the President to be to the opposite effect (*The Treherbert* [1934] P. 31; 47 Ll.L.Rep. 274.) it was rejected by the President who refused to accept his contention "*even if he could persuade higher authority to do so*": *The Manchester Regiment* (1938) 60 Ll.L.Rep. 279.

[54] See *The Beryl* (1884) 9 P.D. 137, at 138, 138, and 140; 53 L.J.Ad. 75; 51 L.T. 554; 33 W.R. 191; 5 Asp.M.C. 321, C.A., *The Banshee* (1887) 6 Asp.M.C. 221; 57 L.T. 841, C.A. and *The Bellanoch* [1907] A.C. 269; 76 L.J.P. 160; 97 L.T. 315; 10 Asp.M.C. 483, H.L., affirming P. 170, at 192, C.A.

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cases is for the purpose of defining the meaning of the phrase "*so as to involve risk of collision*" in Art. 18, as well as others, in which it was provided that:

> Art. 18. Every steamship when approaching another ship so as to involve risk of collision, shall slacken her speed, or stop and reverse, if necessary.

Obviously, in Art. 18, there is nothing "*which hints at any difference between the overtaking rule and the other rules as to the moment at which they apply*". Thus, the judgments delivered by Lord Esher, *et al*, were correct with respect to all rules at that time. However, the situation is different today. In the new international Regulations, "*so as to involve risk of collision*" is nevertheless still one of the key conditions to construct various encounter situations, but not overtaking as Rule 13(b) merely provides that:

> Rule 13(b). A vessel shall be deemed to be overtaking when coming up with another vessel from a direction more than 22·5 degrees abaft her beam, that is, in such a position with reference to the vessel she would be able to see only the sternlight of that vessel but neither of her sidelights.

Nothing about the phrase "*so as to involve risk of collision*". One cannot discuss where the rules begin to apply without noting this change of the rules. The conclusion, thereupon, is that the overtaking rule cannot be interpreted on the basis that the risk of collision exists.

Furthermore, on the second point of Sir Boyd Merriman's view, he held that when the hindmost vessel has the leading vessel approximately six points on her port bow and they are a mile apart, "*the two vessels would have no concern with each other at all*". As a prudent mariner, one may admit that this scenario is not very dangerous. But, since only seven and a half minutes later, the hindmost vessel will reach the closest point of approach (CPA), it is definitely reckless to sail without any concern to the presence of the other.

If his view were correct, this could mean that two vessels would never be in an overtaking situation if the DCPA (distance to the closest point of approach) is more than one mile, and, when the hindmost vessel turns to port towards the leading ship on her port bow when she arrives at CPA, it is the leading vessel who, under the crossing rules, shall take way off to avoid the collision, which is the result of the stupid action by the hindmost ship to bring a "safe" passing situation into a "collision inevitable" situation; and this is contrary to the judgment in the case of *The Moliere*[55].

In his third point of view, Sir Boyd Merriman stated that "*the lateral interval would be increasing all the time and the vessels would be by that much the less concerned with each other*". In fact, the additional interval should be approximately half a mile making the lateral interval up to one and a half miles, and the judge believed that this

[55] The steamship *Moliere*, proceeding, at night, down the Bristol Channel, at a speed of seven and a half knots an hour, on a W course, gradually overhauled the steamship *Baines Hawkins* … proceeding at seven knots an hour, on a W1/2N course … until she had drawn up on the starboard beam of the *Baines Hawkins* when the *Moliere* altered her course to WSW, and a collision occurred. It was held that the overtaking rule applied; that the obligation upon the *Moliere*, under Art. 20, as the "overtaking" ship, to keep out of the way, continued, although she had ceased to be within the area lighted by the sternlight, and had advanced into a position in which she could see the side light of the "overtaken" ship: *The Moliere* [1893] P. 217; 62 L.J.P. 102; 69 L.T. 263; 7 Asp.M.C. 364; 1 R. 639.

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was another strong support to his judgment that the overtaking rules did not apply. However, this is definitely contrary to the following principle which was settled more than one hundred years ago[56]:

> *The overtaking rules applied when two ships were on courses so nearly parallel as to involve no risk of collision, and applied at a time when the ships were three or four miles distant from each other.*

It is interesting to note that, in the second and fourth points of view, the base from which Sir Boyd Merriman reached his judgment is the same, *i.e.* the matter of seamanship. However, the relationship between the rules of good seamanship and the collision regulations has been stated very clearly, but nothing hints that the rules of good seamanship can apply above the rules of collision regulations. As early as in 1888, Lord Esher, M.R. held that[57]: "*If we were not bound by the Act of Parliament, we are advised, and entirely agree, that, as a matter of simple navigation, the best thing for this officer to have done was what he did. But the Act of Parliament has tied the hands of sailors and has tied the hands of the court, and has said:* '*You must not do what a sailor would say is the best thing; you must do what the Act of Parliament tells you to do.*' *It has been carried so far in the House of Lords as to say that, whatever may be the consequence, you must do what the Act of Parliament tells you to do.*" This principle is stated much more clearly in Halsbury's (1983):

