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## A LOOK AT UNITED STATES AND CANADIAN ADMIRALTY LAW—NECESSITY FOR JOINT LEGISLATION?

THOMAS W. TEARNEY

JUST AS THERE are vehicular codes to govern the movement of motor traffic, so there are admiralty codes to govern the navigation of ships. Admiralty "rules of the road," however, have their origin in a far more distant past than modern day traffic laws.<sup>1</sup> But ancient origins are no justification for outdated rules—the laws of admiralty must be constantly re-examined in the light of changing conditions. That constant re-examination and, in some instances, revision is necessary can be seen when one considers, for example, the differences between the United States and Canadian admiralty laws and the effect of these differences upon ocean going vessels entering the United States through the St. Lawrence Seaway.

The Congress of the United States has defined as follows the jurisdictional limits of the rules of the road applicable to safe navigation on the Great Lakes within the jurisdiction of the United States:

. . . [T]he following rules for preventing collisions shall be followed in the navigation of all public and private vessels of the United States upon the Great Lakes and their connecting and tributary waters as far east as Montreal and in the navigation of all other vessels upon such lakes and waters while within the territorial waters of the United States.<sup>2</sup>

The Canadian Shipping Act, Regulations for Preventing Collisions at Sea, spells out the Canadian counterpart of this jurisdictional question:

The said regulations to apply and to have force in all navigable waters within Canada or within the jurisdiction of the Parliament of Canada except the waters

<sup>1</sup> An excellent discussion of the historical background of admiralty law is found in GILMORE and BLACK, *THE LAW OF ADMIRALTY* 1-48 (1957).

<sup>2</sup> 33 U.S.C.A. § 241 (Supp. 1959).

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of Lakes Superior and Huron, Georgian Bay, Lakes Erie and Ontario, their connecting and tributary waters and the St. Lawrence River, including the Ottawa River and its tributary waters, as far east as the lower exit of the Lachine Canal and the Victoria Bridge at Montreal, Province of Quebec.<sup>3</sup>

It can be seen from these legislative mandates that it is incumbent upon those responsible for the safe navigation of vessels to be completely and adequately cognizant of both the American and the Canadian rules.

The master and navigators of "salt water" experience coming into the Great Lakes are well schooled in the International Rules of the Road, and they have found the Canadian rules more closely akin to their past training and experience. Upon their entry into these inland fresh water lakes within the jurisdiction of the United States, however, they must be constantly alert to the variations in the United States maritime laws—variations which may seem strange and unrealistic to these men of salt water experience. It would behoove a master coming into the Great Lakes for the first time to have in his personal file the latest United States Coast Guard publication known as *RULES OF THE ROAD, GREAT LAKES*.<sup>4</sup>

#### "MODERATE SPEED"—A DOCTRINE WITH DIFFICULTIES

Under both the Canadian and United States rules, the basic doctrine of "moderate speed" is one which has given most admiralty lawyers legal nightmares. In the event of a collision, it is incumbent upon the master of a vessel to have the mate or someone else who is equally qualified "cut in"<sup>5</sup> the ship's position and mark the exact time of this "cut" on the chart. Whether or not this is done may spell the difference between success and failure if litigation follows. Even during heavy weather performance of the task will not be overly difficult, because the running D.R.<sup>6</sup> track should be a fair indication of the

<sup>3</sup> P.C. 1953-1287 (Can. Gaz., pt. II [Aug. 26, 1953]).

<sup>4</sup> 33 U.S.C.A. §§ 241-295 (Supp. 1959).

<sup>5</sup> This is the navigational method of ascertaining a vessel's exact position. It is done by taking a true bearing on two or more fixed targets, and where the bearing lines intersect is the exact position of the vessel. (It is a highly developed technique of the master mariner wherein speed of the vessel is also an ingredient of an accurate position.)

