WITH EYES OPEN INTO THE JAWS OF DEATH: THE SCOPE AND OPERATION OF THE NECESSITY DEFENCE TO COLLISION LIABILITY

Necessitas non habet legem

Claudio Bozzi*

1. Introduction

To secure the safety of navigation the *Convention on the International Regulations for Preventing Collisions at Sea (COLREGs*), 1972[1] requires crossing vessels[2] to assume reciprocal obligations and makes non-conforming vessels responsible for the costs of non-conformity. Rule 17 provides regulatory sanction for what would otherwise constitute negligence[3] by authorising a stand-on vessel's ('SOV') departure from its obligations if and only if acting contrary to the rules was a necessary and proportionate response to an immediate risk of collision. Exceptions represent a challenge to the aim of formulating rigorous regulations and promulgating uniform constructions providing predictable, practicable and justified rules for secure navigation. Admiralty has responded pragmatically to exceptional cases as they have arisen, taking a cautious case by case approach to ensure that the claim of justified departure is examined for whether it satisfies the norms of secure navigation, and the exception is not used expediently to evade responsibility. *FMG Hong Kong Shipping Ltd, the Demise Charterers of FMG Sydney v The Owners of MSC Apollo* ('*The Sydney*')[4] involved a complex interplay of actions, reactions, assumptions, miscommunications, and misdirected and misstated intentions amongst multiple vessels in an inherently uncertain and confused navigational context. The judgment illustrates Admiralty's pragmatic approach to the development and extension of the principles of necessary departure. First the court prioritises adherence to the rules as a means of avoiding collision and only then examines and determines whether and when an act contrary to the rules of navigation may be vindicated.

2. Rule of Departure

Rule 17 provides a rule of departure for the SOV to 'avoid collision' in cases of the give-way vessel's ('GWV') non-compliance with its coordinate obligation to keep clear of the stand-on vessel.

> **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 at 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.

Rule 17(a)(i) requires the SOV in a crossing situation to maintain her course and speed. Rule 17(a)(ii) is directed to altering the SOV's course when necessary to avoid a collision and is expressed in permissive language as to the action the SOV may take 'as soon as it becomes apparent' that the GWV is not complying with the rules. Although expressed permissively ('may'), rule 17(a)(ii) is interpreted mandatorily as obliging the SOV to depart

* Dr Claudio Bozzi is a Lecturer at Deakin Law School, Deakin University and a Barrister at the Victorian Bar.
[1] *Convention on the International Regulations for Preventing Collisions at Sea* (*COLREGs*), 1972, 1050 UNTS 16 (entered into force 15 July 1977).
[2] Crossing vessels are defined at *COLREGs* r 15. They are **'**vessels travelling upon converging courses so as to involve a risk of collision': *The Olympic v HMS Hawke* [1913] P 214, 218 (Court of Appeal) ('*The Olympic*').
[3] See *The Birkenhead* (1848) 3 W Rob 75; 166 ER 891; *The James Watt* (1844) 2 W Rob 270; 166 ER 756; *The Vivid* (1856) Sw 88; 166 ER 1034; *The Ceto* (1889) 14 App Cas 670, 673 (Lord Halsbury), 689 (Lord Bramwell).
[4] [2023] EWHC 328 ('*The Sydney*').

from its obligation to keep course and speed, attributing fault when SOVs have been held not to have taken action in response to the GWV's failure to take action in avoidance of a collision.[5] The obligation of the SOV therefore is to keep course and speed until it becomes sufficiently clear that the collision cannot be avoided by the actions of the GWV alone.[6] Rule 17(b) is expressed in mandatory language: under it the SOV 'shall' act to avoid the GWV when the vessels are so close that avoidance would be impossible by the GWV acting alone.

Departure is not an exception to compliance where the regulations cannot be complied with or where the collision was not caused by non-compliance with the rules. In those cases, non-compliance with the regulations is irrelevant to the question of liability for the collision.[7] The departure exception is only available where the regulations could have been complied with but were not and departure is raised as a (partial or complete) defence to liability for the collision. Where a collision which is in fact unavoidable or inevitable is adjudged avoidable by non-compliance with the regulations which in the circumstances appear facially applicable by a mariner exercising reasonable judgment, the fact that it is not avoided by such a departure from the rules does not in itself import liability.[8]

The departure provision is not a directory enactment obligating any particular conduct.[9] Rather it releases converging vessels from an otherwise obligatory direction, recognising that strict adherence to the rules may itself produce the danger[10] the regulations are intended to avert,[11] and that a departure from the rule represents the only possibility of securing *COLREGs'* overarching objective—the safety of navigation.[12]

3. *The Sydney*

3.1. The Facts[13]

On 29 August 2020 in fair conditions *FMG Sydney* ('*Sydney*'), heading for the eastbound lane of the Traffic Separation Scheme ('TSS') on course to leave the port of Tianjin, China collided with *MSC Apollo* ('*Apollo*') entering port via the westbound lane of the TSS. Thirteen minutes prior to collision (C-13) *Apollo* had *Sydney* (and three other vessels) fine on her starboard bow distant about 5.5NM, with a Closest Point of Approach ('CPA') of 0.47NM. They were converging on a constant bearing, and so crossing, but not so as to involve a risk of collision, since by their projected courses *Apollo* would pass astern of *Sydney* at a distance of 2.57NM. At C-12 the projected CPA had reduced to 0.41NM, triggering the crossing rules,[14] requiring *Apollo* to keep clear of *Sydney*.[15] Shortly after C-10 with *Sydney* fine on her starboard bow distant about 4NM *Apollo* altered course 10° to port, and subsequently made three further alterations to port of 5° at C-8, C-7 and C-6. While at C-6.30 she had

[5] The addition of r 17(a)(ii) provided *COLREGs* with a means to deal with a dilemma under the old rules—specifically those situations in which the SOV was placed in difficulty by the GWV which failed take action to keep clear. The stand-on vessel could be held to have breached the first part of old r 21 (her obligation to maintain course and speed) if she took evasive action prior to reaching the point where the collision could not be avoided. See *The Britannia* 153 US 130 (1894); *Pacific-Atlantic SS Co v United States*, 81 F Supp 777 (ED Va, 1948), affd 175 F 2d 632 (4th Cir, 1949) ('*The Oregon-The New Mexico*'). The courts, however, made generous allowance for and were unwilling to find against the stand-on vessel encountering an unresponsive or tardy give way vessel: see, eg, decision of the Court of Appeals in *The Oregon-The New Mexico*.

[6] *The Gulf of Suez* (1921) P 318, 333 (Atkin LJ). The necessity to reverse is not confined to cases of imminent danger. It may arise when it becomes clear that the ship whose duty it is to keep clear does not intend to do so: *The John King*, 49 F 469 (2nd Cir, 1891).

[7] In *The City of Antwerp v The Friedrich* (1868) LR 2 PC 25, 34. Cf *HMS Sans Pareil* (1900) P 267, 282 (AL Smith LJ). This was said to be by virtue of the general law and not under art 27.

[8] *The Benares* (1883) 9 PD 16 (Court of Appeal). See *The Khedive* (1880) 5 App Cas 876, 902.

[9] *The Flora* (1866) LR 1 AE 45 (Dr Lushington referring to the precursor art 27).

[10] *The St Cyran and Henry* (1864) 12 WR 1014; *HMS Sans Pareil* (n 7) 282 (AL Smith LJ).

[11] *The Lucia Jantina v The Mexican* (1867) Holt 130. On striking another ship: *The Concordia and the Esther* (1866) LR 1 AE 93 ('*The Concordia*'). On the operation of art 19 of the Regulations of 1863, see *The Cayuga*, 81 US (14 Wall) 270 (1871); *The Sunnyside*, 91 US (1 Otto) 208 (1876) ('*The Sunnyside*').

[12] *The Elize v The Orinoco* (1867) Holt 98. See *The Concordia* (n 11) 97.

[13] The description provided adopts the following conventions and definitions: (1) 'Heading' is the compass direction in which a vessel is pointing at a particular moment in time. A vessel therefore has a heading whether or not she is moving; (2) 'Course' is the compass direction in which the vessel is moving over a period of time; (3) 'Bearing' is the course one vessel is on as observed by or relative to another observing vessel. Bearing based on the observation of another vessel's course is to be distinguished from the (unsound) sense of bearing based on the observation of another vessel's heading (*Nautical Challenge Ltd v Evergreen Marine (UK) Ltd* [2021] 1 WLR 1436, [48]–[49] ('*The Nautical Challenge*')); vessels approaching on a constant or relatively constant bearing are at risk of collision (*The Nautical Challenge* [52]); (4) Closest Point of Approach (CPA) is the closest distance that two vessels will come to each other based on a projection of their current course and speed provided in terms of direction of the vessels, distance of the vessels from each other, and time to CPA; (5) distance and speed are given in nautical miles (NM); (6) 'C-x.y' means x minutes and y seconds prior to collision C; in *The Sydney* (n 4) y refers variably to seconds or fractional parts of a minute; (7) port and starboard and the actions of turning thereto refer to the left and right hand side of the vessel when facing towards the bow (ahead); (8) crossing the bow (ahead or in front) of a vessel is to be contrasted with crossing the stern (astern or behind) a vessel.

[14] *The Sydney* (n 4) [80].