> *In any case where one of the rules contained in the collision regulations applies and the obligation imposed by that rule differs from the obligation which, in the absence of such a rule, would be imposed by good seamanship, the rule must be observed.*

and the fact is that "*no reference was made to risk of collision when the Rules were amended*"[58].

In addition to *The Manchester Regiment*, *The Nowy Sacz*[59] is the other case which is viewed as one of the important cases on the issue of when the rules begin to apply. Before reviewing this case, let us have a look at *The Auriga*[60], the last case discussed in Section 2.

During the interim period when the decision on *The Nowy Sacz* was rendered by the Admiralty Court and was subsequently appealed, another similar case, *The Auriga* came before Mr. Brandon, J. in the Admiralty Court. In this case, the *Manuel Campos* was steering a course of 239° at a speed of 11 to 12·5 knots in the material time. The red sidelight and both white masthead lights of the *Auriga* were observed broad on the starboard quarter of the *Manuel Campos* at a distance of about three miles, after she turned to 205° when Cape Villano light was abeam to port and distant 10·5 miles by radar. The *Auriga* was steering 212° at a full speed of 14 knots, when the two vessels were on diverging courses, with the *Auriga* gaining on the *Manuel Campos* at a rate of 2 to 2·5 knots. At about 1922, the *Auriga* altered course to 181°, which put both vessels on courses converging at an angle of 24°, with the *Auriga* bearing less than two points aft the starboard beam of the *Manuel Campos*,

[56] *The Moliere* [1893] P. 217; 62 L.J.P. 102; 69 L.T. 263; 7 Asp.M.C. 364; 1 R. 639; see also Cahill, 1983, p.62, and Cockcroft and Lameijer, 1996.

[57] *The Memnon* (1888) 6 Asp.M.C. 317, at 319.

[58] Mukherjee, 1992.

[59] [1976] 2 Lloyd's Rep. 682; [1977] 2 Lloyd's Rep. 91; [1979] Q. B. 236.

[60] [1977] 1 Lloyd's Rep. 384.

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distant approximately 2·25 miles. Quarter of an hour later, the *Auriga* was only a half point aft the starboard beam of the *Manuel Campos*. Neither vessel took any avoiding action, and the collision occurred shortly thereafter[61]. As mentioned in Section 2, the overtaking rule was held not to apply in the case. When reviewing the judgment in *The Auriga*, S. T. Harley said that "*to apply such limitation is, with respect, to give an unfair advantage to the overtaking vessel*"[62].

In his judgment in *The Nowy Sacz*[63] appeal, Sir David Cairns stated that:

> *There was impressive judicial authority for implying into r.24 the condition that it was applicable when vessels were proceeding so as to involve risk of collision.*
>
> *The words "coming up with another vessel" in r.24(b) imported the concept of proximity in space; and the time when one vessel could be said to be "coming up with" another, while it did involve an element of proximity, might be before the time when there was risk of collision.*
>
> *Since the object of the regulations was not only to avoid collisions but also to avoid the risk of collision, it would be a good reason for holding that r.24 applied before there was a risk of collision.*
>
> *R.24 begin to operate before there was a risk of collision and as soon as it could properly be said that the overtaking ship was coming up with the overtaken ship.*

Thereupon, it seems reasonable to conclude that:

- The rules begin to apply when two vessels are approaching so nearly as to involve risk of collision, just before the risk of collision exists;
- The overtaking rules may apply much earlier than this moment.

5. WHEN THE RULES DO NOT APPLY. Although the conclusion reached in the above discussion is that the rules begin to apply just before the risk of collision exists, there are some special circumstances where the rules do not apply even though there is risk of collision. The following are some examples.

5.1. *There is no time to apply*. A regulation was not infringed, within the meaning of the statute, if those in charge of the vessel did not in fact know, and could not, with ordinary care, have known, that the regulation had come into operation. If by a wrong manoeuvre one vessel suddenly caused risk of collision to another, the latter was not held in fault unless there was time for those in charge of her, being seamen of ordinary care, skill, and nerve, to appreciate the situation, and unless also there was opportunity for them to comply with the regulations[64]. In *The Voorwarts and the Khedive*[65] in 1880, Lord Blackburn said that, "*When a sudden change of circumstances takes place, which brings a regulation into operation, though the thing prescribed by the regulation is not done by the person in charge, yet the regulation can hardly be said to be infringed by him till he knows, or ought to have known, and but for his negligence would have not known, of the change of circumstances.*"[66]

[61] *The Auriga* [1977] 1 Lloyd's Rep. 384.