<sup>6</sup> This is the abbreviation for "dead reckoning." Dead reckoning is another navigational term wherein a fairly accurate position of the ship can be ascertained by running a course line projection from the last known "cut," (as described in note 5 *supra*) using the speed of the vessel multiplied by the time that the ship has been on this specific course. This is another highly skilled technique used by mariners wherein they must consider the set and the drift, the condition of the hull, and the various peculiari-

ship's exact position. Immediately following a collision at sea, however, this simple duty may be neglected with the onset of emotions and the natural reaction of "first things first."

The experienced mariner must be extremely familiar with the judicial interpretation of rule 15 of the Great Lakes Rules, which is worded as follows:

Every vessel shall, in thick weather, by reason of fog, mist, falling snow, heavy rainstorms, or other causes, go at a moderate speed. A steam vessel hearing, apparently not more than four points from right ahead, the fog signal of another vessel shall at once reduce her speed to bare steerageway, and navigate with caution until the vessels shall have passed each other.<sup>7</sup>

The cases interpreting the Canadian and United States rules have been extremely consistent in their inquiry as to whether, under conditions of "thick weather," the vessels were traveling at a "moderate speed." In fact, it will be noted that the following portion of the abovementioned rule 15 is implied in the leading cases<sup>8</sup> in the United States: "A steam vessel hearing, apparently not more than four points from right ahead, the fog signal of another vessel shall at once reduce her speed to bare steerageway. . . ."

The Canadian counterpart of rule 15 is Canadian rule 16, which has been established as follows:

(a) Every vessel, or seaplane when taxi-ing on the water, shall, in fog, mist, falling snow, heavy rainstorms or any other condition similarly restricting visibility, go at a moderate speed, having careful regard to the existing circumstances and conditions.

(b) A power-driven vessel hearing, apparently forward of her beam, the fog-signal of a vessel the position of which is not ascertained, shall, so far as the circumstances of the case admit, stop her engines, and then navigate with caution until danger of collision is over.<sup>9</sup>

The above statutes in no way indicate a discretionary act on the part of the master of a vessel. The simple Anglo-Saxon word "shall" is used and used purposely by the legislatures. This is a mandatory act on the part of the master of the ship. Scheduling of arrival time

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ties of the specific vessel. On most vessels today a dead reckoning tack is kept by a mechanical device which calculates the various elements which have been mentioned above.

<sup>7</sup> 33 U.S.C.A. § 272 (Supp. 1959).

<sup>8</sup> *City of Chicago v. Goodrich Transit Co.*, 199 Fed. 112 (7th Cir. 1912); *Erie & Western Transp. Co. v. City of Chicago*, 178 Fed. 42 (7th Cir. 1910); *The Leland Case*, 19 Fed. 771 (N.D. Ill. 1884).

<sup>9</sup> P.C. 1953-1287 (Can. Gaz., pt. II, rule 16 [Aug. 26, 1953]).

and consideration of the operational cost of the particular vessel must yield to this absolute requirement.

#### FOG SIGNAL DISCREPANCIES

In connection with the last mentioned "moderate speed" rules of both Canada and the United States, some attention should be paid to the reference in both laws to "the fog signal" of another ship. Just what constitutes a fog signal is a point of disagreement between the Canadian and American rules. Subsection (a) of rule 14 for the Great Lakes prescribes the fog signal of a steam vessel as follows:

. . . shall sound at intervals of not more than 1 minute three distinct blasts of her whistle.<sup>10</sup>

Whereas, Canadian Rule 15 C(i) (which is identical to rule 15 C (i) of the International Rules<sup>11</sup>) states the following as the required fog signal:

. . . shall sound at intervals of not more than 2 minutes a prolonged blast.<sup>12</sup>

The basic purpose of these fog signals is to communicate the status of one vessel to another; through stare decisis and the rules themselves, these fog signals are used when the other vessel can not be seen. It is obvious from the cursory reading of the above rules, however, that there is a significant legal difference between them in this aspect: The Canadian (and International) rule prescribes not more than a two minute interval, and is very specific in the type of blast; whereas, under the Great Lakes rule the interval is not more than one minute, and three distinct blasts are required. The master must know these differences and must insist that they are religiously adhered to while navigating the Canadian waters and the Great Lakes. An hour or two conference among the ship's officers concerning these particular rules may mean the difference between a successful and a financially disastrous voyage.

