

# The role of navigation assessment and prediction in solving equivocal crossings in or at the entrance of narrow channels in light of The Alexandra I decision<sup>1</sup>

Ayoub Tailoussane<sup>2</sup>

## 1. Introduction

Collision avoidance between vessels at sea is governed by the Convention on the International Regulations for Preventing Collisions at Sea of 1972, in force since July 1977 and better known as the COLREGS. Ratified by more than 160 member states,<sup>3</sup> and representing over 99% of the world's tonnage,<sup>4</sup> the COLREGS are almost universally applicable. They comprise a number of rules, some of which deal with very specific situations and apply under specific conditions. For instance, vessels following the course of a narrow channel are required by rule 9(a) to “*keep as near to the outer limit of the channel or fairway which lies on [their] starboard side as is safe and practicable*”. When two power-driven vessels are within sight of each other, the rules of Part B – Section II (rules 11-18) apply, and the vessels must make an assessment of the situation in order to determine the nature of the encounter between them. If the vessels are approaching one another on reciprocal or quasi-reciprocal courses, the situation is described as a head-on encounter and might call for the application of rule 14. Overtaking encounters involve scenarios where one vessel is approaching another from the rear, or as described by rule 13 from an angle that is wider than 22.5 degrees abaft the beam. Rule 15 is reserved for encounters which fall into neither of the first two categories. The vessels are then said to be crossing.

Each of these rules will guide the behaviour of vessels, through a series of obligations, with the purpose being to prevent collisions. However, for the rules to achieve their potential, they must be applied appropriately by all vessels involved. After all, the duties under each of these rules are different, and the difference can be stark in some cases. It is undeniably dangerous for vessels to either apply the wrong rules, or apply the right rules at the wrong time. Vessels must therefore be mindful of the prevailing circumstances in their assessments and decision-making. This often requires not only being cognizant of the immediate environment, but also understanding what other vessels are doing, in order to determine in turn what your own vessel is required to do. In the words of the UK supreme court, “*the rules need to be applied by reference to what reasonably appears to those navigating one vessel to be being done on the other vessel*”.<sup>5</sup> However, predicting the navigation of other vessels is not straightforward. Circumstances can make it challenging, and two vessels may reach two different conclusions regarding the applicable rules as their respective assessments of the situation can themselves be different. Encounters between vessels leaving a narrow channel (“outbound vessels”) and vessels approaching the entrance of the same channel (“approaching vessels”) offer such a challenge.

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<sup>1</sup> The Alexandra I, [2017] 1 Lloyd's Rep. 666 (Adm.), [2019] 1 Lloyd's Rep. 119 (CA), [2021] 1 Lloyd's Rep 299 (UKSC) & [2022] 1 Lloyd's Rep. Plus 56 (Adm.).

<sup>2</sup> Doctoral Research Fellow, Scandinavian Institute of Maritime Law, University of Oslo

<sup>3</sup> Information on ratification collected from the IMO's reports on the status of conventions which can be consulted here: <https://www.imo.org/en/About/Conventions/Pages/StatusOfConventions.aspx>; last visited 24 April 2022.

<sup>4</sup> Craig H. Allen Sr. and Craig H. Allen Jr., *Farewell's Rules of the Nautical Road*, 9<sup>th</sup> edition, 2020, p. 10.

<sup>5</sup> The Alexandra I, [2021] 1 Lloyd's Rep 299, para 104.

Not all vessels approaching a narrow channel are intending to enter it. Vessels may be heading towards a destination which takes them across and in front of the entrance of a narrow channel but does not require them to enter it. A vessel may have the intention of entering a narrow channel, but not immediately upon reaching the entrance. A vessel entering a narrow channel and a vessel simply passing by will not behave in the same way. Outbound vessels need to distinguish between the former and the latter in order to know how to act appropriately to avoid a collision.

This problem is equally not unknown for encounters which take place within narrow channels. Even there, a vessel might not be intending to follow the course of the narrow channel. In certain circumstances, a vessel might be intending to cross from one side of the channel to the other. Different reasons might justify such actions. The vessel could be proceeding towards a wharf, or the destination might be a pier or a port which lies on the other side. Near areas where a narrow channel curves, vessels might also appear to be crossing. The vessels could actually be crossing, or they might instead just be rounding the bend while following the course of the channel. Determining which situation is which relies on making predictions of the future movements of each vessel, based on contemporaneous factors. But until a certain point is reached, it might be difficult for a vessel to make that determination and the nature of the encounter may remain uncertain. The expression ‘equivocal encounter’ is thus used in this article to describe those situations where the prevailing circumstances may point towards two or more plausible courses which the navigation of a specific vessel can take. Equivocal encounters become particularly dangerous when the determining point, i.e. when the navigation of a vessel becomes clear, might come relatively late and only at a short distance away. In some areas, this risk is much more prominent, with narrow channels representing one of them.

In a recent collision case,<sup>6</sup> the UK supreme court was confronted with a collision incident that involved the type of uncertainty discussed above. An outbound vessel, the *Ever Smart*, was leaving a narrow channel at the same time as another vessel, the *Alexandra I*, was situated outside, but near to, the entrance. The *Alexandra I* was in the pilot boarding area waiting to get a pilot on board. During the 27 minutes preceding the collision, the *Alexandra I* was bearing on the port bow of the *Ever Smart* and was slowly moving, or, as described by the courts, drifting, on a general course that seemed to be crossing the course of the *Ever Smart*. From the point of view of the *Ever Smart*, the *Alexandra I* would thus have been seen on the port bow slowly moving in a direction which, if followed without change, would have taken her across and ahead of the *Ever Smart*’s bow from port to starboard. Hence, the *Ever Smart* considered this to be a crossing encounter. The *Alexandra I*, however, was waiting for a pilot in order to enter the narrow channel, with no intention of crossing ahead of the *Ever Smart*. In her view, this was an encounter between one vessel entering and one leaving the same narrow channel, which called for the application of rule 9(a) only. This was therefore a case of equivocal crossing, where there was disagreement as to whether the vessel outside the entrance was crossing or entering the narrow channel.

This article focuses on the UK supreme court’s methodology, as applied in *The Alexandra I* case, for assessing and predicting the navigation of a vessel as a precursor and necessary step for the proper application of the rules. The decisions rendered by the English courts in *The Alexandra I*

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<sup>6</sup> *The Alexandra I*, [2021] 1 Lloyd’s Rep 299.

case seem to be predicated on exactly this premise: vessels involved in an equivocal crossing in or near the entrances of narrow channels need to determine whether they are actually crossing or just appear to be crossing. If they only appear to be crossing, for instance because one vessel is leaving a narrow channel and another is entering it, rule 9(a) will govern the encounter, while rule 15 can be dis-applied (*infra*, chapter 2). To make a distinction between when the situation might call for one rule or the other, the UK supreme court sought to clarify how one can assess and predict the navigation of an observed vessel that is approaching the entrance of a narrow channel. Taking an analytical look at this decision, I argue that the espoused assessment methodology relies principally on factors which can be detected, recognized and understood by an observing vessel without the need to be in privity to the particular intentions of the seafarers on board the observed target vessel (*infra*, chapter 3). However, the methodology followed in this decision does not in my opinion necessarily lessen the difficulty which vessels have to contend with in assessing the navigation of vessels encountered in or near narrow channels. In fact, an observing vessel may reach different, but equally plausible conclusions about the navigation of an observed target vessel, by following the very same approach as the UK supreme court. Confining our analysis to the case of equivocal crossings within or near narrow channels, we will consider examples of this problem in chapter 4. To mitigate the problem, however, this article proposes that the need for selecting between rule 15, the crossing rule, and rule 9, the narrow channel rule, might not be necessary (*infra*, chapter 5). The duties under both rules seem to be compatible, such as to make it possible for them to be applied concurrently in narrow channels or at their entrances. A concurrent application would circumvent the problems that arise when two vessels take contradictory actions because they have reached different conclusions about which rules are applicable after assessing the situation differently from one another.

This article is therefore an exploration of the UK supreme court's approach to the assessment and prediction of other vessels' navigations, and a critical analysis of its usefulness for solving equivocal crossings in or near the entrances of narrow channels.

## **2. A closer look at The Alexandra I collision and the tension between the narrow channel rule and the crossing rule:**

While we have established that different situations are governed by different parts of the COLREGS, it has yet not been clarified why the English courts needed to make a decision between the narrow channel rule and the crossing rule in this case. We must understand first and foremost the primary duties that stem respectively from each of the two aforementioned rules (*infra*, 2.1 & 2.2), before we take a look at the treatment The Alexandra I case received in each of the admiralty, appellate and supreme court (*infra*, 2.3).

### **2.1. Narrow channels and the keep-to-starboard requirement:**

Narrow channels and fairways constrain the navigation of vessels by offering less space to manoeuvre and bringing vessels in closer proximity than what is usually desirable for safe navigation.<sup>7</sup> Shorter distances between vessels and the higher probability of denser traffic reduces the time available for vessels to assess situations and take appropriate actions. Moreover, the

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<sup>7</sup> Craig H. Allen Sr. & Jr., *Farewell's Rules of the Nautical Road*, p. 227.

‘narrow’ width of such channels, coupled with the often limited water depth, leaves vessels with fewer possibilities for course alterations, not forgetting that the effects of hydrodynamic interactions both between vessels, as well as between vessels and the physical characteristics of the channel, such as banks, can create an added layer of complexity and danger to navigation.<sup>8</sup> All of these factors contribute to an increase in the risk of collision.<sup>9</sup>

By way of organizing the flow of traffic, rule 9(a) of the COLREGS regulates the navigation of vessels in stretches of water where navigation is restricted by boundaries on each side, in order to mitigate the risk of collision.<sup>10</sup> In principle, the rule has the effect of dividing any such bordered stretches of water, which can qualify as a narrow channel or fairway, into two distinct lanes.<sup>11</sup> In each lane, vessel traffic is supposed to flow in a single direction only. The organization and direction of traffic in this way aims to mitigate or even eliminate, in theory at least, the risk of collision between vessels that are following the course of the narrow channel, but in opposite directions. Provided they remain in their respective lanes, the chances of vessels meeting end-on, i.e. on reciprocal or nearly reciprocal courses, are significantly reduced.<sup>12</sup>

The main duty of vessels navigating in narrow channels is thus fairly clear and straightforward. Rule 9(a) dictates that any “*vessel proceeding along the course of a narrow channel or fairway shall keep as near to the outer limit of the channel or fairway which lies on her starboard side as is safe and practicable*”. In other words, vessels following the natural course of the narrow channel are required to keep to the starboard side. By remaining on their respective starboard side, a safe port-to-port passing is ensured with vessels proceeding in opposite directions. Moreover, by specifying that vessels should remain as close as possible to the outer edge of the narrow channel, the rule also aims to increase the passing distance between vessels. For the sake of simplicity and clarity, we shall borrow the appellation used by Craig H. Allen and refer to this obligation as the “keep-to-starboard” requirement.<sup>13</sup>

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<sup>8</sup> Nicholas J. Healy, Joseph C. Sweeney, *The Law of Marine Collision*, (Centreville, Maryland: Press, Inc., 1998), 145-146.

<sup>9</sup> Craig H. Allen Sr. & Jr., *Farewell’s Rules of the Nautical Road*, p. 227.

<sup>10</sup> The problem of defining what is a narrow channel is a complex one that deserves to be treated separately. Thus, it is not considered here.

<sup>11</sup> Certain channels or fairways are too narrow to accommodate bi-directional navigation. The flow of vessels in these areas will usually be restricted to a single direction. In certain cases, the question of whether navigation within the waterway is open to vessels proceeding in both directions may depend on the size and characteristics of the vessels transiting through the area. When required by the circumstances, both-ways traffic can be halted and the channel can be momentarily converted into a one-way waterway to allow vessels above a certain size to navigate safely. See Craig H. Allen, “Taking Narrow Channel Collision Prevention Seriously To More Effectively Manage Marine Transportation System Risk,” *Journal of Maritime Law & Commerce* Vol. 41, No. 1 (2010): 6.

Although also subject to a Traffic Separation Scheme, the Strait of Istanbul is a good example of such an organization. See Ece J.N, Sözen A, Akten N, Erol S, “The Strait of Istanbul: A Tricky Conduit for Safe Navigation,” *European Journal of Navigation*, 5, 1 (2007): 46-55.

<sup>12</sup> Craig H. Allen, “Taking Narrow Channel Collision Prevention Seriously To More Effectively Manage Marine Transportation System Risk”, *Journal of Maritime Law & Commerce* Vol. 41, No. 1 (2010): 30.

<sup>13</sup> Craig H. Allen, “Narrow Channel Collision Prevention,” 18.