[62] Harley, 1977.

[63] [1976] 2 Lloyd's Rep. 682; [1977] 2 Lloyd's Rep. 91; [1979] Q. B. 236. See also: Buzek and Holdert, 1990; Cockcroft and Lameijer, 1996; Lord Hailsham of St. Marylebone, 1983; Cahill, 1983, p.62; *The Digest*: *Annotated British, Commonwealth and European Cases*, 1984 Reissue, vol. 42, Butterworths; Mukherjee, 1992; Smith, 1993; Sturt, 1991; and Si and Wu, 1995.

[64] McGuffie, 1961.

[65] (1880) 52 L.J.Ad.1; 43 L.T. 610; 29 W.R. 173; 4 Asp.M.C. 360; 5 App. Cas. 876, H.L.

[66] See also: *The Emmy Haase* (1884) 9 P.D. 81.

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Based on this rule, it was held in *The Rhondda*[67] in 1883 that, "*16th Article could not reasonably be held to apply before the moment at which it was actually obeyed.*" In *The Beryl*[68] in 1884, it was held that, "*when you speak of rules which are to regulate the conduct of people, those rules can only apply to circumstances which must or ought to be known to the parties at the time; you can not regulate the conduct of people as to unknown circumstances*"[69]. Therefore, the Regulations for Preventing Collisions at Sea 1897 apply in the Mersey but where one of two steam vessels crossing "*so as to involve risk of collision*" was a vessel coming out of dock[70] in *The Llanelly*[71] in 1914, it was impossible to apply Article 19 before a certain time in the course of her manoeuvres and the two vessels had to navigate in accordance with the Rules of Good Seamanship Art. 29.[72]

5.2. *Unknown rules*. It is obvious that the rules must be enforced rigidly. "*The safety of navigation depends essentially upon the certainty which results from exact adhesion to general and well–known regulations*"[73]. In the *Esso Seattle* v. *Guam Bear*[74], the "*U. S. Navy Regulations relating to navigation in Guam Harbour held ineffective since it was not published in the Federal Register as required by law*"[75].

5.3. *Unknown facts*. If a ship sees another in a position that may involve risk of collision, but is unable to make out what course the other is on, she should keep her course, and not alter her rudder, or take any decisive step until she has ascertained the other ship's course.[76] However, Rule 8(e) provides that, "*If necessary to avoid collision or allow more time to assess the situation, a vessel shall slacken her speed or take all way off by stopping or reversing her means of propulsion.*" Rule 19(e) states that, "*Except where it has been determined that a risk of collision does not exist, every vessel which hears apparently forward of her beam the fog signal of another vessel … shall reduce her speed to the minimum at which she can be kept on her course. She shall if necessary take all her way off …*" Thereupon, although she shall not alter her course until the course of another ship is become aware of, she is bound to sail at safe speed and "*in any event navigate with extreme caution until danger of collision is over.*"[77]

[67] (1883) 8 App. Cas. 549; 5 Asp.M.C. 114, P.C.

[68] (1884) 9 P.D. 137, at 138, 139, and 140; 53 L.J.Ad. 75; 51 L.T. 554; 33 W.R. 191; 5 Asp.M.C. 321, C.A.

[69] See also: *The Meanatchy* [1897] A.C. 351; *The Ngapoota* [1897] A.C. 391; K. C. McGuffie (1961), *Marsden: The Law of Collisions at Sea*, 11th ed., pp. 434 and 461, British Shipping Law, vol. 4, Stevens and Sons Ltd., London, and *The Digest*: *Annotated British, Commonwealth and European Cases*, 1984 Reissue, vol. 42, Butterworths, London.

[70] For details, see Zhao *et al*, 1996b, p 245.

[71] [1914] P. 40; 83 L.J.P. 37; 110 L.T. 2698; 30 T.L.R. 154; 12 Asp.M.C. 485, D.C.

[72] See also *The Gulf of Suez* [1921] P. 318; 90 L.J.P. 321; 125 L.T. 653; 37 T.L.R. 704; 7 Ll.L.Rep. 159, C.A.

[73] See *The James Watt* (1844) 2 W.Rob. 270; Griffin, 1949, pp.27–28.

[74] (1970) A.M.C. 1592, at 1602, *per* Honorable William T. Beeks.