[15] Ibid [82].

been on course to pass astern on *Sydney*'s port side at a CPA of 0.4NM, her final porting at C-6 set her on course to cross ahead of *Sydney* at a CPA of 0.2NM.

At C-5.45, with *Apollo* projected to cross ahead of *Sydney* at a CPA of 0.2NM, *Apollo* gave evidence that she noticed the bearing of *Sydney* opening to starboard and concluded that this indicated *Sydney*'s intention to pass astern of her. In fact, *Sydney*'s starboard turn had been in response to *Apollo*'s portside turns between C-8 and C-7. Of the three other vessels *Apollo* had on her starboard side apart from *Sydney*, she agreed by VHF at C-5.30 with *Hai Yang Shi You* to pass her starboard to starboard and received instruction from *Chang Fa Long* at C-4 to turn to starboard, which *Apollo* took to refer to a starboard to starboard passing, whereas in fact *Chang Fa Long* sought a port to port passing.

At C-3.45 *Sydney* observed that *Apollo* would cross ahead of *Hai Yang Shi You*, and *Apollo* confirmed that it would pass port to port with *Chang Fa Long*. But, at C-3.30 *Sydney*, hearing *Chang Fa Long* refuse the port to port passing with *Apollo*, starboarded as much as possible to open up the port side to *Apollo*. Between C-3.30 and C-2 *Apollo* turned hard to starboard from 241º to 250º and then instructed *Sydney* by VHF to pass starboard to starboard: that is, to pass astern. At this point *Apollo*'s heading began turning to port. At C-2 *Sydney* instructed *Apollo* by VHF to pass astern, to which *Apollo* replied at C-1.30 that it would pass her starboard to starboard. Four seconds later, sensing an imminent collision, *Sydney* ordered hard starboard. At C-1.45 (and again at just before C-1) *Apollo* restated its intention to pass *Sydney* starboard to starboard, which *Sydney*'s master rejected, and at C-1 instructed that *Apollo* alter her course to port—which at the time (C-1) *Apollo* was in the process of doing—when the vessels collided.

3.2. The Parties' Submissions

The parties made widely divergent submissions on the appropriate interpretation of the vessels' respective obligations.[16] *Sydney* submitted that it (as SOV) and *Apollo* (as GWV) were crossing with a risk of collision at C-12, and that collision resulted from the failure of *Apollo* to take early and substantial action to keep clear of *Sydney* as required under the crossing rules.[17] *Apollo* submitted that the crossing rules were effective much later at C-5.30, at which point the best way for her to keep clear of *Sydney* was to cross ahead of her as she kept her course and speed.[18] The collision was caused either by *Sydney* altering to starboard at C-4 thereby failing to keep her course; or, failing to turn to port if the action required to avoid collision under the crossing rules could not be undertaken, pursuant to Rule 17(a)(ii) or 17(b). *Apollo*'s fault, if any, was her failure to appreciate that *Sydney* was not aware of her intentions.

4. The First Enquiry

4.1. The Rules Are Paramount I

The starting point for any analysis of collision liability is that the regulations are paramount and are, as a matter of public policy in the interests of the protection of seaborne trade and transit, to be enforced in all the cases to which they apply.[19] The court must determine whether the collision was caused by a breach of the rules or if it would have been averted had the rules been adhered to. Fault is determined on the basis of the breach of *COLREGs* unless special circumstances displace the application of the rules. Rule 17 does not displace the universality of the rules, but operates as an exception: departure is only justified where adherence to the rules will no longer confer protection.[20]

4.1.1. The (Early and Substantial) Action of the GWV

[16] Ibid [70]–[72].
[17] Ibid [71].
[18] Ibid [72].
[19] *The Nautical Challenge* (n 13) [43], citing Lord Wright in *The Alcoa Rambler* [1949] AC 236, 250 (Privy Council) with approval to the effect that the crossing rule is to be applied 'wherever possible'. *The Superior* (1849) 6 Not of Cas 607 (decided under the Trinity House Rules of 1840) (an early case which stresses the necessity of observing rules of navigation wherever it is possible in the strongest terms). Examples in the US context include *New York & Liverpool United States Mail SS Co v Rumball*, 62 US (21 How) 372 (1858) (departure from the rules is only justifiable where it is necessary to avoid immediate danger).
[20] *The Khedive* (n 8) (collision is to be avoided primarily by observing the rules, and only departing from them if necessary to avoid immediate danger); *The Hercules*, 51 F 452 (D SC, 1892); *The Spiegel*, 84 F 1002 (NC NY, 1898). Further, while the rules are paramount mariners may not ignore well known and established local usage and custom in assessing the probable navigation of vessels in particular maritime locations. It would be unreasonable and potentially negligent for mariners not to expect commonly used local manoeuvres and act accordingly. See *The Nautical Challenge* (n 13); *The John S Darcy*, 29 F 644 (SD NY, 1887).

The GWV's obligation under Rule 16 to 'take early and substantial action to keep well clear'[21] is triggered when the risk of collision arises. *Sydney* and *Apollo* were on a constant compass bearing from C-14. At C-13 they were crossing with a projected CPA of 0.58NM and therefore not at risk of collision. Given their sizes, and the speed at which they were travelling, the Nautical Assessors determined that the closest safe CPA for a port to port passing with *Apollo* crossing *Sydney*'s stern was 0.5NM, and, if she were passing ahead of *Sydney*, 1.0NM. A collision risk arose at C-12 when the passing distance (0.36NM) between the vessels was less than the safe CPA advised by the Nautical Assessors.

Apollo argued that on these assessments the risk of collision did not arise at C-12 because a collision was still 'avoidable'. The Court, dismissing *Apollo*'s approach, held that the issue was not whether the collision would have been 'avoidable' at a CPA less than that advised by the assessors, but a matter of identifying the 'minimum safe' CPA.[22] It also rejected *Apollo*'s submission that its obligation to keep clear arose only at C-5.30 at which time radar showed that *Apollo* would cross ahead of *Sydney*.[23] It was immaterial whether *Apollo* would cross ahead (as at C-5.30) or astern (as at C-12) of *Sydney*; the only material fact was whether the CPA would be sufficient for them to cross safely, or the vessels were at risk of collision.[24]

4.2. The Rules Are Paramount II

4.2.1. The Action of the SOV

Rule 17 cannot be used to excuse non-compliance with the regulations on the basis that other manoeuvres may reduce the risk of collision,[25] where, for example, the compliance of the other (or either) vessel alone is in fact sufficient to avoid the collision;[26] or, in a mariner's seamanlike view, it would or would more likely,[27] or would equally safely and more conveniently,[28] avoid a collision. *Sydney* was not culpable in circumstances where it observed *Apollo*'s starboard turn for requiring *Apollo* to execute a port to port passing in compliance with the crossing rules.[29] The mere fact that a turn to port would have avoided a collision was not sufficient to justify an alteration of course.[30]

At C-2 the vessels were at such close quarters that *Sydney* could not rely on the actions of *Apollo* alone to avoid a collision.[31] The Nautical Assessors advised, taking into account the complicated developments between C-5.21 and C-1.13[32] which the master of *Sydney* was required to consider in responding to the situation, that pursuant to Rule 17(b)[33] the only evasive action available to *Sydney* was to turn hard to starboard away from *Apollo*,[34] then bearing on *Sydney*'s portside, which she did at C-1.30.[35]

Apollo submitted that the Assessors' answer was 'unfathomable' because had *Sydney* agreed to a starboard to starboard passing, and turned hard to port to facilitate it, the collision would have been avoided.[36] The Court did not accept that *Sydney* ought to have agreed to a starboard to starboard passing because doing so would have put the agreement between the vessels above the rules and required *Apollo* to cross ahead of *Sydney* in breach of them.[37]

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[21] *The Sydney* (n 4) [74]. *COLREGs* r 16 provides: '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.'
[22] While *Apollo* suggested that the Nautical Assessors' advice was not tempered by considerations of traffic density, available aids to navigation and the effect of keeping a good lookout, *Apollo* was unable to demonstrate how these necessitated a finding of a CPA less than that advised by the Nautical Assessors: *The Sydney* (n 4) [79].
[23] Ibid [81].
[24] See ibid.
[25] *The Flint* (1848) Not of Cas 271.
[26] *The Clara*, 49 F 765 (SD NY, 1892); *The America*, 92 US (2 Otto) 432 (1876) (two steamships which would not have collided end on had either turned to port were both held liable); *The Arazes and The Black Prince* (1861) 15 Moo PC 122; 15 ER 439 ('*The Arazes*'); *Little v Burns* (1881) Ct of Sess Cas (4th Ser) 118.
[27] *The Khedive* (n 8) 895, 904, 909 (Lord Hatherley).
[28] *The Arazes* (n 26) 122.
[29] *The Sydney* (n 4) [159].
[30] Ibid [160].
[31] Ibid [154].
[32] Ibid [156].
[33] Ibid [154].
[34] Ibid [156].
[35] Ibid [157].
[36] Ibid [158].
[37] Ibid [159].