In *The Canberra Star*,<sup>14</sup> a decision of the English admiralty court, the keep-to-starboard requirement was applied so as to also affect the navigation of vessels that were entering a narrow channel. These vessels were said to have a duty to enter the narrow channel in such a manner so as to ensure that they find themselves on the starboard side of it upon entering<sup>15</sup> (Fig. 1). The idea is that a vessel which is entering a narrow channel that lies on her starboard side (“inbound vessel”) would be able to pass safely port-to-port with any vessel which is leaving that same narrow channel (“outbound vessel”). The keep-to-starboard requirement is thus a concern for more than just those vessels which are within the confines of a narrow channel. The duty also affects the

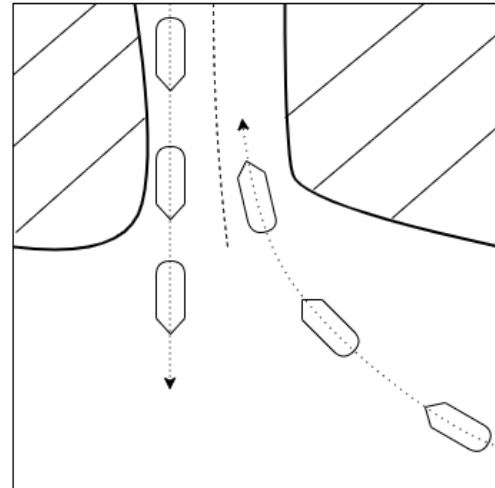


Fig. 1. Vessel entering the narrow channel while keeping to starboard.

navigation of inbound vessels as they enter into the channel. Such extension<sup>16</sup> of the application of rule 9(a) to inbound vessels holds true at the very least as long as the entrance of the narrow channel lies on the starboard side of the said inbound vessels (Fig. 1). This therefore explains the position of the vessel *Alexandra I*. She intended to enter the narrow channel, and therefore in her view she was bound by rule 9(a) to keep-to-starboard, in the same vein as the *Ever Smart* which was leaving it. From this point of view, it may appear reasonable to hold the *Ever Smart* at fault after it was established that she was staying in the middle of the narrow channel and not keeping-to-starboard from at the very least 11 minutes before the collision. This view satisfied the admiralty court and the court of appeal, but failed to convince the UK supreme court as we shall see (*infra*, 2.3).

## 2.2. The crossing rule and the give-way/stand-on dichotomy:

Under rule 15, “[w]hen two power-driven vessels are crossing so as to involve risk of collision, the vessel which has the other on her own starboard side shall keep out of the way”. The vessel “which has the other on her own starboard side” is referred to as the give-way vessel. The give-way vessel has an active role in avoiding a collision, as she must take positive action in order to keep out of the way of the other vessel, i.e. the stand-on vessel. The duties of the give-way and stand-on vessels are governed respectively by rules 16 and 17.<sup>17</sup> Rule 16 directs the give-way vessel to, “as far as possible, take early and substantial action to keep well clear”, while the main

<sup>14</sup> *The Canberra Star*, [1962] 1 Ll. Rep. 24.

<sup>15</sup> *The Canberra Star*, [1962] 1 Ll. Rep. 24, 28 col. 2

<sup>16</sup> In my opinion, a strict interpretation of the words in rule 9(a), or rule 9 in general, does not point towards the application of its provisions outside the narrow channel. This brings to the forefront an interesting discussion on the scope of application of rule 9(a) and the reasoning behind its extension to vessels which have not yet entered, but are in the course of entering. We will not discuss this point further in this article, but I would point out that the case law appears to indicate that compliance with rule 9(a) is a matter of good seamanship. See *The Canberra Star*, [1962] 1 Ll. Rep. 24, p. 28 col. 2; A. N. Cockcroft and J. N. F. Lameijer, *A guide to the Collision Avoidance*, 49. However, this solution does not really offer a good solution to encounters between outbound and inbound vessels when the latter is approaching an entrance which is on her port side. This was also pointed out by the UK supreme court in *The Alexandra I*. See *The Alexandra I* (SC), [2021] 1 Lloyd's Rep 299, para 144.

<sup>17</sup> Other rules also remain applicable, such as those found in Part B Section I of the COLREGS.

duty under rule 17, found in paragraph (a)(i), requires the other vessel to “keep her course and speed.”

Since the vessel *Alexandra I* had the *Ever Smart* on her starboard bow, the *Ever Smart* contended that this was simply and purely a crossing encounter which called for the application of rules 15, 16 and 17 above. In other words, it was the *Alexandra I*'s duty to keep out of the way and in failing to do so, she was at fault for the collision. The UK supreme court agreed that indeed the crossing rule, rule 15, ought to have applied, instead of the keep-to-starboard requirement, rule 9(a).

### **2.3. The English courts divergent conclusions about the navigation of the vessel *Alexandra I*:**

The two vessels could not agree on which rule governed, the collision took place and the courts had to determine if the situation called for the application of the narrow channel rule or the crossing rule. Application of both rules concurrently seemed to be out of the question as far as the admiralty court and the court of appeal were concerned. This possibility will be discussed later on (*infra*, chapter 5). For now, we will take a summary look at the position of the admiralty and appellate courts and contrast it with the decision of the UK supreme court, as that will pave the way towards discussing the UK supreme court's approach to assessing situations involving an encounter between an outbound vessel and a vessel approaching the entrance of a narrow channel.

One of the determining factors in the decisions of the admiralty court and the court of appeal was that the vessel *Alexandra I* was considered and treated as a vessel entering the narrow channel. This was held to be the case, despite the fact that she could not enter as a pilot had not yet boarded. But with that determination being made, the decision of the two courts was then a simple application of the principle introduced earlier in *The Canberra Star* (*supra*, 2.1): The keep-to-starboard requirement should have been enough to ensure a safe port-to-port passing between the two inbound and outbound vessels. The court of appeal therefore concluded that “[t]his was not a situation where it is necessary to apply the crossing rules to secure safe navigation – and if it is not necessary to apply the crossing rules it can fairly be said that it is necessary not to apply them, so as to avoid adding a layer of confusion”.<sup>18</sup> In addition, these two courts found it difficult to accept a concurrent application of both the crossing and the narrow channel rules. In their analysis, they attempted to show that the stand-on vessel's duties under the crossing rule were incompatible with the keep-to-starboard requirement. In their opinion, the duty to keep course and speed stifled the stand-on vessel's ability to make the alterations necessary to keep-to-starboard of the narrow channel. This incompatibility is solved only if one of the rules is foregone. Both these reasons justified dis-applying the crossing rule<sup>19</sup> in favour of the narrow channel rule. This resulted in holding the *Ever Smart* 80% to blame for her failure to remain on the starboard side of the narrow channel.

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<sup>18</sup> *The Alexandra I*, [2019] 1 Lloyd's Rep. 141, at para 74(ii).

<sup>19</sup> The resolution of the case also depended on determining whether there is a built-in “steady course” condition in the crossing rule which must be fulfilled before the rule becomes applicable, which led the supreme court to tackle the question of risk of collision assessment. While these are interesting topics, which also involve a degree of situational assessment, the concept of ‘risk of collision’ is complex and deserves to be discussed separately.

Although the UK supreme court did not disagree with the idea that the crossing rule may need to be dis-applied in certain cases in favour of the narrow channel rule, it held that The Alexandra I collision did not represent such a case. To arrive at this conclusion, the court relied on making a distinction between three different groups of vessels which can be observed by an outbound vessel approaching the entrance of narrow channel: transiting vessels, inbound vessels and waiting vessels<sup>20</sup>.

The UK supreme court defined transiting vessels as being vessels which are moving past the narrow channel's entrance without "*intending or preparing to enter it at all*".<sup>21</sup> Inbound vessels on the other hand do not only intend to enter the channel but are also "*on their final approach to the entrance, adjusting their course to arrive at their starboard side of it*".<sup>22</sup> For transiting vessels, the UK supreme court reiterated that the keep-to-starboard duty is irrelevant as they are not proceeding into the narrow channel, where the duty would apply. On the contrary, the supreme court found, albeit in obiter dicta, that it was necessary for inbound vessels to follow rule 9(a) in order to be on the starboard side of the narrow channel upon entering:

*"... the necessity to disapply the crossing rules [i.e. rules 15, 16 and 17] arises because, once she [i.e. the inbound vessel] is shaping and adjusting her course to enter the narrow channel, the approaching vessel is already having her navigation determined by the need to be in compliance with rule 9(a) when she reaches the entrance, that is, to arrive at her starboard side of it, on a course which enables her to continue on her starboard side of the channel."*<sup>23</sup>

However, the vessel Alexandra I was distinguished by the UK supreme court from both transiting and inbound vessels. The Alexandra I reached the pilot boarding area approximately half an hour before the collision, where she remained until the collision. At no point had she made an attempt to enter the channel, since she could not do so without a pilot. Hence, the UK supreme court saw it fit to treat her as a waiting vessel. Vessels in a similar position to the Alexandra I are "*also intending and preparing to enter, but waiting to enter rather than entering...They may be stationary, or moving, although still waiting to enter*".<sup>24</sup> Here the duty to keep-to-starboard was held to be ineffective in solving the encounter with an outbound vessel, since it should not yet apply to the waiting vessel. Only vessels which are discernibly already manoeuvring to shape their course in order to enter the narrow channel, i.e. inbound vessels, were said to be concerned with this duty. As the narrow channel rule became inapplicable, the reasons to potentially set aside the crossing rule also disappeared in the eyes of the UK supreme court. The decision of the court of

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<sup>20</sup> The UK supreme court refers to these as Group 1, Group 2 and Group 3 vessels respectively. For the sake of clarity, an appellation which describes the goal of each approaching vessel in these three groups will instead be used in this article.

<sup>21</sup> The Alexandra I, [2021] 1 Lloyd's Rep 299, para 134.

<sup>22</sup> The Alexandra I, [2021] 1 Lloyd's Rep 299, para 134-135.

<sup>23</sup> The Alexandra I, [2021] 1 Lloyd's Rep 299, para 138.

<sup>24</sup> The Alexandra I, [2021] 1 Lloyd's Rep 299, para 134.

appeal was thus reversed,<sup>25</sup> and the crossing rule was held applicable instead of the narrow channel rule. The supreme court did not however venture into deciding the apportionment of liability.<sup>26</sup>

Beyond the differences in the conclusions of the courts with regard to the applicable rules, what is of interest for us in this case is the different ways in which the vessel *Alexandra I* was treated and classified throughout the case. The admiralty court and the court of appeal gave significant weight to the fact that the *Alexandra I* intended to enter the narrow channel. At no point before or at the moment of the collision did the *Alexandra I* attempt to enter, but her intention was indeed to do so as soon as she had a pilot on board. This was enough for both the admiralty and the appellate court to consider her an inbound vessel and apply the narrow channel rule. The UK supreme court however gave no heed to those intentions. It focused almost exclusively on what a vessel in the position of the *Ever Smart* could infer about the *Alexandra I*'s navigation, based on an ongoing observation of her manoeuvres. Because there was no sign of entry, she was considered a waiting vessel with no duty to comply with the narrow channel rule. Different approaches lead to different results. Chapter 3 explores the supreme court's approach to situational assessment.

### **3. The UK supreme court's approach to situational assessment and its consequences for the proper application and understanding of the narrow channel and crossing rules:**

The decision of the UK supreme court was partially built on a classification exercise. The UK supreme court attempted to classify the navigation of the *Alexandra I* within a certain category to then draw conclusions about the possible applicable rule(s). The classification was predicated on an assessment of the *Alexandra I*'s navigation, which was itself mainly reliant on observation of her movements (*infra*, 3.1). This seemingly mono-factorial approach stands in stark contrast to how the UK supreme court sought to prove that alterations made by a stand-on vessel are not necessarily in violation of the duty to keep course and speed (*infra*, 3.2). Stand-on vessels are said to be permitted to alter their courses and/or speeds, as long as these alterations are justified by what is referred to in the decision of the UK supreme court as the 'navigation goals', the 'goals-in-mind' or the 'readily apparent nautical manoeuvre' of the stand-on vessel in question. To identify these navigation goals, factors such as the location, the traffic, an assumption of proper knowledge and application of the regulations, were held to inform the assessment of the situation, in addition to the observation of the stand-on vessel's manoeuvres. In the latter of the two situations, the range of factors which seems to have an influence over the assessment of the

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<sup>25</sup> As mentioned earlier (*supra*, note 17), the decision of the UK supreme court hinged upon a determination of the actual conditions of application of rule 15. The UK supreme court rejected the notion of a 'steady course' requirement and held that the application of rule 15 depended on only three conditions: (i) the vessels must be in-sight, (ii) must be on a course, and (iii) such course must be so as to involve a risk of collision. This led the court to discuss the role of rule 7(d) in the determination of the risk of collision. However, these points will not be discussed in this article.

<sup>26</sup> The parties did not request the liability apportionment to be re-considered as they preferred that point to be re-visited by the admiralty court. See *The Alexandra I*, [2021] 1 Lloyd's Rep 299, para 147. After it was remanded, the *Ever Smart*'s share of liability was reduced, but only from 80% to 70%. The admiralty court, following the UKSC's decision, recognized that the *Alexandra I*'s failure to keep out of the way under the crossing rule created a situation of danger. However, taking into account the causative potency and the degree of blameworthiness of the faults of each vessel, the faults of the *Ever Smart* (i.e. a defective look-out, not keeping-to-starboard, failure to take action under rules 17(a)(ii) and 17(b), unsafe speed) were still considered to be more causative and blameworthy. See *The Alexandra I* [2022] 1 Lloyd's Rep. Plus 56, para 150-151, 163, 171, 176-177, 185.



situation is much broader than just observation of manoeuvres. Nonetheless, it is in my opinion clear that both approaches share similar features. They both rely on factors which are discernible, or in other words, which are detectable, recognizable and intelligible without special knowledge of the intentions of the observed target vessel (*infra*, 3.3).