As early as 1869 the importance of correct and accurate fog signals was established by the United States Supreme Court in *The Pennsylvania* case. This decision has been the outstanding guidepost for mariners and American admiralty lawyers in their search for safety at sea. This case, which brought into play both the United States

<sup>10</sup> 33 U.S.C.A. § 271 (a) (Supp. 1959).

<sup>11</sup> 33 U.S.C.A. § 145m (c) (i) (Supp. 1959).

<sup>12</sup> P.C. 1953-1287 (Can. Gaz., pt. II, rule 15(c) [Aug. 26, 1953]).

and British rules of navigation, involved the following facts: The collision occurred in a thick fog about 200 miles from Sandy Hook in the track of outward and inward bound vessels. A British bark, underway, with way upon her, was ringing her ship's bell instead of giving the proper signal on her foghorn. This indicated to other ships in the area, in accordance with the rules at that time, that this particular ship was at anchor. However, the bark was moving through the water with a lashed helm. It was her duty to blow a foghorn in accordance with the International Rules of the Road, but instead she was ringing a bell; she was giving a false signal; she was not communicating her correct status to the other vessels in the area. The *Pennsylvania*, a British steam propeller, was proceeding through the fog, sounding proper fog signals but in direct violation of the "moderate speed" doctrine which has been previously discussed.

*The Pennsylvania* case established, although it has been modified and distinguished by later cases, the "basic fault" doctrine of American admiralty law. The Court announced the doctrine in these words:

[When] a ship at the time of collision is in actual violation of a statutory rule intended to prevent collisions, it is no more than a reasonable presumption that the fault, if not the sole cause, was at least a contributory cause of the disaster. In such a case the burden rests upon the ship of showing not merely that her fault might not have been one of the causes, or that it probably was not, but that it could not have been. Such a rule is necessary to enforce obedience to the mandate of the statute. . . .<sup>13</sup>

This case created for the Admiralty practice, a rebuttable presumption of fault once it is established that the ship or ships in collision were in violation of one of the statutory rules which are designed to prevent collision. Therefore, it is of extreme importance that the mariner realize that if, at the time of a collision, he is in violation of any of these rules, his ship is then "cast" in fault and it becomes incumbent upon him to show "not merely that her fault might not have been one of the causes, or that it probably was not, but that it could not have been."<sup>14</sup>

The above case further points out the supremacy of the legislative intent manifest in rule 14 (a) of the Great Lakes Rules. It is not the duty of the Judiciary to substitute its judicial wisdom for the considered intent of Congress. Further, the Court could not, following

<sup>13</sup> *The Pennsylvania*, 86 U.S. 125, 136 (1873).

<sup>14</sup> *Ibid.*

the strict interpretation of the statute, admit the validity of an equivalent signal for that which the statute had made a positive requirement.

#### THE "GENERAL PRUDENTIAL" AND "SPECIAL CIRCUMSTANCE" RULES

After having established the origin of the basic fault doctrine as presently found in the admiralty jurisprudence of America, it is only fitting and proper to consider the "General Prudential" and "Special Circumstance" Rules, misconception of which seems to have permeated the thinking of so many of the master mariners. In many collision cases the master mariner seems to rely on these two so-called exceptions to the rules of the road to justify his course of action. This concept of an "exception" to the rules makes it extremely difficult for counsel to establish with the court that these two rules are either expressly applicable, depending on the facts, or not applicable considering all the circumstances.