A defence founded on a course of action unavailable in the circumstances is unsustainable. Even where the option is available and would have avoided a collision, the circumstances must enable the action to be taken. *Apollo* submitted that the action required of *Sydney* was an alteration of course to port. Even if it was (retrospectively) demonstrable that a turn to port would have avoided the collision, Rule 17(c) did not permit *Sydney* to alter course to port when the vessel she sought to avoid colliding with was on her port side.[38] A turn to starboard was the 'only' action *Sydney* could (and did) take in circumstances where *Apollo* was altering her course hard to port to effect a port to port passing.

4.3. The Rules Are Paramount III

Apollo submitted that either the primary or a contributory cause of the collision was the faults of S*ydney*: first, her failure to maintain a proper lookout; second, that she travelled at an unsafe speed; and, third, her failure to signal.

4.3.1. Proper Lookout

Whether a vessel kept a proper lookout is a feature of Rule 17(a)(ii) cases because the question arises as to whether the collision was caused by the SOV not observing the GWV until such time as a collision was unavoidable by the actions of the GWV alone, requiring the SOV to alter course.[39] That is whether the SOV was solely or contributorily responsible for the collision because in not keeping a good lookout she failed to appreciate the risk of collision.[40] The issue was whether *Sydney* was justified in maintaining the assumption that *Apollo* would, in accordance with the crossing rules, keep clear of *Sydney* by navigating to starboard.[41] It follows from the obligation to provide the GWV every opportunity to avoid the SOV, that when the SOV is at all uncertain as to whether the GWV intends to comply with the rules, it is incumbent upon her to keep the closest watch, with the highest degree of diligence, and to be ready to take the necessary action to avoid the risk of collision.

The quality of *Sydney*'s lookout was particularly important in the context of a situation of nearly complete confusion[42] and the uncertainty of *Apollo*'s intention. *Apollo*'s obligation was to keep clear of *Sydney* and not pass ahead of her. *Sydney* acquired *Apollo* as a radar target at C-6.30, at which point she was predicted to cross ahead of her at a distance of 0.2NM.[43] At C-5.30 *Sydney*'s radar continued to predict that *Apollo* would cross her bow,[44] and that although the distance between them was increasing the CPA was 0.3NM at the most and therefore not a safe distance. Although at C-5.30 *Sydney*'s master and third officer questioned whether *Apollo* would pass astern or cross ahead of the nearby *Hai Yang Shi You*, the master of *Sydney* nevertheless gave evidence that he maintained the assumption that *Apollo* would comply with the crossing rules and pass astern: because the rules were applicable in the circumstances, required crossing astern, and to do otherwise would breach them; and, because crossing her bow would require her to pass ahead of not only *Sydney* but also *Hai Yang Shi You*, *Shen Hua*, and *Chang Fa Long*—all four of which were on *Apollo*'s starboard side.

The Court found that in the confusion of the situation *Sydney* was not negligent in not concluding that *Apollo* would cross ahead of her, or, in other words, in continuing to maintain the belief that she would cross astern in accordance with the crossing rule.[45] It also found that the obscurity of *Apollo*'s intentions was not due to *Sydney*'s

[38] Ibid [152].
[39] Ibid [117].
[40] In *The Achilleus* [1985] 2 Lloyd's Rep 338 (QB, Admlty) fault arose because evasive action was not taken by the SOV under r 17(a)(ii) when it became apparent that a collision was unavoidable. Sheen J referred to both r 17(a)(ii) and r 17(b) without specifying which of these rules the *Cinderella* had breached. *Cinderella*'s fault was not that she failed to take evasive action when the vessels were so close that collision could no longer be avoided by the actions of the GWV alone (r 17(b)). Rather, she was attributed 30% of the blame for the collision for failing to act in avoidance when she should have noticed (but failed to observe) well in advance of the time her engines were put full astern when the vessels were only half a cable apart, that the GWV in breach of r 15 was not taking appropriate evasive action, and would cross ahead of her; and that, unless it discontinued or the SOV took action, collision was unavoidable (r 17(a)(ii)).
[41] See *The Beryl* (1884) 9 PD 137, 142: *Beryl* was justified in assuming that *Abeona* would not continue to act so obstinately: that is, she would be right to conclude that *Abeona* would, as required under regulation, at some point act so as to give way to *Beryl*. *The Exmouth v The Hellenic Beach*, 253 F 2d 473; 1958 AMC 1018, 1022 (2nd Cir, 1958), citing *Wilson v Pacific Mail SS Co*, 276 US 454 (1928) (that if the 'privileged vessel' (in the antecedent terminology, now the SOV) had to speculate about whether the GWV would obey and act in accordance with the rules '[n]avigation would be reduced to a game of bluff.')
[42] *The Sydney* (n 4) [133].
[43] Ibid [136]. *Apollo* submitted that despite radar evidence to the contrary from C-5, *Sydney* assumed that *Apollo* would not pass ahead of her ([133]). While *Apollo* was shown to be crossing ahead of *Sydney* the distance between them was small at between 0.07NM at C-5.30 and 0.44NM at C-3 ([134]).
[44] Ibid [140] (the Court drew the conclusion that such was *Apollo*'s intention at C-4).
[45] Ibid [141]. See *The Beryl* (n 41) and *The Exmouth v The Hellenic Beach* (n 41).

failure to maintain a proper lookout, or any other fault.[46] *Sydney* had correctly concluded on the basis of its radar reading that *Apollo* was crossing ahead of *Hai Yang Shi You* at C-3.45.[47] Having heard *Apollo*'s VHF conversation with *Chang Fa Long* at C-4–C-3.30 conclude in an agreement to pass port to port the master of *Sydney* was concerned that *Apollo* was not altering course to starboard to accommodate the starboard turn that it would necessarily have to undertake.[48] When *Chang Fa Long* altered course to enable *Apollo* to starboard, *Sydney* had searoom on her starboard side to move into despite the presence there of *Chang Fa Long*; and indeed she altered to starboard to provide *Apollo* with room for a port to port passage.[49] *Apollo* turned to starboard at C-3.30[50] confirming *Sydney*'s third officer's belief that *Apollo* would pass her port to port—especially given that passage astern would be at an unsafe distance of 0.3NM.

Apollo argued that *Sydney* had or ought to have had knowledge of the course on which *Apollo* was set from the anchorage to which *Apollo* was proceeding, and should therefore have taken action earlier.[51] However, the Court held that *Sydney* could not appreciate *Apollo*'s destination, and the course she would therefore have to take to reach it, given that its anchorage had not been clearly identified at any stage of the proceeding.[52] In other words, the obscurity of *Apollo*'s intentions was intrinsic to the manner in which she was navigated. In fact, the Court determined that *Apollo* altered course contrary to its passage plan then sought to argue at trial that the anchorage for which it sailed was its clear intention as evidenced by its course. *Apollo*'s argument however had no bearing on *Apollo*'s obligation which remained that she pass astern of *Sydney*.

4.3.2. Use of VHF

Apollo further submitted that if *Sydney* continued to be confused she ought to have contacted *Apollo* by VHF to clarify any doubts she had about what course *Apollo* would take.[53] The Court analysed this submission in the context of the problematic nature of VHF communications. While VHF is encouraged for traffic management purposes in certain limited contexts where it assists vessels in taking navigational precautions,[54] it is generally discouraged for a number of reasons. First, because VHF communication may be more confusing than helpful.[55] It may for example not be clear who is engaged in the communication—as when *Apollo* was conversing with *Shen Hua* at C-7;[56] or the conversations may consist of discussions falling short of agreements but with the appearance of executory statements.[57]

Second, it may waste time and deflect resources from the necessity to maintain a lookout, particularly in a rapidly developing and chaotic situation such as that in which *Sydney* and *Apollo* were involved. After C-5.30 conversation was far less important than keeping a good lookout. *Sydney* noted *Apollo*'s intention to cross ahead of her at C-3.45. At C-3.30 the third officer reported that the CPA was 0.26NM, and at C-3 *Sydney*'s third officer observed *Apollo*'s alteration of course to starboard (which had been initiated at C-3.30).

Third, the use of VHF to agree or seek agreement to a passage between vessels outside their obligations as SOV and GWV undermines the paramountcy of the rules and is directly in breach of *COLREGs*.[58] It is not for vessels