### 3.1. Distinguishing between an inbound vessel and a waiting vessel:

This part attempts to answer a simple question: do the actual intentions or goals of the vessel approaching the entrance of the narrow channel (“approaching vessel”) matter in determining the applicable rule(s) for the encounter with an outbound vessel? A fortiori, the answer is no.

Both an inbound vessel and a waiting vessel were recognized by the UK supreme court as having the intention to enter the narrow channel. Yet, in the court’s view the keep-to-starboard requirement influences the navigation of the former, but not of the latter. The reason may have to do with the ability of the outbound vessel to infer from the manoeuvres of the approaching vessel her intentions. It is implied that the navigation of a waiting vessel lacks the clarity in manoeuvring of a vessel that is already making the necessary course and/or speed alterations to enter the channel. In the latter case, the outbound vessel can rely on both visual and equipment-assisted observation to surmise the navigation of the approaching vessel. If the manoeuvres indicate that the approaching vessel is going into the narrow channel, then the outbound vessel can deduce that keeping-to-starboard is sufficient to ensure a safe port-to-port passing, since the inbound vessel will be subject to the same rule. To put it simply, the crossing rule can be dis-applied only if the observable manoeuvres of the approaching vessel qualify her as an inbound vessel:

*“The second reason for preferring the appellant’s case is that the test for the occasion when, of necessity, the crossing rules should be overridden must be a clear one, clear that is to those navigating both the vessels involved. **Fundamental to the construction of the Rules is the need to apply them by reference to what is reasonably apparent to those navigating each vessel about the conduct of the other.** On that basis of assessment, the test propounded by the appellant is the clear winner. **The crossing rules are overridden only when the approaching vessel is shaping to enter the channel, adjusting her course so as to reach the entrance on the starboard side of it, on her final approach. That can be determined from the vessel leaving the channel by visual (or radar) observation of the approaching vessel’s course and speed.**”(Added emphasis).<sup>27</sup>*

In contrast, the manoeuvres of a waiting vessel, or lack thereof, would put the outbound vessel in a position where they cannot make any reasonable inferences about the future movements of the vessel outside the narrow channel. The difference between a waiting vessel and a transiting vessel (see *supra*, 2.3) basically becomes difficult to discern.

The reasoning of the UK supreme court on this point is interesting when considering the particular facts of the case. The Ever Smart either had or was in a position to have actual knowledge of the Alexandra I’s preparatory actions in view of her entering the narrow channel. The admiralty court pointed this out:

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<sup>27</sup> The Alexandra I, [2021] 1 Lloyd’s Rep 299, para 141.

*“Ever Smart was or ought to have been aware that Alexandra I was proceeding towards the channel intending to embark the pilot and then proceed down the channel. Certainly the pilot was aware of that when on board Ever Smart.”*<sup>28</sup>

However, the UK supreme court did not pursue this line of inquiry. It did not address the question of whether the Ever Smart knew or ought to have known of that intention, even though a reasonable argument could have been made in my opinion in favour of requiring the Ever Smart to have taken into consideration the special situation of the Alexandra I.

In my view, the circumstances left little doubt that the Alexandra I was waiting for a pilot. While the Alexandra I was moving, she was moving so slowly that she barely covered one mile during a period of 21 minutes.<sup>29</sup> Moreover, the presence of a pilot boarding area near the entrance should have been known to the Ever Smart. If anything, the Alexandra I’s navigation and the locality should have tipped the scale more in favour of classifying her as a waiting vessel and away from a classification as a transiting vessel. Furthermore, the Ever Smart was carrying the pilot who was intended to guide the Alexandra I through the narrow channel. The Ever Smart was thus arguably in a position to inquire about the pilot’s next destination. This same pilot had also warned the Ever Smart about the presence of the Alexandra I, as he was disembarking around 6 minutes before the collision.<sup>30</sup> It is therefore fair to say that the Ever Smart was in a position to have or acquire actual knowledge of the intentions of the Alexandra I. By knowing that the Alexandra I was waiting for a pilot, the Ever Smart could have surmised that she was not intending on crossing from one side of the entrance to the other. Therefore, if the Ever Smart had kept-to-starboard, the collision might have been avoided. The reason why the Ever Smart did not do that is probably because she was unaware of the Alexandra I’s presence altogether. From the accounts of the facts in the UK supreme court’s decision, it is quite clear that the Ever Smart was not keeping a proper look-out:

*“Less than two minutes after the collision the master of Ever Smart said (apparently to the officer of the watch and helmsman) “both of you ... have you seen it or not?” He then said “how come you didn’t see it?””*<sup>31</sup>

The statements of the Ever Smart’s master shows that the presence of the Alexandra I went completely unnoticed. Nonetheless, none of these factors were really taken into account in the UK supreme court’s approach to assessing the situation and classifying the navigation of the Alexandra I. In light of this, the UK supreme court’s position may be telling of a desire to set an objective test of general application independent of the special facts of the case; a test which can arguably be reproduced by vessels navigating in or near a narrow channel to determine when the crossing rule may give way to the narrow channel rule, notwithstanding any special circumstances which may give the outbound vessel insight into the actual intentions of the approaching vessel.

It is certainly not irrational to rely on what is being depicted through manoeuvres to assess the navigation of a vessel, since actual intentions may remain hidden and difficult to ascertain. Indeed,

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<sup>28</sup> The Alexandra I, [2017] 1 Lloyd's Rep. 666, para. 74.

<sup>29</sup> The Alexandra I, [2017] 1 Lloyd's Rep. 666, para. 70.

<sup>30</sup> The Alexandra I, [2021] 1 Lloyd's Rep 299, para 13(vii).

<sup>31</sup> The Alexandra I, [2021] 1 Lloyd's Rep 299, para 13(x).

unlike the Ever Smart which was in a position to know of the Alexandra I's actual intentions, not every single outbound vessel would necessarily have or be in a position to acquire that knowledge. However, one can certainly argue that if an outbound vessel is aware of the actual intentions of the vessel outside the narrow channel, as in The Alexandra I case, reliance on the observation of manoeuvres should no longer be necessary to predict movements. This knowledge can, for example, be acquired through VHF communication. It is not uncommon for vessels to contact one another through VHF to exchange information about their destinations and upcoming manoeuvres. In fact, when the court of appeal put to the Elder Brethren (i.e. nautical assessors) the hypothetical scenario of an inbound vessel that is entering a narrow channel which bears on her port bow (i.e. opposite case of the Alexandra I), the nautical assessors had this to say about how the outbound vessel and inbound vessel could approach the situation:

*"The prudent mariner in the outbound vessel in such circumstances would:*

*(...)*

- *consult the onboard pilot and Jebel Ali VTS/port control re[garding] the subject vessel's identity and intentions*
- *make contact with the other vessel on VHF at an early stage to advise own ship's constraints in a narrow channel and his intentions when dropping his pilot.*

*(...)*

*The prudent mariner in an incoming vessel approaching from the east would:*

- *acquire information from Jebel Ali VTS/ port control regarding own pilot boarding time and position, ensuring that when manoeuvring to pick up his pilot he stays clear of the channel mouth and lines up to enter on his starboard side of the channel*
- *acquire the outbound vessel as an ARPA target at an early stage and keep a close watch on the vessel's bearing to determine the risk of collision*
- *identify and make early contact with the outbound vessel on VHF (identify via AIS or Jebel Ali port) in order to ensure that collision risk is avoided and agree to keep clear of the vessel navigating under Pilotage in a narrow channel."*<sup>32</sup>

Seeking information about the intentions of the vessel outside the narrow channel and the use of VHF are in their opinion part and parcel of what a prudent mariner on board the outbound vessel would do to assess the situation. It is therefore quite curious that the UK supreme court focused solely on the observable manoeuvres of the approaching vessel. But I propose two distinct reasons for this.

One reason could be the general reluctance of the English courts to condone the use of VHF as a primary tool for collision avoidance. A number of decisions warn of the danger of this practice. The risk of miscommunication being for instance one of them,<sup>33</sup> or indeed the temptation to use

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<sup>32</sup> The Alexandra I, [2019] 1 Lloyd's Rep. 119, para 80.

<sup>33</sup> The Maloja II [1993] 1 Lloyd's Rep. 48 at page 52 col. 2.

VHF to agree on manoeuvres which violate the COLREGS.<sup>34</sup> In both cases, VHF may lead the vessels involved in the encounter to take contradictory and self-cancelling actions. The position of the UK supreme court could be seen as a logical continuation of this adverse attitude towards the use of VHF. It is also important to note that the advice of the nautical assessors does not involve contacting the approaching vessel through VHF to inquire about her intentions. Instead, they recommend using VHF for informing the target vessel of the constraints that are imposed on your own vessel. VHF would in that case be used to provide the other vessel with a more thorough picture of the circumstances that affect one's own navigation, and not to communicate the actions that one is intending on taking.

The second reason is directly tied in with the degree of trustworthiness that can be placed on any information obtained regarding the actual intentions of the approaching vessel. Apart from the ever present risk of miscommunication, any information obtained about the intentions of a vessel is unlikely to be binding on that vessel, even if communicated directly by her. A vessel may say one thing and end up doing something completely different. The discrepancy between words and actions may not necessarily be due to a misrepresentation, although that is also possible. An inbound vessel might communicate to an outbound vessel that she is intending on entering the narrow channel. However, a previously undetected obstruction or danger close to the entrance (e.g. a kayaker which could not have been observed from a distance) might require the inbound vessel to change her immediate goals. There might not be enough time to communicate this new information, or the distances might be so close that the outbound vessel might not be able to react to the sudden change. The inbound vessel might also simply omit some information, due to wrongly assuming that it is self-evident. For instance, an inbound vessel might neglect to communicate that she is going to stop at a pilot pick-up station before entering, after she presumes that the outbound vessel would be able to deduce that fact from their knowledge of the local regulations. These two examples should illustrate that even if a vessel becomes aware of the actual intentions of a target vessel, this does not necessarily guarantee that the navigation of the target vessel is going to abide by those intentions. There can always be a discrepancy between the actual intentions of a vessel and their discernible navigation, a point we will explore again later (*infra*, chapter 4).

So, we could say that the Ever Smart being in a position to be aware of the actual intentions of the Alexandra I was immaterial, because these intentions were not discernible from the manoeuvres of the latter. The UK supreme court concluded that a drastic measure, such as disapplying an otherwise applicable rule, cannot be justified when the discernible navigation of the vessel outside the narrow channel leaves doubt as to whether or not she intends on entering the narrow channel:

*“Picking up a pilot before entering a river or a harbour entrance is clearly not a sufficient act of preparation to displace the crossing rules: see The Ada; The Sappho and The Albano. Merely being in a pilot boarding area cannot of itself be decisive, since vessels may be proceeding in that area for other reasons, eg because they are leaving the narrow*

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<sup>34</sup> The Nordlake and The Seaeagle [2016] 1 Lloyd's Rep 656 at para 76; The Aleksandr Marinesko v Quint Star [1998] 1 Lloyd's Rep. 265 at page 278.

*channel, or merely passing its entrance en route to a completely different destination, as was the tug Zakheer Bravo in the present case.”*<sup>35</sup>

We can draw two conclusions from the above: First, it is clear from the UK supreme court’s decision that an outbound vessel has to rely on observation of the manoeuvres of the approaching vessel in order to deduce whether it is an encounter with a transiting, a waiting or an inbound vessel. Only in the last case might the keep-to-starboard requirement be sufficient to resolve the encounter between the two vessels as they can pass each other port-to-port while the inbound vessel is entering, and the outbound vessel is leaving.<sup>36</sup> The crossing rule in this scenario might then not be necessary. In the *Alexandra I*’s case, however, her navigation as she was drifting with little control over her heading and course, did not clearly show that she was entering the narrow channel. Thus, there was no reason to disapply the crossing rule.

Secondly, there is an implication in my opinion that the approaching vessel needs to keep in mind that major reliance is going to be placed on her observable manoeuvres by the outbound vessel. Therefore, the approaching vessel should strive to ensure that her manoeuvres clearly communicate her intentions. And if there is discrepancy between the two, she should be aware that preference would be given to what is inferable from her discernible manoeuvres, even though the outbound vessel might know of her, i.e. the approaching vessel’s, actual intentions.

### **3.2. The proper construction of the duty of the stand-on vessel to keep course and speed:**

The UK supreme court placed great focus on the manoeuvres of the approaching vessel, in order to classify the nature of her navigation for the purpose of determining whether the narrow channel rule might justify disapplication of the crossing rule. This section shows a similar but broader approach to situational assessment; such an approach goes beyond observation of manoeuvres, to take into account other factors which can be detected, recognized and understood independently by an observing vessel. This approach was relied on by the UK supreme court to help identify when an alteration made by a stand-on vessel would not represent a violation of her duty to keep course and speed.