Rule 27 of the Great Lakes Rules (Canadian rule 27), the so-called "Special Circumstance Rule," is worded as follows:

In obeying and construing these rules due regard shall be had to all dangers of navigation and collision and to any special circumstances which may render a departure from the above rules necessary in order to avoid immediate danger.<sup>15</sup>

The "General Prudential Rule" embodied in rule 28 of the Great Lakes Rules (Canadian rule 29) is worded as follows:

Nothing in these rules shall exonerate any vessel, or the owner or master or crew thereof, from the consequences of any neglect to carry lights or signals, . . . or of a neglect of any precaution which may be required by the ordinary practice of seamen, or by the special circumstances of the case.<sup>16</sup>

It will be noted from the wording of these rules that had the courts so desired, they could have vitiated all the rules and allowed the exception to be the rule, rather than the rule itself.

The courts have narrowly construed these rules, and have stated in many cases that the Special Circumstance Rule will not excuse a violation of the plain mandate of the more specific rules even though the master may sincerely believe that his course of action was more prudent, under all the circumstances, than the specific provisions of the rules.<sup>17</sup> It has been held that when construing and obeying these rules<sup>18</sup>

<sup>15</sup> 33 U.S.C.A. § 292 (Supp. 1959).

<sup>16</sup> 33 U.S.C.A. § 293 (Supp. 1959).

<sup>17</sup> *Stevens v. United States Lines Co.*, 187 F. 2d 670 (1st Cir. 1951); *United States v. Woodbury*, 175 F.2d 854 (1st Cir. 1949); *Pure Oil Co. v. Fred B. Zigler*, 105 F. Supp. 121 (E.D. La. 1952).

<sup>18</sup> The courts, when discussing the navigational *rules of the road*, use the unique concept of "these rules." Through custom and tradition they refer to all the *rules of*

due regard must be had to all dangers of navigation and to any special circumstances in any particular case which may render a departure from them necessary in order to avoid immediate danger. However, it is categorically noted that the burden of proof must be carried by the master alleging that he was justified in departing from the specific rules. It has further been held that not only must the master establish, at the time of departure, that it was necessary in order to avoid immediate danger, but also that the course adopted was reasonably calculated to avoid that danger.<sup>19</sup>

In the light of this Special Circumstance Rule we must consider the ruling of the Court in *The Pennsylvania* case that when a vessel has committed a positive breach of statute, she must show not only that probably her fault was not a cause of the disaster, "but that *it could not have been*."<sup>20</sup> This simply means that the course of action taken by the master, when departing from the more specific rules, must not or could not have been the contributing cause of the collision.

A master is bound to obey the rules, and he is entitled to rely on the assumption that the other masters will do the same; if he departs from the rules, therefore, he does so at his own peril. As early as 1886, in *The Oregon* case,<sup>21</sup> Justice Brown stated this principle as follows:

The object of this code was to establish a uniform system of rules and regulations, which should be obligatory throughout the world, taking the place of the various and somewhat conflicting usages which had heretofore obtained among maritime nations. As before stated, they are regarded as sufficient protection for a vessel under ordinary circumstances; and one vessel meeting another, whether of the same or different nationality, has a right to assume that both are governed by the same laws, and each may regulate her own conduct accordingly. Exceptions to these rules, though provided for by rule [*now Rule 27*], should be admitted with great caution, and only when imperatively required by the special circumstances of the case. It follows that, under all ordinary circumstances, a vessel discharges her full duty and obligation to another by a faithful and literal observance of these rules. The power to superadd to them other requirements involves the power to determine what shall be superadded, and in this particular there is room for a great and embarrassing diversity of opinion. Thus, one court might hold that, in addition to displaying the regulation light, a vessel at anchor should swing a torch; another, that she should ring a bell; another, that she should blow a horn, beat a drum, or fire a cannon, and

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*the road* in this phrase. Sometimes it is most difficult to follow their reasoning when these general terms are used instead of more specific consideration of a particular rule.