[46] Ibid [147]. Evidence was presented of the quality of *Sydney*'s lookout from C-11.30 to C-6.45. *Apollo*'s red and green side lights were seen at C-11.30 by the third officer who correctly assessed *Apollo* to be porting. *Sydney* further observed *Apollo*'s 10° alteration of course to port at C-9.45, two further 10° alterations of course to port at C-8 and C-7, and a further 5° alteration at C-6 ([135]).
[47] Ibid [139].
[48] Ibid [138].
[49] Ibid [138]–[139].
[50] Ibid [141] (which the third officer of *Sydney* observed as an alteration of course at C-3).
[51] Ibid [118].
[52] See ibid.
[53] Ibid [142].
[54] See, eg, *The Owners and Demise Charterers of the LNG Tanker Wilforce v The Owners and Demise Charterers of the MV Western Moscow* [2022] EWHC 1190 (Admlty) where VHF was used in the Precautionary Area of the Traffic Separation Scheme of the Singapore Straits.
[55] In *The Nautical Challenge* (n 13) the importance of visual observation and keeping a proper lookout compared with ship to ship communications was illustrated by the confusion caused by an overheard conversation between port control and the tugboat *Zakheer Bravo* ([11(i)–(iii)]).
[56] *The Sydney* (n 4) [95].
[57] The master of *Apollo* conducted several conversations with the vessels in the vicinity of *Apollo*. At C-6 and C-5.30 he spoke with *Hai Yang Shi You* which *Apollo* was on course to cross ahead of and agreed a starboard to starboard passing. At C-4.30 and C.3.30 he spoke with *Chang Fa Long* which *Apollo* was set to pass astern of and agreed to a port to port passage. At C-2.15 and C-1.30 he spoke with *Sydney* which *Apollo* was on course to cross ahead of but came to no agreement regarding the passage of the vessels.
[58] *The Sydney* (n 4) [94]. See *The Mount Apo and The Hanjin Ras Laffan* [2019] SGHC 57, [156], [160] ('*The Mount Apo*'). Observational and reasonable inference based on the rules is a surer guide than potentially ambiguous communication ([156]). In that case *Hanjin* sought to avert the application of the crossing rules by negating the possibility of a reasonable inference from *Mount Apo*'s current heading and movement in the particular circumstances. That is 'the traffic situation in the westbound lane was not suitable for a crossing'. Awareness is an essential condition of the crossing situation, and the test of awareness is objective ([160]). The critical question was whether *Hanjin* as

to agree to undertake actions that would otherwise be contrary to *COLREGs* rather than adhere to the crossing rules because 'compliance with the Rules is a first principle of good seamanship'.[59]

Fourth, replacing observation with communication undermines the rules' objective to ensure that vessels make their navigational intention known by taking early and substantial action that is open and notorious to the other vessel and which can be observed or reasonably inferred by the other vessel even in the absence of communication devices.[60]

VHF may be used in some circumstances where it is available to inform vessels of actions being taken to comply with *COLREGs*. However, only in exceptional circumstances will the use of VHF be sanctioned to avoid collisions, although not to act contrary to *COLREGs*. Even when collision avoidance is intended by the use of VHF the application of *COLREGs* must 'remain uppermost'.[61]

4.3.3. Safe Speed

Pursuant to Rule 17(i) the duty of the SOV is to keep course and speed. The SOV keeps her course and speed when she maintains the nautical manoeuvre in which she was engaged when the crossing rules were triggered—which may inherently involve alterations of course and speed.[62] If the SOV fails to keep her course and speed or act consistently with the principles of good seamanship, a departure from its obligations under the rules, even in seeking to avoid the risk of collision, may result from its own fault. The SOV would not then have acted in accordance with permissible departure from her obligation to keep course and speed contemplated under Rule 17(a)(ii). Therefore, if *Apollo* could prove that *Sydney*'s speed or course caused or contributed to the collision, then *Sydney* could not avoid or mitigate liability.

Apollo submitted that *Sydney* was travelling at a speed that did not permit her to avoid the collision by giving her time to assess or respond to the situation or to alter her course as required under Rule 17(a)(ii).[63] Safe speed in the TSS was defined as that which enabled a vessel's 'full ahead manoeuvring' giving it sufficient time to assess the approaches of any ships.[64] *Apollo* argued that *Sydney* did not maintain a safe speed as defined. Rather *Sydney* travelled at a speed greater than that recorded in her passage plan.[65] The Court however concluded that in doing so she did not significantly reduce the time she had to assess the risk of collision, or affect the time in which to act in avoidance. *Sydney* therefore did not travel at an unsafe speed by travelling at a speed not indicated on her passage plan.[66]

5. The Second Enquiry – Justifying Departure

5.1. An Exceptional Jurisdiction

When crossing vessels risk collision because the GWV is not taking evasive action, Rule 17(a)(ii) authorises the SOV's departure from her obligation to keep course and speed on the very restrictive ground of necessity alone.[67] Permitting disobedience of the rules to avoid an inevitable collision is a jurisdiction which is very carefully supervised by the court[68] and will only be permitted in 'very exceptional'[69] circumstances. In determining whether the requirements of special circumstances have been satisfied it is not possible to formulate a test applicable in every case. The court is guided by general principles which set out three necessary conditions: first, that in the

GWV was in a position to appreciate that the SOV was crossing, and whether the intention to cross was open and notorious to the crew of the GWV. That intention could be open and notorious on the basis of an observation of the SOV's conduct, or by receiving unambiguous and first hand or direct (ie from *Mount Apo* herself) information about the vessel's intention by informing VTIS by VHF.

[59] *The Nautical Challenge* (n 13) [66] (Lord Briggs and Lord Hamblen).

[60] *The Mount Apo* (n 58) [160].

[61] *The Sydney* (n 4) [96]; *Mineral Dampier v Hanjin Madras* [2001] 2 Lloyd's Rep 419.

[62] *The Nautical Challenge* (n 13) [62] (Lord Briggs and Lord Hamblen)

[63] *The Sydney* (n 4) [120].

[64] Ibid [124].

[65] See ibid.

[66] Ibid [125].

[67] Departure for reasons other than safety imposes a duty of extra care**.** In case of collision the departing vessel has the burden of showing that violation of the rule could not have contributed to the collision: see *Moore-McCormack Lines, Inc v SS Portmar*, 249 F 464 (SD NY, 1966) ('*Moore-McCormack Lines*'). See also *The Kinetic* 40 F 2d 258 (3rd Cir, 1930).

[68] *The Test* (1847) 5 Not of Cas 276 (Dr Lushington).

[69] See ibid.

circumstances departure was required to avoid 'immediate danger, perfectly clear';[70] second, that the action taken in departing from the rules was reasonably likely to avoid the risk of collision;[71] and third, that the departure from the rules is proportionate in that it is no more than is necessary to avoid the collision.[72]

The analysis is always a factual and circumstantial enquiry into the cause of the collision in the particular case.[73] The departing vessel assumes the very heavy obligation of justifying a breach of the crossing rules. It must with clear and distinct evidence demonstrate the existence of the circumstances alleged to have rendered the deviation necessary.[74] First, it must show that a risk of collision existed, and that adhering to the rules would have caused a collision.[75] Second, she must prove that appropriate action capable of avoiding the collision was taken,[76] and that violation of the rule could not have contributed to the collision, even if in fact a collision was not averted.[77]

5.1.1. Allowance

Since the demands on the SOV would conclude in findings of contributory negligence in situations where she was required to depart from the rules, allowances are to be made for the SOV's reasoning and conduct. The SOV has usually been put into the position of having to decide whether and when directory rules should be disobeyed to avoid a collision by the misconduct or negligence of the GWV. On the one hand, the regulations compel mariners' obedience to ensure that departure is only undertaken with great reluctance and having met onerous evidentiary standards of necessity to avoid 'trust[ing] to their own nerve and skill' concluding in 'the very evil which the Act was intended to prevent'.[78] On the other hand the captain of the SOV must give 'sudden consideration' to new and difficult special circumstances[79] and respond promptly to avoid a collision. Courts will not therefore expect her to exercise the same level of skill[80] of a competent mariner in ordinary circumstances or demonstrate the same 'perfect nerve and presence of mind'[81] to ensure the best possible outcome.

Therefore, the very greatest allowance is made for the SOV in special circumstances, and very clear proof of contributory negligence is required[82] before any fault is attributed to her. The SOV will not be attributed blame as long as it is demonstrated that it exercised due care in its observation of the other vessel and either made all reasonable efforts to avoid a collision by adhering to *COLREGs* or otherwise to depart from them. In taking the latter course, the SOV is to do so only at the proper time (seasonably), and to the extent necessary and in a manner reasonably likely to avoid the collision. Nor will the SOV be attributed blame if it is afterwards shown by more complete facts that it 'acted too soon or waited too long'.[83]

5.2. The Test – Actual Necessity

A departure from the rules requires 'a clear case of necessity [to be] made out'.[84] Actual necessity arises when a vessel cannot as a matter of fact avoid a collision by complying with her obligations under the crossing rules.[85] The scope of necessity has been articulated in a variety of ways, without particular precision, because the public policy of the safety of navigation is best served by preserving the flexibility of responding to the exigencies of the particular situation. The authorities are materially consistent on the point of when a SOV can justifiably depart