Let us start by observing that the duty of the stand-on vessel to keep her course and speed should not be interpreted so rigidly as to be equated with an absolute and categorical prohibition of any sort of course or speed alterations from the stand-on vessel. It cannot be reasonably expected of vessels to freeze in time their navigation, maintaining without any deviation under all circumstances whichever course and/or speed they were proceeding with at the time when they find themselves under the ambit of rule 17(a)(i). The UK supreme court also made this point very clear:

*“... Nor is the stand-on vessel’s obligation to keep her course and speed necessarily an obligation strictly to maintain her precise heading, course, or even her precise speed. If the nautical manoeuvre upon which she is visibly engaged when she becomes the stand-*

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<sup>35</sup> The *Alexandra I*, [2021] 1 Lloyd’s Rep 299, para 141.

<sup>36</sup> It must be stressed that the keep-to-starboard requirement performs well as a solution for the encounter as long as the inbound vessel is bearing on the port side of the outbound vessel. In the opposite scenario, the crossing rule

*on vessel involves altering her heading or course, or slowing down, she may do so without undermining the obligation of the give-way vessel to keep clear.”*<sup>37</sup>

This interpretation of the duty to maintain course and speed is well accepted under English Law,<sup>38</sup> and can be traced back at least to the decision of the court of appeal in *The Windsor-Roanoke* case.<sup>39</sup> As reported by A. N. Cockcroft and J. N. F. Lameijer,<sup>40</sup> this particular collision occurred when the similarly-named vessel, the *Roanoke*, stopped her engines to take on board a pilot from the Rotterdam pilot boat. The *Roanoke* was on a crossing course with another vessel bearing on her port bow, making the *Roanoke* the stand-on vessel which must keep her course and speed. The decision to stop the vessel in order to take on the pilot was a contributing cause to the collision and was contended to be a violation of the duty to maintain course and speed. The court of appeal however exculpated the *Roanoke* from any fault flowing from this decision and clarified that:

*“‘[C]ourse and speed’ mean course and speed in following the nautical manœuvre in which, to the knowledge of the other vessel, the vessel is at the time engaged. It is not difficult to give many instances which support this view. The ‘course’ certainly does not mean the actual compass direction of the heading of the vessel at the time the other is sighted.”*<sup>41</sup>

By the same token, this flexible construction, first espoused in *The Roanoke*, was applied later on in *The Taunton*:<sup>42</sup>

*“[w]hen the rule talks about keeping course and speed it means the course you were going to take for the object you had in view- not the course and speed you had at any particular moment. So you keep your speed although you stop, and you keep your course although you alter it 16 points. You keep your course if you are going round the bend of a river although you are altering it to follow the bend. You keep your speed though you stop to pick up a pilot. It follows that if you are crossing the tide your course is to keep diverging; and, therefore, according to the authorities, you are keeping your course although you are continually porting.”*<sup>43</sup>

What these three cases (*The Alexandra I*, *The Roanoke* and *The Taunton*) tell us, is that the duty of the stand-on vessel to maintain course and speed has to be assessed in light of the navigational requirements imposed by the circumstances, as well as the navigation goals which the stand-on vessel has in mind. It does not refer to a specific speed, heading or course measured at a specific point in time. A stand-on vessel constantly porting or starboarding to follow the natural curvature

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<sup>37</sup> *The Alexandra I*, [2021] 1 Lloyd's Rep 299, para 62.

<sup>38</sup> The position does not diverge U.S. Law either. See *US v SS Soya Atlantic*, 330 F.2d 732, 1964 A.M.C. 898, at 737; *Commonwealth & Dominion Line v. US*, 20 F.2d 729, 1927 A.M.C. 1690 reversed on other grounds by 278 U.S. 427, 49 S.Ct. 183, 73 L.Ed. 439.

<sup>39</sup> *The Roanoke* [1908] 4 WLUK 19 (1908), [1908] P. 231.

<sup>40</sup> A. N. Cockcroft and J. N. F. Lameijer, *A Guide to the Collision Avoidance*, 79.

<sup>41</sup> A. N. Cockcroft and J. N. F. Lameijer, *A guide to the Collision Avoidance*, 79 citing Lord Alverstone in *The Roanoke* (1908) 11 Asp. 253, at p. 239.

<sup>42</sup> *The Taunton*, [1928] 31 Lloyd's Rep. 119, p. 120 col. 2.

<sup>43</sup> *The Taunton*, [1928] 31 Lloyd's Rep. 119, p. 120 col. 2.

of a channel is maintaining her course and speed.<sup>44</sup> It would also not be a violation of her duty if the vessel were to reduce her speed, stop or reverse to avoid some navigational hazard.<sup>45</sup> A vessel slowing down to pick-up a pilot,<sup>46</sup> or accelerating after dropping a pilot, could likewise be in compliance with the meaning of the rule.<sup>47</sup> Presumably, however, this flexibility cannot be unqualified. Not every ‘object’ that the stand-on vessel has in mind, can or should, for that matter, justify an alteration of course and/or speed under rule 17(a)(i).

This freedom of movement is tempered by the requirement that the object-in-mind, or, that is to say, the intentions of the stand-on vessel, be made apparent to the give-way vessel.<sup>48</sup> In *The Roanoke*, it was made clear that for an alteration not to violate the duty to keep course and speed, it had to be justified by “*the nautical manoeuvre in which, to the knowledge of the other vessel, the vessel is at the time engaged*”(Added emphasis).<sup>49</sup> Commenting on *The Roanoke*’s construction of the duty to maintain course and speed, the UK supreme court added in *The Alexandra I* decision that:

*“First the “object you had in view” must be reasonably apparent to the give-way vessel, if the purpose of the obligation to keep course and speed, as explained in The Roanoke, is to have effect. Secondly, the “object ... in view” must include, or take account of, the stand-on vessel’s obligation to comply with the other provisions of the Rules. This may include avoiding a collision with a third vessel, which may be approaching the stand-on vessel head-on, or complying with the narrow channel rule*

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<sup>44</sup> J. W. Griffin, *The American Law of Collision*, (New York, N.Y.: The Helga Press, 1949),143; *The Taunton*, id.

<sup>45</sup> *The Dona Myrto*, [1959] 1 Lloyd’s Rep. 203, p. 211 citing a passage from *The Roanoke* (1908) 11 Asp. 253, at p. 239.

<sup>46</sup> *The Roanoke* (1908) [1908] P. 231, at p. 241-242.

<sup>47</sup> (American case) *US v SS Soya Atlantic*, 330 F.2d 732, 1964 A.M.C. 898, p. 737. Although in an English case, *The General VII*, [1990] 2 Lloyd’s Rep. 1, the ‘putative’ stand-on vessel would have been held at fault for picking up speed after the pilot had disembarked and such action would have been considered in violation of the duty to maintain course and speed, if the overtaking rule was applicable to the collision, since the court considered that the “ordinary and proper manoeuvre” in which the overtaken vessel was engaged ended when she slowed down to pick up her pilot.

<sup>48</sup> In my view, there are practical reasons for requiring the object-in-mind of the stand-on vessel to be apparent. The dichotomy of duties between the give-way and stand-on vessels solves the problem of having two vessels taking diametrically opposite and cancelling actions. In a crossing scenario for example, the most instinctive approach for avoiding collision is for one vessel to alter course in order to pass astern of the other vessel. Altering course towards the direction in which the other vessel is located seems to be a “natural” response among subjects both with and without any knowledge of the COLREGS. See John Kemp, “Behaviour Patterns in Crossing Situations”, *The Journal Of Navigation* (2009), 62, 443–453. Without the give-way/stand-on distinction, the vessel which has the other on her starboard bow will naturally prefer to alter course to starboard to ensure that she passes astern. Likewise, the other vessel having her on the port bow will want to alter to port in order to achieve the same goal. These two actions cancel each other out perfectly, leading the two vessels to move closer and closer to each other. By ensuring that only one vessel has the active role of taking positive actions, this problem can be avoided. The give-way vessel stands a better chance at predicting the future positions and keeping out of the way of the stand-on vessel if the latter maintains course and speed. The duties of the two vessels work in tandem. If the stand-on vessel’s manoeuvres lose predictability, the give-way vessel’s job becomes more difficult to carry out. This explains very well why the give-way vessel must have ‘knowledge’ of the stand-on vessel’s manoeuvres under the duty to maintain course and speed. When the stand-on vessel has in mind an object which requires some form of course alteration, knowledge thereof by the give-way vessel is necessary for maintaining predictability. And predictability can be achieved only if the give-way vessel is capable of understanding, one way or another, what the stand-on vessel is doing.

<sup>49</sup> A. N. Cockcroft and J. N. F. Lameijer, *A guide to the Collision Avoidance*, 79 citing Lord Alberman in *The Roanoke* (1908) 11 Asp. 253, at p. 239.

*in rule 9(a) to keep to the starboard side of the channel, as is implicit in Scrutton LJ's example of turning to follow a bend in a river." (Added emphasis).<sup>50</sup>*

There is little doubt here that the UK supreme court is not narrowing down the test to only what is inferable from observing the contemporaneous manoeuvres of the stand-on vessel. A multi-factorial approach, which takes into account external factors, such as the locus of navigation, surrounding traffic or the applicable regulations, is favoured. All of this information, in combination with the visually- and/or radar-observable manoeuvres, help inform the give-way vessel in her efforts to predict the intentions of the stand-on vessel. Our second observation is therefore that determining the object-in-mind of the stand-on vessel requires a multi-factorial approach.

This multi-factorial approach can be read in a couple of ways. On the one hand, it tells us that the location of navigation and the applicable regulations in that area are equally important sources of information. In an area where pilotage is compulsory, incoming or outgoing vessels should be expected to be making their way to the designated area(s) for dropping off or picking-up pilots.<sup>51</sup> A vessel proceeding in a narrow channel should be expected to make adjustments to her course in order to follow the shape of a curving channel while keeping-to-starboard. Observation of only the visible manoeuvres of the stand-on vessels might not show at a given time that the vessel is intending on altering course. At a sufficiently faraway distance from where a narrow channel curves, the visible manoeuvres of a stand-on vessel may suggest a straight course. Yet, the upcoming bend ought to let the give-way vessel know that the stand-on vessel might be altering course to negotiate the turn. In other words, the manoeuvre in which a vessel is engaged at a given time might not correspond to the manoeuvre in which they will be engaged at a future point in time. If the give-way vessel is to understand what is being done on the stand-on vessel, reliance on observing the manoeuvres of the stand-on vessel as the sole source of information is not enough. The observed manoeuvres must be analysed side-by-side with factors which can affect the navigation of the observed stand-on vessel.

On the other hand, it also indicates that the manoeuvres of the stand-on vessel must be legitimate and not opportunistic in nature. A manoeuvre made for the sake of getting the vessel faster to her destination or serving a similarly self-interested goal is arguably not enough. The stand-on vessel can manoeuvre only if the reasons behind it are intelligible and comprehensible to the give-way vessel. The examples in the passage above all share this feature. The manoeuvres are made necessary by a fact which is or should be known to the give-way vessel, e.g. the presence of a third vessel or the keep-to-starboard requirement under the COLREGS. Therefore, the leeway granted to the stand-on vessel can be read to carry the opposite duty for the stand-on vessel to make only those manoeuvres which are motivated by reasons of which the give-way vessel can or ought to be aware, based on the immediate and apparent circumstances.<sup>52</sup> Our third observation therefore

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<sup>50</sup> The *Alexandra I*, [2021] 1 Lloyd's Rep 299, para 64.

<sup>51</sup> E.g. of cases involving collisions taking place under such circumstances include *The Albano* [1907] UKPC 11 (27 February 1907), *The Alcoa Rambler* [1949] UKPC 11 (14 February 1949).

<sup>52</sup> Certain external factors that can affect the navigation of one or both vessels in an encounter might not be equally apparent or discernible to both of them. There is always a risk that the give-way vessel will, for instance, simply not be in a position to have the full picture of the circumstances which might, from the perspective of the stand-on vessel,



is that the factors which inform the assessment of the situation are those which are discernible to the give-way vessel without it being privy to what those on board the stand-on vessel might have in mind in terms of subjective navigation goals.

Our conclusions are in this part threefold. First, the duty to keep course and speed does not translate into a prohibition on any alterations by the stand-on vessel from the moment the crossing rule is engaged. But although the duty of the stand-on vessel might not be so rigid so as to be immutable, a coherent and consistent navigation is still to be expected. For this, only those alterations which are justified by the goal the stand-on vessel has in mind do not violate the duty to keep course and speed. Secondly, it is not enough for the alterations of the stand-on vessel to be in line with her navigation goals, the reasons behind the alteration must also be discernible to the give-way vessel. Thirdly, the reasons are deemed to be discernible if the give-way vessel is capable of recognizing them and understanding their implications for the stand-on vessel's navigation from the prevailing circumstances. The prevailing circumstances include only those which are discernible to a give-way vessel without any special knowledge of the actual intentions of the stand-on vessel. These circumstances include factors such as the location of navigation, surrounding traffic, knowledge of the applicable regulations, and they must inform, alongside information obtained from observation of the stand-on vessel's manoeuvres, the give-way vessel's assessment of the situation.