<sup>19</sup> States S.S. Co. v. Permanente S.S. Corp., 231 F.2d 82 (9th Cir. 1956); British Transport Comm'n v. United States, 230 F.2d 139 (4th Cir. 1956); Buckeye S.S. Co. v. Union Towing & Wrecking Co., 68 F. Supp. 749 (N.D. Ohio 1946).

<sup>20</sup> *The Pennsylvania*, 86 U.S. 125 (1873). (Emphasis added.)

<sup>21</sup> *The Oregon*, 158 U.S. 186 (1895).



the result would be that a lookout would never know when he had performed his full duty to an approaching vessel. . . .<sup>22</sup>

It can be seen that the courts have been adamant in their thinking and rationale concerning a departure from the specific rules. Thus, it is of vital importance that it be understood, in the purview of *The Pennsylvania* and *Oregon* cases, how this Special Circumstance Rule may be used and used properly. It might be said that under the so-called "rare exception" and "special circumstances," a variation from the specific rules may be made when, under all the circumstances considered as a whole, the situation is in fact one of special consideration. Perhaps one of the best examples would be that of a vessel when maneuvering into position alongside of its pier; that situation would present a peculiar problem to which the specific rules could not logically apply. Also, a third vessel entering into a two vessel passing or crossing situation could well create "circumstances" requiring special action. And the presence of an obstruction in the water, which could prevent normal maneuvering, has been held a special circumstance, thereby excusing the vessel from following the more specific rules literally.<sup>23</sup>

In rule 28 quoted above, and known as the "General Prudential Rule," there is, in a sense, a repetition of the "Special Circumstance Rule."<sup>24</sup> But it should be noted that this rule goes further and makes it clear that the specific rules are not a complete and comprehensive code of navigation, but rather that the basic thesis of "good seamanship" is still required. And it should be added that the term "good seamanship" is not as nebulous as one might think, for it is defined by custom and case law.

#### THE ROLE OF NEGLIGENCE IN MARITIME LAW

It has been shown that a violation of a specific rule at the time of collision will raise a presumption of fault. The time-honored concept of "negligence" in general, however, as well as the above-mentioned non-compliance with the rules, is a ground upon which to establish liability. "Negligence" at sea does not differ fundamentally from

<sup>22</sup> *Id.* at 202.

<sup>23</sup> *The Hoyt Case*, 136 Fed. 671 (D.N.J. 1905); *Cusumano v. The Curlew*, 105 F. Supp. 428 (D. Mass. 1952).

<sup>24</sup> *Stevens v. United States Lines Co.*, 187 F. 2d 670 (1st Cir. 1951); *United States v. Woodbury*, 175 F. 2d 854 (1st Cir. 1949); *Pure Oil Co. v. Fred B. Zigler*, 105 F. Supp. 121 (E. D. La. 1952).

negligence ashore. It may be defined briefly as a correlative of the very vague standards of "due care" or "good", or "prudent" seamanship which appear again and again in our case law. A good example of this is the situation when two vessels pass in close quarters: The suction causes the smaller vessel to move toward the larger, and a collision is the direct outcome of this close quarter maneuvering. The standards of "prudent" and "good" navigation would require that the speed through the water be reduced in close quarters to avoid this inevitable result, but nowhere in the rules is this specifically covered. Similarly, the rules hold no positive requirement as to lookouts, but one of the surest ways for a vessel to inculcate herself is to neglect to post lookouts.<sup>25</sup>

An extremely interesting relationship between the rules and this general concept of negligence is found in *United States v. Woodbury*.<sup>26</sup> In this case the United States submarine Sea Owl, diving in a designated restricted area, fouled her periscope and superstructure with the fishing gear of the trawler vessel, Ariel. This diving area was governed by Inland Rules of the Road, which do not require any indication that the vessel is trawling, in contradistinction to the International Rules, which require that a trawler display a basket signal so as to advise her status of trawling to vessels approaching.<sup>27</sup> The fishing vessel, knowing that she was in inland waters, did not display such signal. The submarine Sea Owl was not aware of this "trawling status" and was forced to make a quick dive to avoid collision. The nets of the trawler were caught on the periscope sheers and destroyed.