[75] See Buzek and Holdert, 1990, p. 53; *The Emma Kate Ross* (1890) 41 Fed. 826, at 828; and Zhao *et al*, 1996b, p. 245.

[76] See McGuffie, 1961, pp. 463–464; *The James Watt* (1844) 2 W.Rob. 270; *The Moderation* (1863) 1 Moo.P.C. 528; 9 L.T. 586; 1 Mar.L.Cas.(o.s.) 413; *The Great Eastern* (1864) 3 Moo.P.C.(n.s.) 31; 2 Mar.L.Cas.(o.s.) 97; Br. & Lush. 287; Holt Adm. 167; 11 L.T. 5; *Beal* v. *Marchais* (1873) L.R. 5 P.C. 316; 28 L.T. 822; 21 W.R. 653; 2 Asp.M.C. 1; *The Rona and the Ava* (1873) 2 Asp.M.C. 182; 29 L.T. 781; *Odfjell A/S* v. *The Vesuvio* [1930] Ex.C.R. 207 (CAN),

[77] Rule 19 of the Collision Regulations 1972.

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5.4. *Not sailing on a definite course*. Farwell's (1993) believes that one of the characteristics necessary to any overtaking situation is that, the vessel ahead is on a definite course. A freighter was ruled not to be overtaking a shrimp boat that had crossed a mile ahead of the freighter's course and then made a series of erratic port and starboard turns prior to collision.[78]

In *The Oceano*[79] in 1878, it was held that, "*What was decided really was, that in such a river the particular direction taken for a moment, or a few moments, in rounding a corner or avoiding an obstacle, was not such an indication of the real course of the ship as to justify another ship in saying,* '*I saw your course, I saw that if you continued in that course we should be crossing ships, and I left to you, therefore, the entire responsibility of getting out of my way under the rule.*' *And all that was really decided was, that in the particular part of the Thames, and under the particular circumstances which the Court had to deal with in that case, a vessel was not by that rule exonerated from the consequences of her omission to do what good seamanship required to do.*"

In the case of *Pessac* v. *Spitzberg*[80], Mr. Justice Hill said that, "*as regards the crossing rule it may be that the rule in terms applies to these two ships from the time when the* Spitzberg *began to turn so far in following that cutter under port helm that she opened her green light to the* Pessac *on the* Pessac*'s port side, coming down the river. But if you apply the rule you have to remember what was the course of these two vessels. They were each of them making for the pilot-boat and known to each other to be intending to make for the pilot-boat, … To apply the crossing rule and the co-relative course and speed rule can only be done by considering what was the course and speed of these vessels and what each ought to have thought in reference to the other in regard to an ordinary and proper manoeuvre in the course of navigation. But I think it is difficult to apply even the crossing rule and that good seamanship ought to govern the case.*"

Furthermore, in the recent case of *The Sestriere*[81], Mr. Justice Brandon said that, "*the Court was not satisfied that* Alonso *ever settled on such a course, for she was free to adjust her heading as necessary while performing the operation of dropping her pilot and was also free to change her heading as she might wish after doing so; thus she was not on a sufficiently settled course to bring the crossing rules into operation; nevertheless, even if those rules did not apply, it was that duty of* Sestriere *as a matter of good seamanship in the special circumstances of the case and under r. 29 to take timely action to keep clear of* Alonso *which had arrived on the scene first, and for that purpose to avoid crossing ahead of her.*"

In conclusion, the principle is that: "*the crossing rule does not apply if two vessels are momentarily on crossing courses as a result of one of them altering course to avoid another vessel or an obstacle.*"[82]

6. CONCLUSION. Reviewing the cases concerning the time when the Rules begin to apply shows that those appearing to support the opinion that the Rules only apply when the risk of collision exists, simply say that the rules do not apply

[78] *McDonald* v. *Archangleos* (1980) A.M.C. 88.
[79] (1878) 3 P.D. 60, at 63.
[80] (1922) 12 Ll.L.Rep. 482, at 484.
[81] [1976] 1 Lloyd's Rep. 125.
[82] Lord Hailsham of St. Marylebone, 1983.

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when two vessels are sailing normally without any chance or possibility of collision. However, if the risk of collision exists when one of them takes action departing from the rules, it will be safe to say that this is the moment they are approaching so nearly as to involve risk of collision, and that the rules begin to apply. Therefore, the Regulations begin to apply just before the risk of collision exists. The overtaking rules may apply much earlier than this moment, as the risk of collision is not a prerequisite any more in the 1972 Regulations.

However, when there is no time to apply a rule, including a local rule, or for one reason or the other a rule and/or facts are not known by navigators, the rules do not apply. Attention is also drawn to the fact that the rules do not apply either when two vessels are momentarily on certain courses as a result of manoeuvring.

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