Applied to The Alexandra I collision, we know the Ever Smart was following the course of the narrow channel proceeding towards the sea. Her presence within the narrow channel would *ipso facto* entail application of the keep-to-starboard requirement. Therefore, the discernible navigation in which the Ever Smart was engaged was to proceed along the course of the narrow channel while making any course and/or speed alterations necessary for keeping-to-starboard. A vessel within or outside the narrow channel, like the Alexandra I, should reasonably expect the Ever Smart to alter her course to starboard in order to maintain or regain navigation on the starboard side of the narrow channel where she ought to be. This was the conclusion of the UK supreme court and thus the risk of inconsistency between the keep-to-starboard requirement and the duty to keep course and speed was resolved, since the stand-on vessel could potentially comply with both simultaneously.

### **3.3. Common features in the approach of the UK supreme court to situational assessment:**

The range of factors taken into account by the UK supreme court in its approach to the assessment of the situation/navigation of another vessel can seem to be broader in the context of the construction of the duty to maintain course and speed. When classifying the navigation of the vessel Alexandra I, focus was plainly on inferences drawn from observation of her manoeuvres without much taking into account, or at least not explicitly, other factors, such as the location of

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justify an alteration of speed and/or course. Obstacles or hindrances that are too small to be detected from a distance, small vessels without a radar reflector, sea conditions of which the give-way vessel is not yet aware, etc. A number of circumstances which have little to do with the intentions or the goals of the seafarers on board the stand-on vessel, but which are not discernible to the give-way vessel, might legitimize alterations of course and/or speed. Although the (over-)use of VHF has been discouraged by a number of English courts, there might be no other option in such situations than to communicate with the give-way vessel to inform them of the necessity to make a certain manoeuvre. We will not go further into a discussion of this possibility and whether or not it might amount to good seamanship, but it is worth pointing it out to encourage further reflection.

the vessel or the requirement for compulsory pilotage, the latter of which was the main reason for the presence of the vessel in front of the entrance.

This may have been justified by the fact that an understanding of the reasons behind the presence of the Alexandra I near the entrance of the narrow channel would not have changed the end result under the analysis of the UK supreme court. Indeed, the decision gave the same treatment both to vessels that are passing by the entrance and to vessels that are waiting to board a pilot. Neither vessel is bound by the keep-to-starboard requirement. Making a distinction between the two was thus unnecessary.

Moreover, it might not be entirely accurate to say that assessing the navigation of the approaching vessel does not take into account other factors than the observed manoeuvres. The reasoning behind why the crossing rule can be dis-applied when the approaching vessel is already shaping her course to enter the narrow channel is predicated on an understanding of the implication of the application of the keep-to-starboard requirement. Indeed, upon noticing that an approaching vessel bearing on the port bow is clearly on her way to enter the narrow channel, an outbound vessel can deduce, by applying the keep-to-starboard requirement, that the approaching vessel will be altering and keeping-to-starboard, thus ensuring a safe port-to-port passing. Therefore, it is by combining information drawn from where the approaching vessel is coming from, her apparent manoeuvres and knowledge of the applicable rules, that the outbound vessel infers useful conclusions about the approaching vessel's navigation. This might not have been made explicit by the UK supreme court simply because it is assumed to be self-evident.

Whatever factors were omitted by the UK supreme court in classifying the navigation of the Alexandra I, e.g. possibility to acquire knowledge of the actual intentions of the Alexandra I, I would argue that it is because they fail to be independently discernible. In other words, they require the outbound vessel to inquire about, or otherwise acquire, special knowledge of the intentions of those aboard the approaching vessel. The focus of the UK supreme court is however on what can be discerned by a competent mariner, with proper knowledge of the regulations, keeping a proper look-out. And this is not dissimilar to how the court decided which types of alterations do not violate the stand-on vessel's duty to keep course and speed. The determining factor is that the reasons behind the alterations have to be apparent to the give-way vessel. It seems therefore that the UK supreme court's general approach to the assessment of navigation is characterized by a dominant feature: the assessment should be based on sources of information which are available to any vessel subject to the COLREGS that is in a similar position to the one under scrutiny, without having or seeking to obtain some special knowledge outside of what can be deduced or inferred from keeping a proper look-out and being aware of the characteristics of the locus of navigation (e.g. water depth, marked wrecks/obstructions, sea and weather conditions, VTS communications, applicable regulations and so on and so forth).

The UK supreme court's use of or reference to a varied range of expressions/concepts, such as 'observable manoeuvres', 'object-in-mind', 'apparent nautical manoeuvre' in different parts of the decision, is not necessarily indicative of a change in the approach. It is rather in my opinion an attempt by the court to focus on those aspects that seem to have the most pertinence for the specific issue under scrutiny. The test remains the same. When the UK supreme court says "*the rules need*

*to be applied by reference to what reasonably appears to those navigating one vessel to be being done on the other vessel*”,<sup>53</sup> my proposed understanding is based on the following:

- (i) The assessment is not about simply observing the manoeuvres that a vessel is undertaking during a specific length of time.
- (ii) The predictions must be informed by other factors apart from pure observation of the manoeuvres, such as the characteristics of the location and the requirements imposed by the applicable regulations.
- (iii) Only those factors which are susceptible of being detected, recognized and understood without special knowledge of the actual intentions of the observed vessel are to be taken into account. However, special circumstances might require vessels to establish VHF communication in order to inform one another of exceptional factors that might not be readily apparent to the other vessel through visual and/or equipment-based observation.
- (iv) The assessment does not entail uncovering or discovering the actual intentions of the observed target vessel. It is what can be reasonably inferred from what is shown and done on the target vessel, rather than what is thought or said, that should prevail. Even if knowledge of the actual intentions of a target vessel is acquired, preference should be given to what can be observed being done by that vessel.
- (v) Vessels ought to be aware of any potential discrepancies between what they intend on doing and what their actions might communicate to other vessels regarding those intentions. In the case of a stand-on vessel, for instance, one could even argue that she has a duty to confine any changes in course and/or speed to those that would be reasonably expected by other vessels observing her manoeuvres under the given circumstances, giving special attention to factors such as the locus of navigation, the applicable regulations, traffic, weather and/or sea conditions.

For the sake of simplicity and ease of writing, we will continue referring to this methodology wherever necessary as the discernible navigation test.

With that said, the next couple of chapters will contemplate the usefulness of the UK supreme court’s approach to predicting and/or classifying the navigation of vessels in or near narrow channels for the purpose of determining the applicable rule(s).

#### **4. The inability of the discernible navigation test to completely solve the inherent difficulty in assessing and predicting the navigation of vessels in or at the entrances of narrow channels:**

Collision avoidance is reliant on the ability of vessels to foretell the movements of other vessels, in order to take the correct measures. As we have previously seen, these predictions can be based on different factors. Of course, the frequent and continuous observation over time of the

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<sup>53</sup> The *Alexandra I*, [2021] 1 Lloyd's Rep 299, para 104.

manoeuvres of a vessel is a primary source of information. This was a major point of focus for the UK supreme court in *The Alexandra I*. But the location of navigation is equally important. Again, *The Alexandra I* decision touched on this factor when determining whether a change of course made in order to keep-to-starboard within a narrow channel would be incompatible with the duty of a stand-on vessel to maintain course and speed. The answer was in the negative. Due to the location of the stand-on vessel within a narrow channel, such course alterations are to be expected and they are not in violation of rule 17(a)(i). The applicable regulations are also a major source of information for predicting the navigation of other vessels. In a narrow channel, the keep-to-starboard requirement applies, and alterations made towards achieving that goal are to be expected. All of these factors play a role in predicting the intentions of nearby vessels. The problem arises when two or more of these sources can lead you to different conclusions.

This chapter argues that the risk of reaching conflicting, but equally plausible, predictions in regard to the navigation of an observed vessel may be higher in or near areas such as narrow channels, where vessels are expected to be in close-quarters. These uncertain scenarios are what we dubbed earlier equivocal encounters.

The *Heranger*<sup>54</sup> illustrates reasonably well a situation where the expectation of one vessel, based on the locus of navigation and regulations applicable to that area, do not conform with the discernible navigation or even the actual intentions of another vessel. It therefore deserves some attention (*infra*, 4.1). The pervasiveness of the problem with equivocal encounters in cases involving narrow channels casts some doubt over the practicality of the UK supreme court's approach to the assessment and prediction of other vessels' navigation (*infra*, 4.2).

#### **4.1. The *Heranger* collision – An example of a difficult navigation to predict:**

The *Heranger* was proceeding along the Long Reach channel down the river Thames, keeping to starboard at all times. Where the Long Reach channel ends, another channel by the name of St. Clement's Reach begins. This point is marked by the Stone Ness Light. This navigational mark also coincides with a bend in the river and the narrow channels running along it. As the *Heranger* was navigating towards the Stone Ness, she could see behind the bend on her port bow another vessel, the *Diamond*, about a mile distant, proceeding up river. Due to the curvature of the river, the *Heranger* could only see the masthead and the green starboard light of the *Diamond*. Outside a narrow channel, this would be a clear telltale sign of a crossing encounter. However, because the vessels were in a narrow channel, the *Heranger* expected the *Diamond* to follow the curvature of the channel and open up her red port side light in due time. Indeed, the *Heranger* "kept her course and speed in the expectation that the *Diamond* would open her red light as she rounded Stone Ness under starboard wheel and would pass the *Heranger* port-to-port",<sup>55</sup> as the keep-to-starboard requirement would entail. However, the *Diamond* was heading towards a wharf which lay across and on the other side of the river and thus was not actually intending to round the bend by starboarding, but rather altered her course to port, in order to cross to the opposite bank of the river. This brought the *Diamond* ahead of the bow of the *Heranger* when they were about two

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<sup>54</sup> *The Heranger*, [1938] 62 Ll.L.Rep. 204.

<sup>55</sup> *Id.*, at p. 205 col. 1.

cables apart and the collision could not be avoided. By the time the Heranger realized that there was a danger of collision, at about four cables distance or two minutes before collision, she stopped her engines and when the distance reduced to two cables, or one minute before collision, she put them full astern. However, these actions proved to be insufficient.

The dispute did not revolve around whether or not the Diamond was at fault, as she clearly was, due to her decision to make a port alteration and cross ahead of the bow of the Heranger at a very close distance. It was rather about whether or not the Heranger should also bear a portion of the blame for not reversing her engines earlier.<sup>56</sup> In deciding the matter, the then House of Lords noted that there existed “no rules which apply to the particular facts. Deciding which action should be taken can only depend on the requirements of good seamanship and the application of the ordinary principles of the law of negligence.”<sup>57</sup> Any reference, even by analogy, to the duties under the crossing rule was discarded.<sup>58</sup> The Heranger was ultimately held partly at fault for waiting until the vessels were two cables apart to put her engines full astern, when as a matter of good seamanship, she ought to have done so at a distance of four cables, when the danger of collision was identified.

In any case, what interests us in this case is not so much whether the crossing rule ought to have applied to this situation or not<sup>59</sup>, but rather how the Heranger’s expectations were based on a valid assumption, the application of the keep-to-starboard requirement, and yet, those expectations proved to be wrong. It was quite clear from the case that the Heranger’s reluctance to reverse the engines earlier, which was described as a drastic measure for a vessel of her size, was motivated by the false conviction that the Diamond was following the course of the narrow channel and was therefore not a crossing vessel. She maintained this belief even when the vessels were only four cables apart. With the benefit of hindsight, one can criticize the Heranger for not realizing, based on the Diamond’s observable manoeuvres, especially once the latter had reached and passed Stone Ness where the channel bends without turning to starboard, that this was a crossing situation. However, it is important to remember that the increased proximity between vessels in narrow channels often leaves vessels with little time to assess in the first place, and perhaps no time at all to reassess their prior conclusions. The Heranger assumed that the Diamond would abide by the keep-to-starboard requirement and was in a way justified in not assuming she would cross ahead. Based on the location of navigation and the applicable bylaws<sup>60</sup> in the river Thames, expecting that the Diamond would keep to her starboard side of the channel was legitimate. It is an accepted principle under English Law that between two vessels proceeding in opposite direction along the

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<sup>56</sup> The Heranger did bear 1/3 of the liability in the end, even though it was recognized that the collision was mainly caused by the completely unforeseen actions of the Diamond.

<sup>57</sup> *Ibid.*, at p. 210 col. 2 - 211 col. 1.

<sup>58</sup> *Ibid.*, at p.211 col. 1.