[70] *The Allan and the Flora* (1866) 14 LT 860; *The Moderation* (1863) 1 Moo PC NS 528; 15 ER 799 (referring to art 27); the present rule refers to the necessity of avoiding the risk of collision: see *The Ceto* (n 3) 684 (Lord Watson). The old rules referred more broadly to 'danger' rather than specifically to 'collision'. The danger in question however had to be endogenous to the vessels: that is, the existence and persistence of a risk of collision to which the vessels alone were exposed, and which was caused by the actions of the non-departing vessel: see *The Benares* (n 8) 17 (Brett MR), 17 (Bowen LJ). *The Flora* (1866) LR 1 AE 45.
[71] *The Memnon* (1889) 6 Asp MC 488.
[72] *The Saragossa* (1892) 7 Asp 289.
[73] *The Gulf of Suez* (n 6) 331 (Lord Sterndale MR).
[74] *The John Buddle* (1847) 5 Not of Cas 387; *The Great Eastern* (1867) LR 1 AE 384; *The Highgate* (1890) 6 Asp MC 512.
[75] *The Concordia* (n 11) 93. See *The Corsica*, 76 US (9 Wall) 630 (1869).
[76] *The Agra and the Elizabeth Jenkins* (1867) LR 1 PC 501 ('*The Agra*') (held at fault for a collision with the other steamship in the absence of proof that the starboarding was necessary). See *The Concordia* (n 11); *The Corsica* (n 75).
[77] *Moore-McCormack Lines* (n 67). See also *The Kinetic* (n 67).
[78] *The John Buddle* (n 74); *The Great Eastern* (n 74); *The Highgate* (n 74) 408.
[79] *The Owners of the Ship The Tasmania v The Owners of the Ship City of Corinth* (1890) 15 App Cas 223, 238 ('*The Tasmania*').
[80] *The Bywell Castle* (1879) 4 PD 219; *The Khedive* (n 8) 902*; The Theodore H Rand* (1887) 12 App Cas 247.
[81] *The Bywell Castle* (n 80).
[82] *The Tasmania* (n 79) 238.
[83] *The Gulf of Suez* (n 6) 331 (Lord Sterndale MR).
[84] *The Highgate* (n 74) (Sir James Hannen distinguishing the then subsisting decision of the Court of Appeal in *The Tasmania* (n 79)).
[85] *The Ann Caroline*, 69 US (2 Wall) 538 (1865). Further, special circumstances may arise as in *The Commodore Jones*, 25 F 506 (SD NY, 1885); *The Whiteash and The Winnie*, 64 F 893 (SD NY, 1894); *The Tweedsdale* (1889) 14 PD 164, 19. But see *The Albano* [1907] AC 193.

from the rules, and when it has provided the GWV sufficient opportunity to take evasive action in compliance with the regulations.

Classic formulations provide that a SOV may depart from her obligations 'as soon … as … a master of reasonable skill and prudence' determines that adhering to the course under the rule 'would involve immediate danger';[86] or, in circumstances where a collision was 'inevitable'.[87] Discretion[88] plays no role in determining whether circumstances amount to actual necessity.[89] It is appropriate to rely on the evidence of what the officer in charge 'reasonably think[s]' is necessary to avert imminent danger.[90] 'Necessary' therefore means that the infringement of the vessel's obligation was justified not in the sense that a collision would have inevitably occurred if action had not been taken, but, rather, that 'the circumstances are such as to convey to the mind of a skilled seaman that risk of collision is so imminent as to make it indispensable to stop and reverse',[91] and it was therefore 'prudent or expedient' to do so.[92] The case will therefore fall within the departure exception when it is sufficiently probable that a prudent seaman navigating the SOV with reasonable care would take action to alter course or speed or both to avert the collision—even if in fact the GWV was able to take unilateral action in avoidance at such time.[93]

The rules remain paramount, and the SOV is required to comply strictly with the obligation to keep course and speed as long as there is a possibility of the GWV taking evasive action. The coordination principle underpinning the strictness of the rules is designed to avoid the greater danger that would arise if the SOV acted unilaterally to avoid the collision on the earliest indication that the GWV was not taking evasive action.[94] Courts have nevertheless refused to find fault with the SOV for not taking a step until the last possible moment to avoid a collision with a GWV which was not keeping clear either because it was incapable of or not intending to take such action, even if it were possible on the facts to conclude after the collision that the SOV adhered too stringently to the rule to keep course and speed.

A SOV is not negligent in waiting until the collision seems imminent to alter her course and speed under the mandatory provision Rule 17(b).[95] Further, a SOV may justifiably depart from its obligation under the crossing rules to keep course and speed if there is any delay on the part of the GWV which may cause the SOV to assume that the GWV is not going, or intending, to act;[96] or, as soon as it becomes apparent to the SOV that the GWV was not taking action compliant with her obligations to keep clear[97] and the SOV's manoeuvre was necessary to avoid collision.[98]

Whether departure from the rules is justified to mitigate the effects of a collision rather than avoid it appears not to be a settled question. On the one hand, it would seem to contradict the requirement of actual necessity and determine departure on the basis of a vessel's best as opposed to sole interest. However, there is little authority directly on the point, and what exists is inconsistent. In *The Khedive*, Article 27 of the 1863 Rules was not available as justification for a departure which could only reasonably be expected to diminish the force of the collision, but

[86] *The Tasmania* (n 79) 226 (Lord Herschell).
[87] *The Khedive* (n 8); *The Benares* (n 8). Even where conditions exist to satisfy special circumstance within r 17(ii)(b), exempting a vessel from observing the crossing rule if she may 'take any other steps necessary to avoid collision' then departure is not available*:* see RA Smith, *Farwell's Rules of the Nautical Road* (Naval Institute Press, 7th ed, 1993) 317.
[88] *The Benares* (n 8) 18 (Baggallay LJ).
[89] *The Khedive* (n 8) 18 (Bowen LJ) authorises departure exclusively on the ground of necessity, and the rules are not to be infringed on the basis that 'a master acted from the best of motives and according to the best of his ideas, for the law says not that the master is to do what he believes to be best, but that the Regulations are to be obeyed. Even an experienced master navigating in a manner which he thought a skilful mariner would consider the best approach under trying conditions is at fault if by doing so he breaches the rules.' See also *The Benares* (n 8). In *The William Frederick and The Byfoged Christensen* (1879) 4 App Cas 669, the Privy Council opined that as a matter of public policy masters of vessels are to be relieved of all discretion as 'dangerous to the public; and that, to require them to exercise such discretion, except in a very clear case of necessity, is hard upon the masters themselves, inasmuch as the slightest departure from these rules is almost invariably relied on as contributory negligence'. See *The Legatus and The Emily* (1867) Holt 217 ('*The Legatus*').
[90] In *The Beryl* (n 41) 144 (Bowen and Fry L JJ) (questioning whether the words 'if necessary' meant 'if it is actually necessary' or 'if the officer in charge should reasonably think that a necessity has arisen'.)
[91] Decided under the 'stop and reverse' arts 23 and 27 of the 1863 Rules. *The Byfoged Christensen* (n 89) 690 (Lord Fitzgerald). See also 694 (Lord Herschell).
[92] Ibid 689 (Lord Bramwell).
[93] *The Olympic* (n 2) 245.
[94] *The Tasmania* (n 79) 245.
[95] In *The Menelaus*, 1982 AMC 654 (ED La, 1980) citing Grant Gilmore and Charles L Black J, *The Law of Admiralty* (Foundation Press, 1957) 504. This was the first reported US decision under the current crossing rules. The only possible negligence was the SOV's failure to alter her course and speed sooner in avoidance (under the permissive provision r 17(a)(ii)).
[96] As did *Hawke* in *The Olympic* (n 2) 278, departing when *Olympic* was 'uncomfortably close'. In the circumstances *Hawke* could not be said to have acted—regardless of the applicability of the rules—inconsistently with the principles of good seamanship.
[97] *Re Shaun Fisheries Inc*, 1984 AMC 2650 (D Or, 1983).
[98] *Re Ocean Foods Boat Co*, 692 F 1253 (D Or, 1988).

not avoid it.[99] Some older authority vies, albeit not strongly, in opposition, and it has been said that a vessel sailing into the wind should as a matter of prudence reduce speed or stop to mitigate as far as possible the effects of a possible collision.[100]

5.2.1. In the Assessment of a Skilled Mariner

The necessity or otherwise of the navigational manoeuvre departing from the obligations of the crossing rule can only be determined in the light of the knowledge which a skilled mariner[101] possessed or ought to have had at the time the decision was taken.[102] The existence of a risk of collision will be determined by all means available to the vessel subject to the risk. In the case of doubt risk will be deemed to exist. Incomplete information cannot be filled in by assumptions, only by rules.[103] Obviously precaution cannot be taken against an unknown risk, but equally an obligation does not arise, nor can necessity be invoked 'only when all the facts are ascertained'[104] by evidence presented at trial. Hindsight plays no role in determining necessity.

The reasonable likelihood that the action taken in departing from the rules will avoid the risk of collision is to be understood as meaning that in the assessment of the skilled mariner exercising reasonable judgment it represented the 'one chance still left of avoiding a danger which otherwise was inevitable'[105] or the only chance of escape.[106] As Bowen LJ said in *The Benares*, 'a captain is not required to sail with his eyes open into the jaws of death'.[107]

5.2.2. By Evidence Available at the Time the Decision Was Made

The necessity of a departure from the crossing rules is assessed on the facts of the surrounding circumstances in which the decision was made, and not by subsequent or further evidence that comes to light. The question that arose in *The Tasmania* was what the captain of *Tasmania* (as SOV) could have known having seen *City of Corinth*'s (as GWV) green light, and whether that was the earliest reasonable time at which a departure from the crossing rules arose;[108] or, whether *Tasmania* properly maintained its course upon first sighting *City of Corinth*'s green light, and rightly altered her course and speed only when a short interval later (estimated at about 1 minute) *City of Corinth* came into view close by.[109]

The House of Lords found that the captain of *Tasmania*, at the time of seeing the green light, could have known little more than that a sailing vessel was cutting across his ship's bows, but not what type of vessel it was.[110] Nor

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[99] *The Khedive* (n 8)*:* Art 27 did not justify a departure from the regulations on the ground that it was reasonable to expect that the force of the blow would thereby be diminished.