The Court established negligence on the part of the fishing trawler, reasoning that "good seamanship" would have required her to display the basket or some other device to advise approaching vessels of her trawling status condition. The Court held the fishing trawler libale despite the lack of any statutory mandate requiring this display of signals. This principle was stated succinctly as follows:

It does not follow, however, that the Ariel was free from fault in flying no signal whatever to indicate the activity in which she was engaged at the time and place of the collision, for mere literal compliance with a specific rule of navigation is not always and under all circumstances enough to exonerate a vessel from fault. This is so for the reason that article 29 of the Inland Rules, 33 U.S.C.A. 221, which although general in its language is just as much a

<sup>25</sup> *Stevens v. United States Lines Co.*, *supra* note 24.

<sup>26</sup> 175 F. 2d 854 (1st Cir. 1949).

<sup>27</sup> 33 U.S.C.A. § 145g (e) (iii) (Supp. 1959).

statutory command as the rules couched in more specific terms, provides in pertinent part:

"Nothing in these rules shall exonerate any vessel, or the owner or master or crew thereof, from the consequences of any neglect to carry . . . signals . . . or . . . neglect of any precaution which may be required by the ordinary practice of seamen, or by the special circumstances of the case."

This rule requires, in addition to bare compliance with the literal provisions of some specific rule, the adoption either of such additional precautions as it is the ordinary practice of seamen to take in a particular situation, or of such additional precautions as the special circumstances of the particular case demand.<sup>28</sup>

The view of the Supreme Court in this subject area is perhaps best exemplified in these words from *The Oregon* case:

Undoubtedly, where the circumstances of the case are such as to demand unusual care, such care should be exercised. . . . The Code, however, is supposed to make provision for all ordinary cases.<sup>29</sup>

It is under the general negligence doctrine that the newest and most misunderstood aid to safe navigation finds its logical place. The reference here is to the electronic marvel known as radar. The rules do not as yet speak specifically on this important topic, but the case law approaches the use and the possession of radar under the general concept of negligence. The possession of radar is not of itself required, but it is this author's opinion that in the not too distant future, radar will be considered an indispensable constituent of the seaworthy vessel, and will be incorporated into the statutory requirement much the same as the running lights, mast head lights, prescribed whistle, and fog signals.<sup>30</sup> It is interesting to note that the United States Coast Guard has established that after May 1, 1962, every radar equipped vessel of 300 gross tons and over which is issued a Certificate of Inspection for navigation on ocean, coastwise, or Great Lakes waters shall have in its required complement of deck officers (including the master), only officers who have qualified as "radar observers."<sup>31</sup>

#### THE DILEMMA OF RADAR

The general area of radar has come before our admiralty courts indirectly under the aegis of any added obligation to use radar once it has been installed on the vessel. This thinking has manifested itself in *The Medford*,<sup>32</sup> the ship in that case was equipped with radar but

<sup>28</sup> *United States v. Woodbury*, 175 F. 2d 854, 861-862 (1st Cir. 1949).

<sup>29</sup> *The Oregon*, 158 U.S. 186, 201 (1895).

<sup>30</sup> *Anglo-Saxon Petroleum Co. v. United States*, 88 F. Supp. 158 (D. Mass. 1950).

<sup>31</sup> 25 Fed. Reg. 3969 (1960).