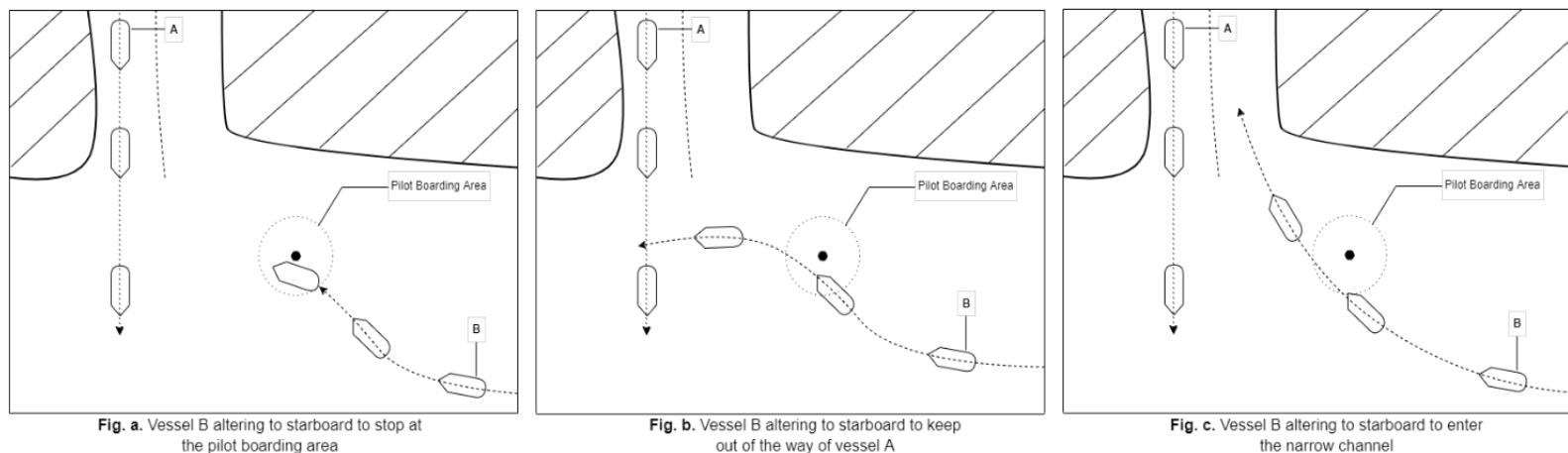
<sup>59</sup> Although the case was not treated as such, it is my opinion that the two vessels were clearly approaching each other on a crossing course. A risk of collision was deemed to have existed at least from the moment the vessels were four cables apart, and it can be argued that the risk was there even before that point. All the elements of the crossing rule were met, and the rule could have been reasonably held to apply. Its application would not have necessarily affected the fault-apportionment but would have grounded the decision on less esoteric rules than the ‘principle of good seamanship’.

<sup>60</sup> Navigation in the river Thames is subject to specific rules incorporated in the bylaws which are established by the Port of London. This case was judged under the bylaws which were in force between 1914 and 1934.

same narrow channel, the narrow channel rule applies even though the vessels might appear to be on a crossing course due to bends and curves in the channel.<sup>61</sup> Nonetheless, in this case, it led the Heranger to mis-predict the intentions of the other vessel. One can argue that the presence of a wharf on the other side of the river should have alerted the Heranger to the possibility that the Diamond might have been aiming towards it. Nonetheless, before the Diamond reached the Stone Ness without changing course to starboard in order to turn into the Long Reach channel, both possibilities would have been valid. Once that point was reached, the distances were already so close that there was no time for further assessment and only immediate action could have avoided a collision.

#### 4.2. The difficulty of discerning navigation in spite of proper situational assessment:

The Heranger incident happened within a narrow channel, but a similar problem can easily be imagined at the entrance of a narrow channel. An outbound vessel can experience quite some difficulty in predicting the navigation of a vessel approaching the entrance of a narrow channel. Observing the manoeuvres of a vessel approaching the entrance of a narrow channel might not say much about whether said vessel is intending to enter or to simply pass by the entrance until the vessel is perhaps much too close to the entrance. Other discernible factors might not be of much help either. Depending on the side, the angle and place of origin from where the approaching vessel is coming, one and the same manoeuvre could be made to achieve various goals. Figures a, b & c below show an example of a starboard alteration made by an approaching vessel for different purposes. The outbound vessel may have a hard time settling on one conclusion among all the possibilities before the approaching vessel is much too close. This is perhaps why the nautical assessors' advice in *The Alexandra I*, on the proper way to solve the hypothetical encounter between an outbound vessel and an approaching vessel bearing on her starboard bow (i.e. coming from the opposite side than the vessel in Fig. a, b and c), involved ascertaining the intentions of the approaching vessel from VTS and using VHF communication.



<sup>61</sup> *The Empire Brent*, (1947) 81 Ll.L.Rep. 306, p. 312 col. 1.

Whenever a conclusion is reached about the navigation of another vessel, there are three possible outcomes. The conclusion can be correct, or it can be wrong in either of two ways. The decision could be a ‘false positive’ where one assumes that something is correct when it is not, or a ‘false negative’, meaning that a certain thing is deemed untrue when it is actually true.<sup>62</sup> Relying on the ability of vessels to predict each other’s navigation might be necessary, but it is also dangerous. As such, reliance on it should perhaps be kept to a minimum whenever possible.

## **5. The compatibility of the crossing rule and the narrow channel rule reduces the role of prediction in determining the applicable rules:**

An often ignored objective of the COLREGS is to eliminate guess-work by coordinating the actions of vessels that encounter one another. Through interpretation, it is possible to conciliate between the crossing rule and the narrow channel rule, so as to minimize the risk of collision without having to dis-apply either one of them. It also lessens the role that prediction of intentions or navigation plays in determining the applicable rules in equivocal crossing encounters in or near narrow channels. Marsden and Gault cites a number of cases,<sup>63</sup> decided before *The Alexandra I*, which have recognized the possibility for both the narrow channel rule and the crossing rule to be simultaneously applicable,<sup>64</sup> although they note that one of the two rules may still be dis-applied.<sup>65</sup> The hypothesis which this chapter explores is that the duties imposed by each of the narrow channel and the crossing rule are not inconsistent and, in some cases, are exactly the same. In most crossing situations involving narrow channels, the duties of the non-crossing vessel will quite often remain unaffected, regardless of whether or not the crossing rule applies (*infra*, 5.1 & 5.2). This is the case because in the majority of cases, the crossing vessel will also be the give-way vessel. The non-crossing vessel as the stand-on vessel will thus be required only to keep the course and speed that allows her to keep-to-starboard. As for the crossing vessel, complying with the crossing rule will often result in compliance with the narrow channel rule as well, since the duties under the two sets of rules are consistent with one another (*infra*, 5.3).

### **5.1. Crossings or equivocal crossings at the entrance of a narrow channel:**

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<sup>62</sup> Craig H. Allen, *Farewell’s Rules of the Nautical Road*, 2020, p. 180.

<sup>63</sup> Cited cases in Marsden and Gault: *The Leverington* (1886) 11 P.D. 117; *The Ashton* [1905] P. 21; the State of Himachal Pradesh [1985] 2 Lloyd’s Rep. 573, affirmed [1987] 2 Lloyd’s Rep. 97, CA.

<sup>64</sup> Andrew Tettenborn, John Kimbell, *Marsden and Gault on Collisions at Sea*, 15th edition, para 7-243, 7-244.

<sup>65</sup> Cited case in Marsden and Gault: *The Jaroslaw Dabrowski* [1952] 2 Lloyd’s Rep. 20.

As long as the vessel approaching the entrance is on the port bow of the outbound vessel (Fig. 2), the navigation of the latter remains virtually unaffected.

If the crossing rule applies, as is the case when encountering transiting (Fig. 2.1.) and waiting (Fig. 2.3.) vessels, the outbound vessel is under a duty to maintain course and speed as the stand-on vessel, which we determined comes down to maintaining the course and speed necessary to keep-to-starboard. If the crossing rule does not apply, for example when meeting an inbound vessel (Fig. 2.2), the narrow channel rule still obliges the outbound vessel to keep-to-starboard. The importance of determining to which group the approaching vessel belongs is limited to the approaching vessel itself, for whom the duties will vary depending on which rule applies.

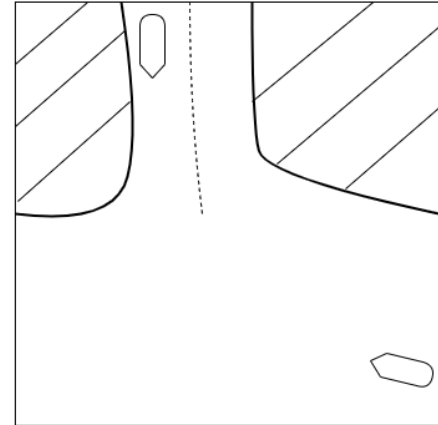


Fig. 2. Vessel approaching an entrance which lies on her starboard side.

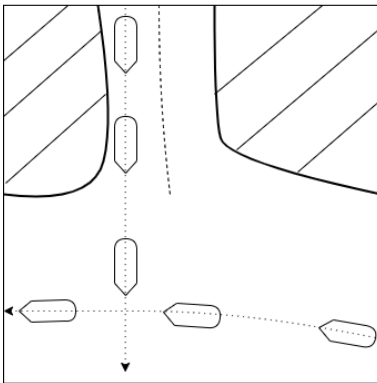


Fig. 2.1. Approaching vessels passing in front of the entrance in a crossing with outbound vessel.

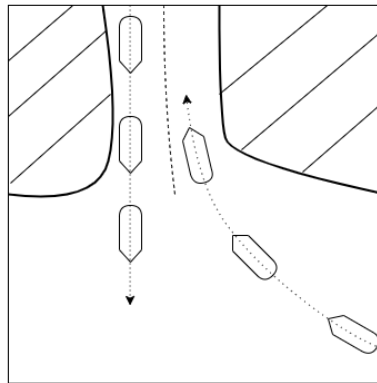


Fig. 2.2. Approaching vessel shaping her course to enter the narrow channel.

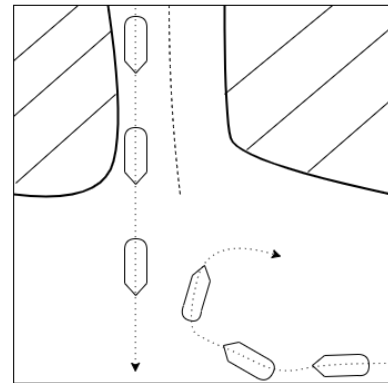


Fig. 2.3. Approaching vessel waiting near the entrance until she is ready to enter.

Under the crossing rule, the approaching vessel will have the obligation, as the give-way vessel in this situation, to keep out of the way of the outbound vessel. While under the narrow channel rule, the vessel must enter the narrow channel while keeping-to-starboard. Therefore, it seems that there is a higher emphasis on the ability of the vessel that is approaching the entrance of the narrow channel, while bearing on the port bow of outbound vessels, to determine which of the narrow channel or the crossing rule applies. Viewed under this lens, the focus on even the discernible navigation of the approaching vessel seems unnecessary. On the one hand, the outbound vessel has the same duties regardless of the applicable rule. On the other, the approaching vessel is *de facto* aware of her actual intentions. By extension, the approaching vessel ought to be aware of the discrepancy between her actual intentions and her discernible navigation, if such discrepancy exists. The *Alexandra I* collision is a perfect example. While the vessel had the intention of entering the narrow channel, the vessel would have also been aware that her navigation before and at the moment of the collision neither conveyed those intentions, nor were they intended to do so. The *Alexandra I* was not in a position to enter the narrow channel and thus would have been cognizant that (i) the narrow channel rule did not yet apply to her and (ii) an outbound vessel would not be



able to forecast her future intention to enter from her discernible navigation at the time when she was near the entrance.

Equally, discerning the navigation of the approaching vessel is no more useful when we consider the situation where the approaching vessel is bearing on the starboard bow of the outbound vessel, making the latter the give-way vessel under the crossing rule (Fig. 3). A similar scenario to the one in Fig. 3 was considered as a hypothetical in *The Alexandra I* decision and the UK supreme court favoured, albeit in obiter dicta, the application of the crossing rule instead of the narrow channel rule.<sup>66</sup> The distinction between the three groups therefore once again has no bearing on the duties of the outbound vessel, or, for that matter, on those of the approaching vessel. In all three scenarios, the approaching vessel will be on a crossing course with the outbound vessel, regardless of whether the former is entering the narrow channel (Fig. 3.1) - or not (Fig. 3.2.). The duties of the approaching vessel, as the stand-on vessel, will also not change. They will still be to maintain course and speed. If the vessel were entering the narrow channel, then ‘course and speed’ would correspond to those required to enter it while keeping-to-starboard.

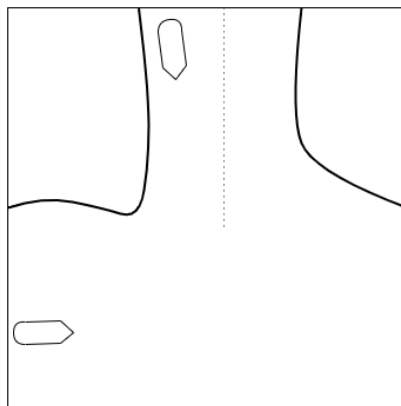


Fig. 3. Approaching vessels bearing on the starboard side of an outbound vessel.