[100] *The Agra* (n 76). There is also an older (albeit the question persisted into the 1980s) largely academic debate and some dicta providing for a departure from the crossing rules in favour of good seamanship when vessels are approaching or in the pilot boarding area: RA Cahill (1983) *Collisions and Their Causes* (Fairplay Publications, 1983) 140 (that the rules do not apply and that UK cases held that they did but 'in a special way'); Lord Hailsham of St Marylebone *Halsbury's Laws of England* (Butterworths, 4th ed, 1983) vol 43, para 895 (that approaching a pilot boarding area is not a special circumstance justifying a departure from the rules) citing *SS Albano v Allan Line SS Co Ltd* [1907] AC 193, 206 (Privy Council); *The Ada, The Sappho* (1873) 2 Asp (NS) 4, PC; *The Lucile Bloomfield* [1966] 2 Lloyd's Rep 239. Cf *The Achilleus* (n 40) 338. However, in some cases, it was held that the crossing rules did not apply, eg, *The Avance* [1979] 1 Lloyd's Rep 143; RA Smith, *Farwell's Rules of the Nautical Road* (Naval Institute Press, 7th ed, 1993) (that the ordinary rules apply)*;* John Wheeler Griffin, *The American Law of Collision* (Edwards Brothers, 1949) 115 (on the difference between US and UK decisions on and approaches to this point); *The Monterey*, 161 F 95 (2nd Cir, 1908) and *The Manchioneal*, 243 F 801 (2nd Cir, 1917) (that special circumstances started applying once vessels had started manoeuvres to enter the pilot boarding area); *The Alaska*, 33 F 107 (SD NY, 1887); *The Agnella*, 198 F 147 (SD Ala, 1912); affd in part 204 F 440 (5th Cir, 1913) (that it was a question of prudence rather than precise rules).

[101] *The Ceto* (n 3) 670; followed in *The Knarwater* (1894) 63 LJ (Ad) (NS) 65 and distinguished in *The Lord Bangor* (1896) P 28, PDA.

[102] *The Byfoged Christensen* (n 89) 694 (Lord Herschell). See also 686 (dicta of Lord Watson).

[103] *The Nautical Challenge* (n 13) [45].

[104] *The Beryl* (n 41) 138 (Lord Esher): the 'rules … can only apply to circumstances which must or ought to be known to the people at the time. You cannot regulate the conduct of people as to unknown circumstances.' These words were quoted with approval by Lord Herschell in *The Theodore H Rand* (n 80) 250; and by Lord Fitzgerald in *The Ceto* (n 3) 691. See also *The Dordogne* (1884) 10 PD 6 (Court of Appeal).

[105] *The Benares* (n 8) 17 (Brett MR).

[106] Ibid 19 (Bowen LJ): held by the Court of Appeal, that where there is one and only one 'chance of escape' from collision a seaman is justified in taking the benefit of that chance, although it necessitates a departure from the regulations.

[107] Ibid.

[108] *The Tasmania* (n 79) 237 (Lord Morris). Inconsistent cases were presented. *City of Corinth* failed at trial in arguing that *Tasmania* had altered course contrary to her obligation to keep course and speed under art 22 of the then rules. On appeal she succeeded in arguing that *Tasmania* had failed to alter her course when she should have to avoid the collision with *City of Corinth* which had failed to take action in time for the collision to be avoided.

[109] *The Tasmania* (n 79) 233 (Lord Macnaghten provided the estimate of the interval).

[110] The captain had testified that he had expected to see 'a small cutter' and 'did not think a ship would do such a foolish thing … as cross a ship's bows'. The House of Lords in considering the argument that this had been a retrospective rationalisation by the captain observed that it was not improbable, had been accepted at trial, and that the captain had not been cross-examined on it: *The Tasmania* (n 79) 234.

had the captain of *Tasmania* any way of knowing if, when he saw *City of Corinth*'s green light, she was in the process of giving way and expecting *Tasmania* to adhere to her own reciprocal obligation to maintain her course. If *City of Corinth* was in the act of keeping clear, then *Tasmania* would have no defence at law for her own manoeuvre. *City of Corinth*'s lights did not convey any impression as to her intention (whether to manoeuvre away or adhere obstinately to her course). *Tasmania* could not therefore be required to alter course to avoid the GWV as soon as the captain had seen its green light.

It would have shown a lack of reasonable care for *Tasmania* to alter her course as long as *City of Corinth* had a possibility of manoeuvring to keep clear. *Tasmania* was required to determine whether to keep or alter her course and speed. If she kept course and speed but *City of Corinth* did not adhere to her obligation to keep clear there would be a collision; on the other hand, an alteration would deprive *City of Corinth* of an opportunity to keep clear. The evidence showed *City of Corinth* to have formed no intention with respect to *Tasmania*, having apparently neither seen her nor known of her presence. Further, the evidence did not demonstrate that *Tasmania* delayed in acting but acted as soon as it saw *City of Corinth*—which is when it considered itself justified in altering her course.

6. Departure

Whether the SOV's departure from the rules was necessary is answered through a factual and circumstantial analysis of what caused the collision. The first question therefore is whether either or both vessels took sufficient and appropriate action under the regulations to avoid the collision, or whether their conduct breached *COLREGs* or was otherwise unreasonable or reckless.[111] The GWV must take steps to keep clear of the SOV, and the SOV must provide the GWV with adequate opportunity to avoid the collision by keeping her course and speed. If the SOV departs from its obligations, the court determines whether the SOV was justified in concluding that the GWV had not or did not intend to take evasive action. If the SOV maintains course and speed and a collision ensues, the court determines whether it was it was justified in assuming that the GWV would keep clear.[112]

The final determination is if and when it became necessary in the circumstances for the SOV to avoid the GWV.[113] The question may be asked of the SOV whether it was justified in altering or maintaining course and speed (that is whether it would continue to have a defence of excusatory necessity under the regulations); or whether it had deprived itself of a defence by failing to act seasonably.[114] The question may also be asked of the GWV whether it was capable of executing its obligations to keep clear, or could do so in a manner that did not involve the SOV departing from her obligation to keep course and speed.[115]

6.1. Departure – Acting Boldly

In *The Sydney*, the cardinal question was what action *Sydney* could or ought to have taken if in a crossing situation *Apollo* was not navigating to keep well clear of her,[116] and whether she ought to have altered her course or reduced her speed. The Court observed that action pursuant to Rule 17(a)(ii) had to be appropriate and seamanlike and, in satisfaction of Rule 8(b), 'large enough to be readily apparent to another vessel' insofar as the circumstances of the case might 'admit'.

The Court considered whether *Sydney*, in altering her course by turning progressively to starboard, had acted negligently or had been justified pursuant to Rule 17(a)(ii). Determining whether *Sydney* acted in a manner intended to and capable of preserving the safety of navigation required an examination of the circumstances in which she responded to *Apollo*'s purported failure to take appropriate action. *Apollo*'s intentions had been uncertain since at least C-12, as evidenced by her three alterations of course, and her VHF exchanges with *Hi Yang Shi You* and *Chang Fa Long*. Her intentions remained unclear and created confusion in the mind of the master of *Sydney*, which at C-4 could consider a number of options under Rule 17(a)(ii).

The circumstances in which *Sydney* was required to respond to *Apollo* were, firstly that *Apollo* had agreed to a port to port passing with *Chang Fa Long* which would necessitate a starboard turn; and, secondly, that because *Sydney* assumed that *Apollo* would turn to starboard and pass her port to port,[117] she was concerned to provide her

[111] See *The Beryl* (n 41) 142. For a consideration of the case see below Part 6.3.
[112] See ibid.
[113] See ibid.
[114] See ibid.
[115] Ibid 143.
[116] *The Sydney* (n 4) [144].
[117] Ibid [138].

with as much searoom on her port side as possible to execute that manoeuvre safely. Despite the presence of *Chang Fa Long* on its starboard side *Sydney* calculated that it had room to turn to starboard to provide room for *Apollo* to make its own starboard turn.[118] *Sydney* executed its starboard turns progressively because they were undertaken when the opportunities arose: that is, only once *Chang Fa Long*—having turned down *Apollo*'s request for a starboard to starboard passing at C-4, and subsequently altered her own course to starboard at C-3 in accordance with Rule 17(a)(ii)—allowed her room to do so.[119] They were therefore as 'handsome' or substantial as the circumstances permitted and the rule required.

Apollo submitted that in altering its course to starboard *Sydney* breached Rule 17(a)(ii).[120] Further, that had she maintained her course and speed the collision would have been averted. And, finally, that these actions were not caused by or attributable to *Apollo*. The issue was whether it would be negligent not to treat Rule 17(a)(ii) as non-obligatory; or whether any other course was open to *Sydney* consistent with the operation of the rule. The Nautical Assessors' view was that, given *Apollo*'s uncertainty and the confusions it created in the mind of the master of *Sydney*, he was justified in altering *Sydney*'s course to starboard. *Sydney*'s actions were a response to the fact that *Apollo* had not taken early and substantial action to keep well clear of her.[121]

The Court emphasised that Rule 17(a)(ii) is only applicable where the actions or omissions of the GWV have caused the SOV to conduct herself in a manner other than that entailed by her obligations under the crossing rules in order to secure the safety of navigation. The collision resulted from *Sydney* altering her course pursuant to Rule 17(a)(ii) rather than maintaining her course under the crossing rules. In other words, properly understood, her sanctioned actions were necessarily caused by *Apollo* failing to give way.