<sup>32</sup> 65 F. Supp. 622 (E. D. N.Y. 1946).

did not, in prudence, make use of it. The Medford steamed into a fog bank without activating its electronic gear and was held at fault for this "negligent act of omission." It has been argued in many quarters that the shipowner who equips his vessels with radar is held to a greater degree of liability in the event of a subsequent collision, than his counterpart who does not see fit to provide this technical advantage. It is suggested that this interpretation could be a deterrent to the increased use of radar without a mandatory rule requiring its installation; the courts have actually discouraged, and in some sense "penalized," the shipowner who installs radar for the safety of his ship.

Many of the first cases discussing this question of possession and use of radar have stemmed from collisions during the convoy operations of World War II. In *United States v. The Australia Star*,<sup>33</sup> a vessel was held at fault for failing to keep another vessel under radar observation after she herself had turned on her running lights. The court seems to indicate that *The Australia Star*, having established radar contact, was negligent in failing to continue to plot and analyze the course and speed on *The Hindoo* (the other vessel involved). In the exact words of the court:

Had her master continued to call for radar reports, the information so obtained should have suggested to him that his assumption that the *Hindoo* could and would keep out of the way was incorrect and might have enabled him to take some avoiding action.<sup>34</sup>

From this and various other cases it can be seen that if the vessels had not been equipped with radar, their obligation and responsibility to use this device would not have been raised before the court.

The courts have extended the age-old doctrine of seaworthiness into the field of radar. This question was not on all fours in the *Timur Fishing Corp.* case.<sup>35</sup> Judge Aldrich pointed out the doctrine of seaworthiness and its relationship to the possession and maintenance of radar in the following words:

Therefore I would not find her unseaworthy to have a radar that was less than 100% perfect, so long as its limitations were apparent and known. Installation and maintenance difficulties would have been involved to have placed the radar screen so that no blind spot existed.<sup>36</sup>

<sup>33</sup> 172 F. 2d. 472 (2d Cir. 1949).

<sup>34</sup> *Id.* at 475-476.

<sup>35</sup> *Timur Fishing Corp. v. Cap'n Bill, Inc.*, 160 F. Supp. 563 (D. Mass. 1958).

<sup>36</sup> *Id.* at 564.

Another court's attitude is found in *British Transport Comm'n v. United States*:<sup>37</sup>

At this point it is well to refer to the Duke's radar. Its use would have avoided the collision and its unavailability was due to neglect of repair. There was ample warning—a day or two—of its disrepair. Had it been in operation, the situation so urgently demanding its services, omission to use it would clearly have been negligence. However, as the Duke of York's excessive speed was the predominant fault leading to the collision, it is not necessary in this case to pass upon the question of whether or not, in the absence of statute requiring radar, a lack of diligence in maintaining existing radar facilities is negligence.<sup>38</sup>

From these leading cases one could possibly conclude that both the Judiciary and those responsible for the safe navigation of vessels need a statutory enactment covering this most important subject.

The Canadian rules and the American Great Lakes rules require that fog signals be used only "whenever there is thick weather by reason of fog, mist, falling snow, heavy rainstorms, or other causes, whether by day or by night. . . ."<sup>39</sup> The crossing signals as required by these rules are to be used only when the vessels are visible to each other. As has been pointed out previously, the primary purpose of fog signals is to advise other vessels of the status of all vessels in the vicinity. After this status has been ascertained, the master is then called upon to make his prudent judgment as to his course of action within the purview of "good seamanship" and "due care." Assuming that radar, with competent interpretation of its electronic signal, lifts the veil of "thick weather," thereby placing the various ships in the status of perfect visibility, one is faced with the problem of being caught on both horns of a dilemma: On one horn, if a client whose ship has radar is advised to follow the statutory rules requiring execution of the fog signal, one is forced to the conclusion that a ship visible on radar is really not "visible." On the other horn, if a client is advised to completely ignore the statutory requirement of the fog signal, based upon the assumption that the vessel is "visible" on the radar screen, in the event of collision the client is cast in fault under *The Pennsylvania* doctrine.<sup>40</sup>

A very recent case, *Weyerhaeuser S. S. Co. v. United States*,<sup>41</sup>

<sup>37</sup> 230 F. 2d 139 (4th Cir. 1956); *Petition of the United States*, 131 F. Supp. 712, 717 (E. D. Va. 1955).