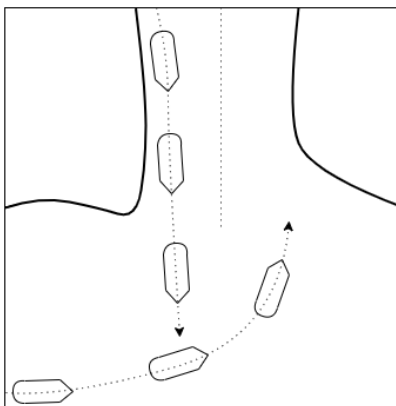


Fig. 3.1. Approaching vessels entering the narrow channel.

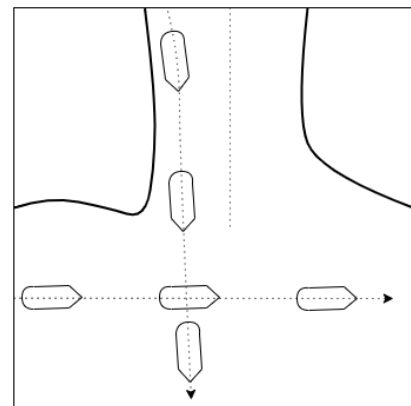


Fig. 3.2. Approaching vessels passing in front of the entrance.

The crossing rule might however not always be an optimal solution in this case. The channel vessel may have limited ability to take early and substantial action to keep out of the way. Insufficient water depth outside the narrow channel can hinder the give-way vessel’s ability to make evasive manoeuvres. Speed alterations might still be possible, but they can also in some cases be undesirable, as they can affect the manoeuvrability of some vessels.<sup>67</sup> This is why the narrow channel rule, and more specifically rule 9(d), may still be necessary.

Rule 9(d) prohibits vessels from crossing a narrow channel, when doing so would embarrass the navigation of a vessel which can safely navigate only within that channel. A similar view can be

<sup>66</sup> *The Alexandra I*, [2021] 1 Lloyd's Rep 299, para. 143-145.

<sup>67</sup> As the size of a ship increases, the speed at which the ship can be manoeuvred and kept on course also increases. Rudder action and increasing the propeller’s RPM can improve manoeuvrability, but it may still not be enough to compensate against the effects of wind and currents. See IR.J. P. HOOFT, IR. M. W. C. OOSTERVELD, “The Manoeuvrability Of Ships At Low Speed”, Netherlands Ship Research Centre TNO, report no. 138 S (May 1970), S2/141.

gleaned from *The Canberra Star*,<sup>68</sup> where the court pointed out that “[t]he rule of good seamanship for a vessel entering a main channel is that she should do so with caution and not hamper traffic already navigating in it.”<sup>69</sup> While the court could not have been referring to paragraph (d) of rule 9,<sup>70</sup> the duty is effectively the same. At the very least, it seems that good seamanship also requires an inbound vessel to refrain from entering a narrow channel, when doing so would require her to cross the bow of an outbound vessel if the crossing would hamper the latter’s navigation.

When a vessel is directed to not impede the passage of another, rule 8(f)(i) states that the vessel must “take early action to allow sufficient sea-room for the safe passage of the other vessel”. This obligation, alongside the one in rule 9(d), is usually read as requiring an inbound vessel to take early action not only to avoid a crossing which would otherwise impede the safe passage of an outbound vessel that can only navigate within the narrow channel, but also to actually preclude the risk of collision from arising.<sup>71</sup> Absent a risk of collision, the application of the crossing rule may also be eliminated. However, it does not entirely remove any possibility of it applying. Rule 8(f) does not exonerate vessels from following other rules which may be applicable under the circumstances, as stated in subparagraphs (ii) and (iii):

*(ii) A vessel required not to impede the passage or safe passage of another vessel is not relieved of this obligation if approaching the other vessel so as to involve risk of collision and shall, when taking action, have full regard to the action which may be required by the Rules of this Part.*

*(iii) A vessel, the passage of which is not to be impeded remains fully obliged to comply with the Rules of this part when the two vessels are approaching one another so as to involve risk of collision.*

The reference to the “Rules of this Part” includes rules 4 to 19, and therefore the crossing rule (rule 15) as well. The duty not-to-impede does not prima facie exclude the crossing rule from applying.<sup>72</sup> The effect that paragraph (f) has, however, is to make it the obligation of both the give-way and the stand-on vessel to take action in order to avoid a collision.<sup>73</sup> Under rule 8(f)(ii), the stand-on vessel cannot avail herself of the obligation to maintain course and speed under rule 17(a)(i) to justify not taking early action under rule 8(f)(i).<sup>74</sup> But at the same time, it does not exonerate the give-way vessel from keeping out of the way just because she is a vessel whose passage should not be impeded.

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<sup>68</sup> *The Canberra Star*, [1962] 1 Ll. Rep. 24.

<sup>69</sup> *The Canberra Star*, [1962] 1 Ll. Rep. 24, p. 28 col. 2.

<sup>70</sup> The *Canberra Star* case was decided under the 1948 version of the COLREGS which did not contain a provision similar to the one found in rule 9(d). During the 1960 amendment of the COLREGS, a narrower version of the current duty not-to-impede was introduced. Under rules 20(b) and 25(c) of the 1960 COLREGS, a duty to not hamper the navigation of a vessel that can navigate safely only inside a given narrow channel was imposed on respectively sailing vessels and power-driven vessels of less than 19.80 meters (or 65ft).

<sup>71</sup> Craig H. Allen, “Narrow Channel Collision Prevention,” 21.

<sup>72</sup> Nicholas J. Healy, Joseph C. Sweeney, *The Law of Marine Collision*, 150.

<sup>73</sup> Craig H. Allen, “Narrow Channel Collision Prevention,” 21.

<sup>74</sup> Harry Hirst, *Collisions at Sea Volume 1: Liability and the Collision Regulations*, (United Kingdom: Xilbris, 2019), 193.

The rules could thus be read to impose a duty on the crossing vessel to take early action to prevent a risk of collision from arising with a channel vessel. However, if such a risk develops, whether because of the inaction of the crossing vessel or the inefficacy of her action, and the crossing rule is engaged, the channel vessel is required to take the appropriate actions under the crossing rule as well, notwithstanding the fact that her passage should not be impeded. And at all times, and even though the crossing rule may start applying, the crossing vessel is not exonerated from her duty not-to-impede.

The important thing to note is that the ability of the outbound vessel to identify the approaching vessel's discernible navigation, based on the circumstances, serves little purpose in determining the applicable rules and accompanying duties in any of these cases. The onus of identifying which rule applies to encounters at the entrances of narrow channels seems to be more or less on the vessel that is approaching the entrance, rather than the outbound vessel. As such, it is not so much the ability of the outbound vessel to identify the approaching vessel's discernible navigation that is important, as it is the approaching vessel's ability to differentiate between her actual intentions and the ones that she is making public through her manoeuvres and navigation as they can be observed by other vessels. Indeed, one can argue that it ought to be up to the approaching vessel to make sure that her manoeuvres clearly illustrate her actual navigation goals. If the approaching vessel intends on entering the narrow channel, then she ought to approach the entrance in such a manner as to clearly indicate such intent, for instance by adjusting her course early to show that she is adopting a curving course meant to take her into the narrow channel. On the contrary, if the approaching vessel is incapable of entering the channel, as was the case in *The Alexandra I*, she ought to be aware that her navigation will not indicate an intention to enter the narrow channel and if she is on a crossing course with an outbound vessel, she ought to apply the crossing rule. And in all cases, the approaching vessel should keep in mind the potential application of the not-to-impede duty.

## 5.2. Crossings or equivocal crossings in narrow channels:

In narrow channels, the most common scenario where two vessels may appear to be on a crossing course is when they meet near a bend. At that point, it is rather difficult for vessels to tell whether it is an actual crossing (Fig. 4.1.), where one vessel (Vessel B) does not intend on rounding the bend, or

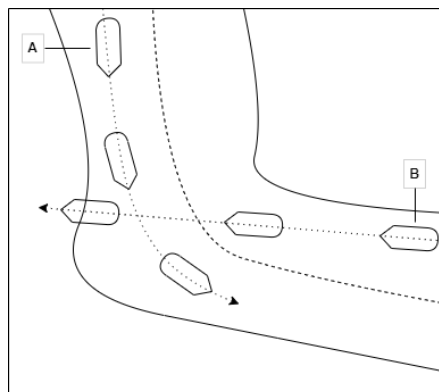


Fig. 4.1. Actual crossing in a narrow channel.

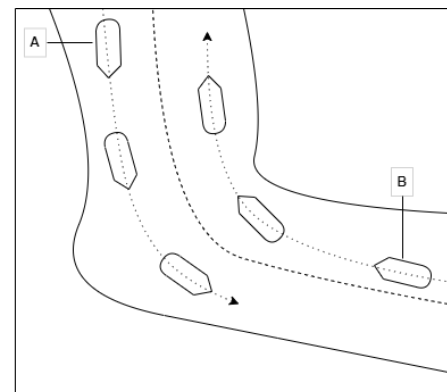


Fig. 4.2. Appearing crossing while vessels are following the curvature of the narrow channel.

simply an equivocal crossing caused by the channel's curvature, but which will resolve with a port-to-port passing, thanks to the keep-to-starboard requirement (Fig. 4.2.).

Interestingly, the risk of collision is much higher when the vessel that has the other on her starboard side (Vessel B) intends on crossing the narrow channel from one side to the other (Fig. 4.1.). If the putative stand-on vessel (Vessel A) under the crossing rule decides to go outside the boundaries of the narrow channel, it usually causes no hindrance to the other vessel (Fig. 4.3.). The crossing rule would apply only in the scenario where vessel A alters to port with the intention of crossing mid-channel to the other side (Fig. 4.3-bis), in which case vessel A would be the give-way vessel under the crossing rule.

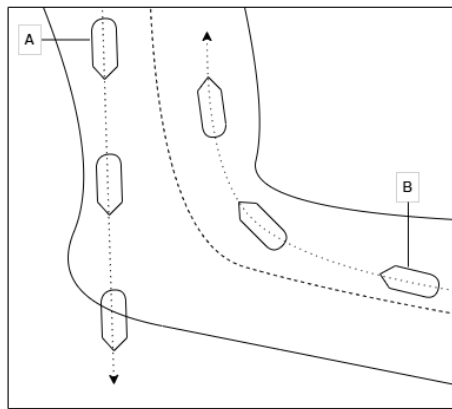


Fig. 4.3. Vessel not following the course of the narrow channel.

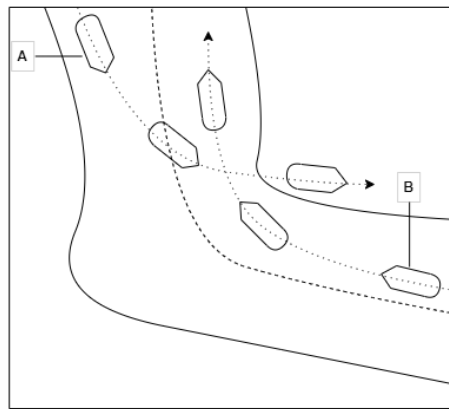


Fig. 4.3-bis. Vessel A crossing the mid-channel towards the other side of the narrow channel.

Similarly, when a vessel crosses a narrow channel outside of the situation involving a natural curving narrow channel, the crossing vessel will in most cases be the give-way vessel under the crossing rule (Fig. 5.1. and 5.2.). Only in a case where the crossing vessel is crossing from the same side as the vessel following the course of the narrow channel (Fig. 5.3.), will the give-way vessel not be the crossing vessel.

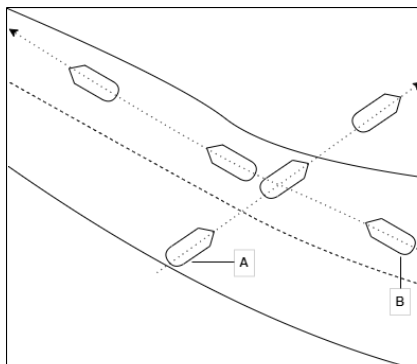


Fig. 5.1. Vessel A crossing in a straight stretch of a narrow channel. The crossing is the give-way vessel.

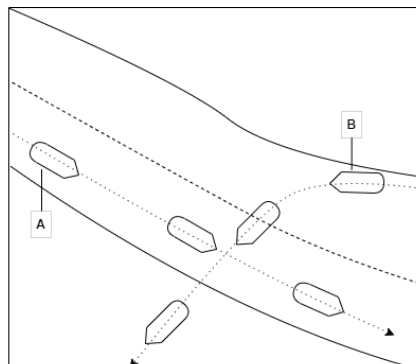


Fig. 5.2. Vessel B crossing in a straight stretch of narrow channel. The crossing vessel is the give-way vessel.