Further, even proof that the collision would have been avoided had *Sydney* maintained her course and speed would not displace *Apollo*'s liability. Firstly, because the GWV must respond to altered circumstances, and secondly, because the question of causation—whether the actions of *Sydney* were such as to put her at fault for the collision—is not merely a counterfactual enquiry into whether the collision would have been avoided had the SOV kept her course and speed, but requires an investigation into all the circumstances[122] which explained and justified *Sydney*'s starboarding.

Whilst evidence suggested that the vessels would have crossed without incident albeit in very close proximity, had *Sydney* maintained course and speed, the Court found equally persuasive the argument that the collision would have been avoided had *Apollo* continued its starboard turn. Further, the most appropriate time for *Sydney* to take action was at or from C-4.13 upon her master hearing the conversations between *Apollo* and *Hi Yang Shi You* and *Chang Fa Long*. However, the Court expressed concern that *Sydney* reducing speed presented its own dangers because doing so while *Apollo* made a late starboard turn to pass *Sydney* astern risked collision.

The Court concluded that, while Rule 8(b) requires action taken in avoidance to be bold rather than progressive, circumstances constrained *Sydney*, when excusably departing from her obligations under the crossing rules pursuant to Rule 17(a)(ii)), to do so progressively in stages and at a rate permissible in relation to other ships in the vicinity.

6.2. Departure – Early and Substantial Action: The GWV

Vessels must act seasonably to avoid a collision.[123] To avoid liability the SOV must prove that her alteration of course was the most effective available precaution taken at the proper time.[124] It is neither compliant with the regulations nor a defence to culpability for the collision for a vessel to demonstrate that it acted, albeit at the improper time, when not having done so sooner caused the collision.[125]

[118] Ibid [139].
[119] Ibid [33].
[120] Ibid [149].
[121] Ibid [148].
[122] Ibid [150].
[123] *The Trident* (1854) 1 Sp 217, 222; *The Westhall*, 153 F 1010 (ED Va, 1899).
[124] *The La Plata* (1857) Sw 220, 223.
[125] *The Stadacona* (1847) 5 Not of Cas 371, 374 (Dr Lushington); *The Fenham* (1870) LR 3 PC 212 (as to lights). For the same view taken by the US Courts see: *The Johnson*, 76 US (9 Wall) 146 (1869); *The Vanderbilt*, 73 US (6 Wall) 225 (1868); *The Steamer Syracuse*, 79 US (12 Wall) 167 (1871); *The Sunnyside* (n 11) 208; *The America* (n 26) 432.

Vessels in crossing situations have the right to assume that under ordinary circumstances the other vessel can and will conform to its obligations,[126] but not a right to obstinately adhere to that assumption, or their own obligations, under altered or special circumstances.[127] There is however a tension between justified assumptions and unfolding circumstances. Early and substantial action communicates the GWV's intention and capacity to comply with the obligation to keep well clear under the regulations. Late action may raise legitimate doubts in the SOV as to whether she can and will conform to her obligations. Late or insubstantial actions taken by the GWV which close shaves the SOV are culpable even though a collision is avoided if that shaving results in damage.[128]

At what time after the risk of collision emerges the GWV is required to act depends on the circumstances. The Nautical Assessors' response to the question as to the 'latest time' for *Apollo* to act was that given that the vessels risked collision from C-12—from which time *Apollo* was required to take early and substantial action to keep well clear of *Sydney*—she should have acted 'at or before C-7' to comply with Rules 15 and 16. However, Rules 15 and 16 require the GWV to take 'early' action to 'give way' or 'to keep well clear' of the SOV, and she cannot avail herself of the defence of acting at or before 'the latest time' to satisfy the regulation. *Apollo* could and should have reacted any time between C-12 and C-7. Therefore, requiring *Apollo* to avoid collision by complying with Rules 15 and 16 at or near to C-12 is not inconsistent with the advice that action under Rules 15 and 16 could and should have been taken at the latest by C-7. There is no suggestion that waiting until C-7 to act under Rules 15 and 16 was good seamanship.[129]

The requirement to take 'early and substantial action' cannot have a single fixed meaning because action must be taken with regard to the circumstances. It does not inexorably or necessarily follow that, because an action cannot be taken immediately or promptly, the GWV is to be understood as not intending or as refusing to keep clear. Early action is not necessarily an immediate response to a risk of collision. Because a timely response to a crossing situation may fall on a broad spectrum the question in the case was put in terms of the 'latest time'. At C-7 the CPA still exceeded the minimum CPA the Nautical Assessors had identified as enabling safe crossing. The rule did not require action prior to C-7 in absolute terms. It required action to be taken having regard to the circumstances which gave substance to the concept 'early'. *Apollo* failed to take action before C-7 and therefore did not take early and substantial action to keep clear of *Sydney*.

The purpose of the crossing rules (and the obligations with which both the GWV and the SOV are burdened) is to prevent close quarters situations and collisions from arising in the first place. *Apollo* was the GWV with respect to four ships either ahead or on her starboard bow and was required to keep clear of each of them.[130] A starboard turn at C-7 maintained until she had sailed clear of *Sydney* would have fulfilled *Apollo*'s obligations with respect to *Sydney* and the other vessels in her vicinity.[131] The essential fault of *Apollo* as GWV was that she had not taken early and substantial action to keep well clear of *Sydney*.[132] Prior to making a series of four turns to port of 10º, 5º, 5º, and 5º, *Apollo* was taking early and substantial action and on course to pass astern and keep clear of *Sydney*.[133] At the latest she should have turned hard to starboard at C-7 rather than at C-3.30. Had she done so then she could be said to have taken early and substantial action, and the close-quarters situation at C-3.30 would not have arisen.

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[126] *The Jesmond and The Earl of Elgin* (1871) LR 4 PC 1. See also *The Free State*, 91 US (1 Otto) 200 (1876), for a decision of the Supreme Court of the United States to the same effect.

[127] In *The Crathie* [1897] P 178, *Elbe* (SOV) should have abandoned the assumption that *Crathie* (GWV) would take evasive action, and departed from her obligations under the regulations when she saw that *Crathie* was persistently neglecting to give way by porting her helm. The German Marine Court of Inquiry held *Crathie* mainly at fault, but that *Elbe* too had breached regulations by not taking evasive action or sounding warnings when she saw that *Crathie* failed to adhere to r 16. In *The Legatus* (n 89) 488, *San Salvador* (GWV) with *Memnon* (SOV) on her starboard side took no evasive action until she turned to starboard when the ships were only three lengths apart. *Memnon* at the same time stopped engines (which if she had not done the ships would most likely have passed without incident). The Court found *Memnon* equally to blame with *San Salvador* for the collision, because her actions were based on a failure to properly calculate the courses of the two vessels as crossing courses involving a risk of collision. She ought to have departed from the rules and taken action in avoidance earlier than she in fact had rather than assuming that *San Salvador* would comply with the rules (for which she had no basis) (distinguished by *Wilson v Currie* [1894] AC 116).

[128] *The John Brotherick* (1845) 8 Jur 276; *The Benefactor*, 3 F Cas 182 (ED NY, 1877) (by apprehension caused to the other vessel, or causing the other vessel to assume that she will not comply with her obligations).

[129] *The Sydney* (n 4) [89].

[130] Ibid [84].

[131] See ibid. Eg, by turning to starboard, it being unlikely that all of them would agree to a starboard to starboard passage. If only one of the four had insisted on a port to port passage under the rules, *Apollo* would be required to turn to starboard. In the alternative, the same result would have been achieved by means of a substantial reduction in speed in accordance with r 8(b) to allow *Sydney* to cross her bow.

[132] Ibid [114].

[133] Ibid [91].

An attempt to cross the ships' (including *Sydney*'s) bows, or only effect a turn to starboard after it had cleared the bow of *Hai Yang Shi You*, contravened standards of good seamanship.[134] Further, Rule 15 obliged *Apollo* not to pass ahead of *Sydney* unless prevented by circumstances from doing so. But circumstances did not constrain *Apollo* to pass ahead of *Sydney*. It was consistent with *Apollo*'s intention to pass ahead of *Sydney* and effect a starboard to starboard passing with it and the other vessels that she gave instructions for a starboard to starboard passing to *Hai Yang Shi You* at C-5.30 (which were accepted) and *Chang Fa Long* at C-4 (who refused and insisted on a port to port passing).