<sup>38</sup> *Id.* at 142.

<sup>39</sup> 33 U.S.C.A. § 271 (Supp. 1959).

<sup>40</sup> *The Pennsylvania*, 86 U.S. 125 (1873).

<sup>41</sup> 174 F. Supp. 663 (N.D. Cal. 1959).

has discussed the very point of liability set out above. In *Weyerhaeuser*, two vessels, both having radar and using it to observe each other, managed to use this radar observation to bring themselves to the exact same position at the same time in collision; this is known as a radar assisted collision. During the course of maneuvering into collision, one of the vessels made at least one or two course changes, while the other one made three course changes. These vessels were heading towards each other and during the time of their radar observations, one of the vessels changed course to port while the other one made three course changes to starboard based on its radar observation.

Rule 18 of the Great Lakes rules provides: "When two steam vessels are meeting end on, or nearly end on, . . . each [vessel] shall alter her course to starboard so that each shall pass on the port side of the other."<sup>42</sup> The record discloses that one of these vessels, after detecting the other, changed her course to starboard in accordance with this rule 18, but the other vessel, knowing this course change, managed to turn to port, thereby bringing her back on a collision course. The principle of this case is quoted as follows:

Rule 18, written before the advent of radar as an aid to navigation, specifically refers to instances in which the vessels or their lights are visible to each other. This court can see no reason why its application should not extend to a situation in which two vessels "*see*" each other by radar.

It is argued that under the conditions of the instant case a right turn was not warranted because neither vessel could know that the other had radar and abide by the rules.<sup>43</sup>

The court in answer to the objection that the passing rules do not apply in the fog, further developed its thesis as follows:

But even if the Pacific had not had radar and had maintained a straight course, a right turn by the *Weyerhaeuser* would have avoided the collision and the same is true if the situation is reversed. Certainly, a left turn was totally unjustified. It is difficult to see how application of Rule 18 under these conditions would have anything but a positive effect upon safety.

Two cases are cited in support of the position that the meeting and passing rules do not apply in fog. *Borcich v. Ancich*, 9 Cir., 1951, 191 F.2d 392; *The George F. Randolph*, D.C.S.D.N.Y. 1912, 200 F.96. Both are distinguishable from the instant case. In the former, fog made the burdened vessel unable to determine that there was another vessel to starboard, and in the latter, both vessels were uncertain of each other's location in the fog.<sup>44</sup>

<sup>42</sup> 33 U.S.C.A. § 282 (Supp. 1959).

<sup>43</sup> *Weyerhaeuser S.S. Co. v. United States*, 174 F. Supp. 663, 666 (N.D. Cal. 1959). (Emphasis added.)

<sup>44</sup> *Ibid.*

In this case both vessels knew the location and the exact course of the other vessel. The court concluded, after distinguishing the *Borcich* case and the *Randolph* case, that both these vessels were bound to turn to starboard under the same situation as if they could have seen each other and that rule 18, which specifically required this course of action was applicable, notwithstanding the fact that their "seeing each other" was based on radar observations.

The foregoing discussion of the relatively new concept of radar as applied to the nautical rules of the road indicates the necessity for the consideration and resolution of a most difficult problem by the legislatures of both Canada and the United States. An attempt has been made to provoke thinking concerning both this question of radar in admiralty and the problem of the rebuttable fault doctrine. It would seem that these problems, by their nature, are so closely interwoven between the Canadian waters and those of the United States, that perhaps a very closely knit working committee should be established: The recommendations worked out as a joint venture could be of untold importance to the future development of the St. Lawrence Seaway and the Great Lakes.