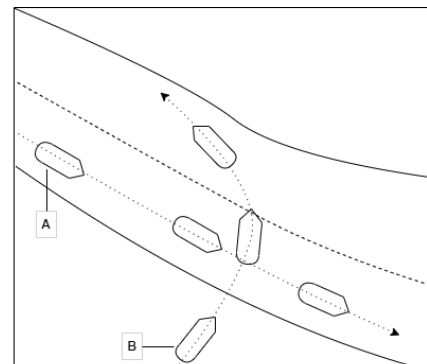


Fig. 5.3. Situation where the crossing vessel is the stand-on vessel.

As we can see, and with the exception of the encounter in Fig. 5.3., where two vessels appear to be on a crossing course, regardless of whether one or both vessels intend on actually crossing or not, the crossing vessel happens in most cases to be the give-way vessel. For the non-crossing channel vessel, application of the crossing rule has little effects on her duties once again, similarly to the different scenarios at the entrance of narrow channels. As the stand-on vessel, the duty will simply be to maintain the course and speed necessary to keep-to-starboard of the narrow channel.

It is mostly the duty of the potentially crossing vessels, which may change depending on whether or not the crossing rule applies. However, even in a case where the crossing rule applies, it can be argued that the duties imposed on the give-way vessel by the crossing rule are capable of producing the best results when applied concurrently with the narrow channel rule.

### 5.3. The synergy between the give-way vessel's duty under the crossing rule and the narrow channel rule:

While rule 9(a) only requires vessels to keep-to-starboard, under the crossing rule, the give-way vessel has at least three different possible options to consider, with two being preferable and more likely. The compatibility of each of these options with rule 9(a) deserves to be explored:

- (i) **A starboard alteration** – The duties under rule 9(a) and rule 15 turn out to be essentially one and the same for the give-way vessel in this case. An alteration to starboard will in most cases, with the exception of the one illustrated in Fig. 5.3., ensure that the crossing vessel is also keeping-to-starboard, which means that an alteration to starboard to keep out of the way of the stand-on does not lead to violation of rule 9(a). They are virtually the same action (Fig. 6.1(a), 6.1(b) and 6.1(c)).

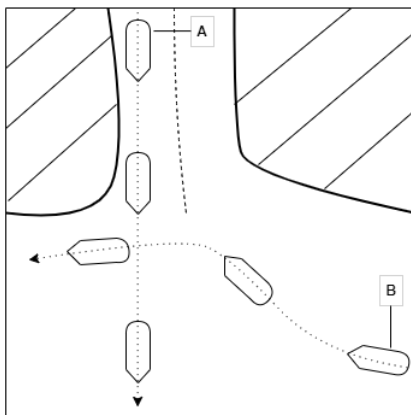


Fig. 6.1(a). Crossing vessel (B) altering to starboard and passing astern to keep out of the way

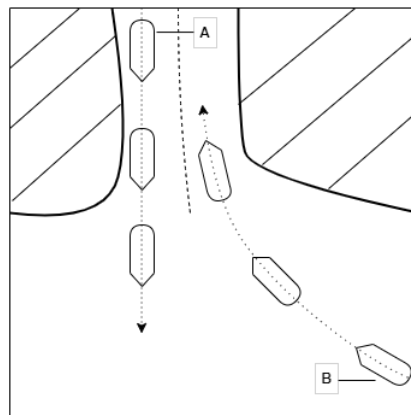


Fig. 6.1(b). Vessel B shaping her course by altering to starboard to enter the narrow channel.

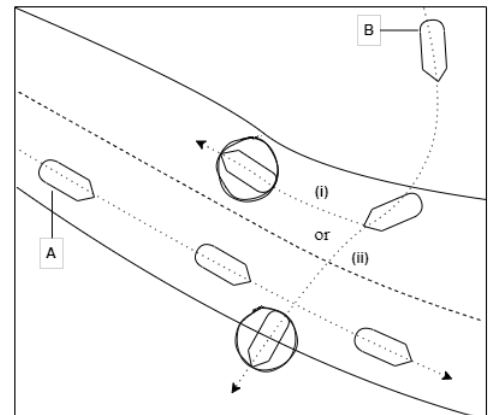


Fig. 6.1(c) Upon reaching the channel, Vessel B can turn to starboard either (i) to keep-to-starboard, if she is following the course of the channel, or (ii) keep out of the way of Vessel A, if she is crossing.

An alteration to starboard under the crossing rule does not appear all that different from one that is meant to ensure entry into the narrow channel, round a bend in a curved narrow channel or simply join the traffic on the correct side of the channel while following the keep-to-starboard requirement.

- (ii) **Speed reductions, stopping or reversing** – As long as the give-way vessel stays on the starboard side, adjusting speed for example to wait for the stand-on vessel to pass before proceeding is not incompatible with rule 9(a) either. (Fig. 6.2(a), 6.2(b))

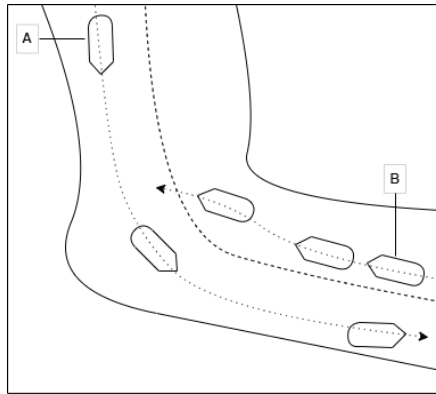


Fig. 6.2(a). Vessel B slowing down before crossing.

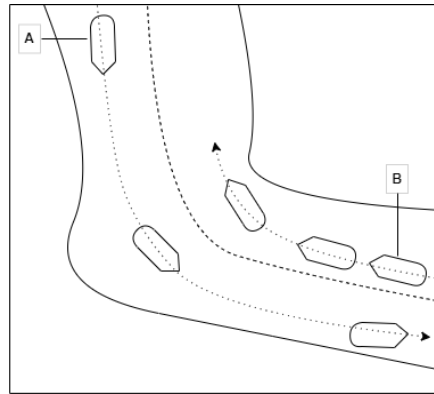


Fig. 6.2(b). Vessel B slowing down before making the turn.

- (iii) **Porting** – This option is the most likely to be problematic. First, in a narrow channel, an alteration to port would usually bring the give-way vessel across the bow of the stand-on vessel (Fig. 6.3(a) and 6.3(b)). Such action would be contradictory to the warning for the give-way vessel not to cross ahead of the bow of the stand-on vessel in rule 15. Secondly, it would entail abandoning the keep-to-starboard requirement of rule 9(a). Thirdly, it may also be in violation of the not-to-impede duty when the non-crossing vessel can safely navigate only within the narrow channel. The fact that the give-way vessel has access to two other means in this case which are better suited to avoiding the collision with the stand-on vessel render this third course of action quite unreasonable and potentially dangerous.

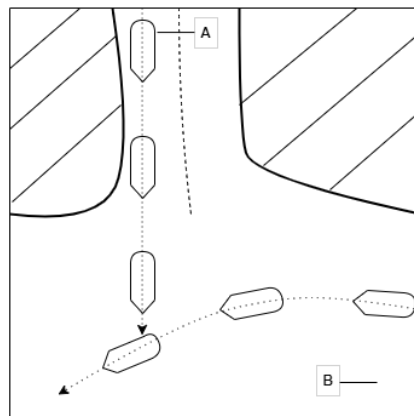


Fig. 6.3(a). Vessel B altering to port while on a crossing with vessel A.

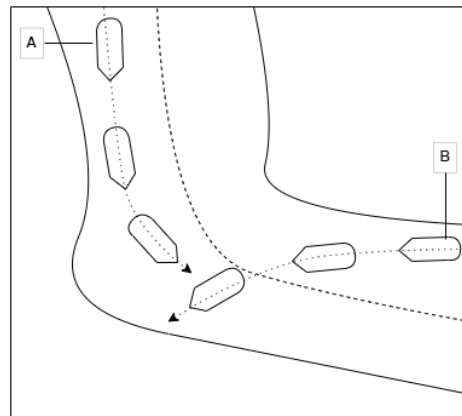


Fig. 6.3(b). Vessel B intending to cross the narrow channel and altering port thus crossing ahead vessel A.

Where the crossing vessel is the give-way vessel under the narrow channel rule, the onus on the non-crossing vessel to identify whether the narrow channel rule or the crossing rule applies to the encounter is greatly diminished. If the non-crossing vessel (“NCV”) assumes a crossing situation, and the crossing vessel (“CV”) ends up not crossing, there are no negative consequences. The NCV’s duty is to simply keep-to-starboard and by doing the same, the CV ensures that they pass each other safely port-to-port. If the NCV’s assumption is correct and the crossing rule applies, her duty will be to maintain the course and speed which allows her to keep-to-starboard, while the

CV has to keep out of the way. And as we have seen, with the exception of an alteration to port, actions taken by the CV to keep out of the way would be compatible with the narrow channel rule.

Therefore, the necessity for the non-crossing vessel to be able to determine the intentions of the other vessel is somewhat diminished, since the obligations of the stand-on vessel remain more or less unaffected regardless of which rule applies, and the give-way vessel can comply concurrently with the duties under both the crossing rule and the narrow channel rule. Simply put, if both vessels always apply both the crossing rule and the narrow channel rule in every equivocal crossing scenario, the need for predicting navigation would be greatly diminished. Compliance with the rules ought then to be encouraged.

## **6. Conclusion:**

Regardless of whether or not one has nautical training, it should be apparent that it is no easy task to predict the intentions or the navigation of other vessels. Yet, it is a major component of the collision avoidance rules as discussed in both chapters 2 and 3. The stand-on vessel's duty to keep course and speed is assessed in light of her discernible navigation. Whether the crossing rule or the narrow channel rule applies at the entrance of a narrow channel is partly dependent on what can be deduced from the discernible navigation of the vessel approaching the entrance. However, predicting navigation is a challenging exercise fraught with risks, as seen in chapter 4. Discernible navigation can be misleading and not representative of the vessel's actual intentions. Circumstances may be confusing, as two or more assessments of the same situation may be equally plausible. We have therefore to wonder if we can lessen the role that assessment and prediction of navigation plays in determining the applicable rules in equivocal crossing within or near narrow channels.

One possible solution is to recognize that the crossing rule and the narrow channel rule are not mutually exclusive, and that vessels need not choose and follow only one of the two. The rules tend to be clear on what determines their application.<sup>75</sup> Overriding an otherwise applicable rule should be approached with caution, especially when the COLREGS do not envisage such an effect. If the conditions of application of the crossing rule are fulfilled, the presence of a narrow channel should have little effect. In most scenarios, the duties under the two sets of rules are far from being incompatible, whether it is from the point of view of the stand-on or the give-way vessel. But above all, admitting that both rules can apply concurrently reduces the role that intentions communication and understanding play in determining the applicable rules. Two vessels approaching the entrance or the bend of a narrow channel in what appears to be a crossing course ought to assume that the crossing rule applies. If the crossing rule does not apply and the two vessels pass each other port-to-port by keeping-to-starboard, no risk is created by the earlier assumption. The duties of both vessels remain essentially the same. If both rules can apply simultaneously, then it becomes unnecessary to distinguish between all the various encounter configurations. This is what we sought to resolve in chapter 5.

Moreover, we have seen that because in most cases the crossing vessel tends to be also the give-way vessel under the crossing rule, there ought to be a bigger onus on the crossing vessel to (i)

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<sup>75</sup> The *Alexandra I*, [2021] 1 Lloyd's Rep 299, para. 83(ii) and (iii).

ensure that her manoeuvres indicate her intentions to cross (or not) and to (ii) be aware when her discernible navigation does not reflect her actual intentions. The goal is to put more focus on clear intentions-communication, and less on intentions-prediction. For instance in sub-chapter 3.2, we determined that a stand-on vessel keeps her course and speed if her manoeuvres are justified by her readily apparent navigation goals or discernible navigation as proposed by this article. However, a different reading of the same duty could be proposed instead in the following manner:

“The stand-on vessel shall restrict her manoeuvres under the duty to maintain course and speed to those which are made necessary by the ostensible circumstances. Ostensible circumstances include factors such as the location of the vessels, applicable regulations that have an effect on navigation, surrounding traffic, weather, sea conditions, of which a vessel in the same position as the give-way vessel can or ought to be aware.”

The purpose is to make vessels more aware of the message their navigation communicates to other vessels and how that may affect the latter’s assessment of the situation, and with it their perception of the applicable rules. The stand-on vessel is aware of her own navigation goals and ought therefore to (i) endeavour to make these intentions ostensible and intelligible to the give-way vessel, while (ii) avoiding any alterations of course and/or speed when they cannot be reasonably expected by other vessels given the ostensible circumstances.

By focusing more on intentions-communication, we put more emphasis on the responsibility of each vessel to be conscious of how their navigation influences the other vessel’s decisions regarding which rules to apply and what actions to take. And by recognizing the possibility that both the crossing rule and the narrow channel rule can apply concurrently, we eliminate the possibility for vessels to disagree on which rules actually apply. Thus, vessels may still be required to show their intentions, but the effect it has on the applicable rules is kept to a minimum when it comes to equivocal crossings in or near narrow channels.