6.3. Departure – Poised on the Precipice: The SOV

When the GWV fails to comply with the rules either at all or seasonably, the SOV may depart from the rule from necessity to avoid collision. The difficulty for the SOV is knowing if it has provided the GWV with the opportunity to keep clear, and when to take evasive action in departure from her obligation to keep course and speed under the rules. In *The Gulf of Suez*[135] Lord Sterndale MR noted that the SOV's obligation to keep course and speed is the most difficult to observe. That obligation rests on the SOV until it becomes clear that the collision cannot be avoided by the actions of the GWV alone. The SOV must therefore determine when to take action if the GWV has failed to take avoidance action.[136] A SOV which acts too soon may interfere with the intended avoidance actions of the GWV. However, the SOV must take action at some point regardless of whether the GWV had formulated such an intention without having as yet acted upon it.[137] The SOV is therefore 'poised on the precipice' of deciding whether to keep or alter her course and speed. If she keeps it but the GWV does not adhere to her obligation to keep clear there may be a collision; on the other hand, if she alters it she deprives the GWV of an opportunity to keep clear of her.[138]

In *The Owners of the SS Orduna v Shipping Controller*,[139] the porting of *Konakry* was delayed to a point approaching negligence but the Court held that there was nevertheless still sufficient time for her to do so to avoid a collision if *Orduna* had kept course. In her defence *Orduna* submitted that she was misled by *Konakry*'s long delay from which it said it could reasonably infer an intention on the part of *Konakry* not to give way, relieving her of the obligation to keep course and speed.[140] The defence is in principle sound but depends on evidence led in the circumstances of the case, and no grounds were found to have been established that *Orduna* found *Konakry*'s delay to be misleading and that she had in fact been misled.[141] Rather the House of Lords held that *Orduna* had prematurely and unjustifiably concluded on the evidence available to it that *Konakry* would not give way (or keep her course) as obliged. *Orduna* had not justified her breach of Article 21, nor acted with the care and skill expected of good seamanship.

The issue in *The Beryl* was whether *Beryl* breached the 'stop and reverse' requirement under Article 27 of the then regulations by keeping her course and speed and signalling to *Abeona*, and slowing down only when it was clear to *Beryl* that *Abeona* was not taking evasive action, and that a collision would ensue if she kept on at the speed and course she was on. The trial court, the Nautical Assessors, and the Court of Appeal concurred that it was unnecessary for *Beryl* to stop and reverse when the vessels were ¼-½ mile apart.[142] Although *Abeona* was not taking evasive action but was 'obstinately going on', *Beryl* was justified in assuming that she would not continue to act so obstinately and was right to conclude that *Abeona* would, as required, give way to her under the rules.[143] A further question arose as events unfolded: when were the circumstances such that it became necessary for *Beryl* to stop and reverse to avoid the collision with *Abeona*? The Court framed the question in two forms: first, whether *Beryl* was justified in waiting until the distance between the vessels was 300 yards before stopping and reversing, and secondly, whether at 300 yards *Abeona* had any way of avoiding the collision that did not involve *Beryl* stopping and reversing.[144] The answer to both was that *Beryl* was not justified in waiting until the vessels were 300 yards apart and the GWV had no way of avoiding the SOV by her actions alone before acting (stopping and reversing).[145]

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[134] Ibid [84].
[135] *The Gulf of Suez* (n 6) 330 (Lord Sterndale MR).
[136] Ibid.
[137] Ibid 331.
[138] *The Tasmania* (n 79) (Lord Macnaghten).
[139] *Owners of The SS Orduna v Shipping Controller* [1921] AC 250 (House of Lords) ('*The Orduna*').
[140] See *The Olympic* (n 2) 214.
[141] *The Orduna* (n 139) 264.
[142] *The Beryl* (n 41) 142.
[143] See ibid
[144] See ibid.
[145] See ibid 143.

A SOV will not be held liable for not departing when the rules are prima facie applicable unless the GWV's non-compliance was clearly observable with reasonable care by a SOV maintaining a proper lookout[146] and it was within its power to avoid the collision. The SOV may be required to act without knowing whether the GWV was in the process of or intending to keep clear. However, the rules are coordinate in the sense that they enable and provide grounds for vessels to take action in reliance on the other vessel's adherence to their reciprocal obligations. The SOV justifies departure if she has grounds on which to base a reasonable inference that the GWV was not complying with the rules, and that non-compliance made collision imminent.

However, a SOV acted recklessly when she 'pertinaciously kept her course, when she ought to have seen that [the GWV] was not going to keep out of the way in compliance with the law'.[147] Obstinate non-departure (adherence) is unreasonable and contrary to the principles of good seamanship. It is culpable for a vessel 'to stand in a difficulty upon a right … regardless of the safety of others'.[148] The navigational rules must not be used contrary to their purpose as a cover to cause injury to another vessel when it was within the power of the vessel in the circumstances to avoid injuring the other vessel by navigating in a manner otherwise than that directed by the rules.[149] In *The Byfoged Christensen*,[150] the Privy Council confirmed the principle of *The Commerce*[151] that a SOV may not be deliberately or negligently obstinate in maintaining course and speed. If she knows or ought to know that the GWV will not keep clear her supervening obligation is to avoid the collision.

6.4. Departure: Of the GWV

Apollo submitted in its defence that it too could depart from its obligations out of the same necessity as *Sydney*. *Apollo* argued that the best way for her to keep clear of *Sydney* at C-4 was to maintain speed, not alter course, and cross ahead of *Sydney*.[152] The Court considered *Apollo*'s submissions in the light of judicial authority that the crossing rules are to be strictly enforced to preserve the safety of navigation,[153] and confirmed the importance of the duty of the GWV to keep clear of the SOV 'so far as possible'.[154] *Apollo*'s submissions ignored the fact that her obligation to keep clear arose well before C-4 when the crossing rules were first engaged and in the circumstances at a time when the CPA between the vessels was between 1–3 cables.[155] *Apollo* failed without justification to fulfil its obligations under the rules to keep well clear or to avoid crossing ahead of *Sydney* by either substantially altering her course to starboard, or reducing her speed, or both.

The reconstruction of events and responses in the circumstances suggests that *Apollo* had failed to understand or appreciate the essential features of her encounter with *Sydney* and explains her plan to cross ahead of her.[156] First, the master of *Apollo* mistook the positions and courses of the ships and failed to understand the manner in which they were approaching. At C-10 radar indicated that *Sydney* would cross the bow of *Apollo* on a port to port passing. However, the master of *Apollo* deposed that at that time *Sydney* would undertake a starboard to starboard passing astern *Apollo*.[157] Further, the master of *Apollo* misunderstood the reason why at C-6 the bearing of *Sydney* was opening to starboard: it was not (as the master said) because *Sydney* was shaping to pass astern *Apollo*, but because for two minutes prior at C-7–C-8 *Apollo* had altered her own course to port.

Secondly, she failed to appreciate the risk of collision at the appropriate time, and was therefore not heeding Rules 15 and 16. She was therefore unable—because not cognisant of the need—to take early and substantial action to keep clear of *Sydney*.[158] The master of *Apollo* instead assumed (or hoped) that by means of her speed and by a series of alterations of course to port, and from the courses of the approaching vessels on her starboard side, he could cut across the bows of *Sydney* and the other vessels. This was consistent with his evidence that at C-10 the vessels were to pass starboard to starboard when *Sydney* was crossing ahead of *Apollo* on a port to port passage. But it was not a reasonable inference based on the available radar information (which the Court concluded was ignored) and breached the crossing rules which required her as GWV to keep clear of *Sydney*. In the circumstances

[146] See above Part 4.3.1 'Proper Lookout'.
[147] *The Byfoged Christensen* (n 89) (Sir J W Colville, delivering the judgment of the Privy Council).
[148] *The Legatus* (n 89).
[149] *Handaysyde v Wilson* (1828) 3 Car & P 528; 172 ER 532. See also *Mayhew v Boyce* (1816) 1 Stark 423; 171 ER 517. Cf *The CR Stone*, 49 F 475 (ED NY, 1892); *The Hercules* (n 20) 476.
[150] *The Byfoged Christensen* (n 89). See *The Legatus* (n 89).
[151] *The Commerce* (1850) 3 W Rob 287; 166 ER 969.
[152] *The Sydney* (n 4) [111].
[153] Ibid [107]; *The Nautical Challenge* (n 13) [43]–[44] (Lord Briggs).
[154] *COLREGs* (n 1) r 16.
[155] *The Sydney* (n 4) [111].
[156] Ibid [93].
[157] Ibid [113], [115].
[158] See ibid.

Apollo did not know how to respond to the essentially confusing situation she found herself in.[159] The reason she starboarded at all was in agreement with *Chang Fa Long* seeking a port to port passing—at which time *Apollo* and *Chang Fa Long* were only half a cable apart, contrary to the master's statement that *Chang Fa Long* posed no danger.[160] It was *Apollo*'s uncertain response that created and exacerbated the dangerously confused situation from which *Sydney* attempted to extricate itself.

7. Conclusion

COLREGs is a rational system of regulation which excuses an actor's attempt to avert a greater harm by inflicting a lesser evil. The first and foremost rule of navigation is to observe the rules of navigation. The regulations compel mariners' obedience to ensure that departure is only exculpated with great reluctance and having met onerous evidentiary standards of necessity. Because of the serious ramifications of overriding navigational rules, the court is required to carefully weigh the quality and strength of the evidence relied upon in support of the vessel's claim for exemption from the application of *COLREGs*. The nature of the evidence required to establish the exception will invariably depend on the circumstances of the case. *The Sydney* demonstrates the importance of a careful forensic consideration of events in the context of confusing circumstances and conflicting assumptions and intentions. Departure provided a complete defence, since compliance with the rules was impossible without risking imminent collision. *Apollo*'s actions were neither early and substantial nor undertaken to keep her clear of S*ydney*. *Sydney*'s action in departing from the rules to avoid the evil of collision was necessary, in the sense of being the only reasonable means available to do so, and proportionate to the immediate harm.

[159] Ibid [113].
[160] Ibid [114].