1950
*Nov. 16, 17, 20, 21.
1951
*May 10.

REDERIAKTIEBOLAGET PULP, OWNERS OF THE SHIP *DAGMAR SALEN (Defendant)* ... APPELLANT;

AND

PUGET SOUND NAVIGATION CO., OWNERS of the MOTOR VESSEL *CHINOOK (Plaintiff)* ..... RESPONDENT.

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA, BRITISH COLUMBIA ADMIRALTY DISTRICT.

Shipping—Collision at sea—Fog—Both ships equipped with radar—Speed —Passing port to port—Change of course.

Two ships, both equipped with radar, collided in fog-shrouded waters of Puget Sound, U.S.A. The trial judge found the *Dagmar Salen* two-thirds to blame and the *Chinook* one-third on the grounds that the *Dagmar Salen* disregarded the general practice of vessels on this seaway to pass port to port and that both were proceeding at too great speed.

Held (Estey and Locke JJ. dissenting) and reversing the percentage findings of the trial judge, that the *Chinook* should be charged with two-thirds of the responsibility and the *Dagmar Salen* with one-third.

Both ships were going at excessive speed under the circumstances and there was no rule nor invariable custom requiring vessels to pass port to port, but the main fault rested with the *Chinook* for changing her course just prior to the collision. If the *Chinook* had maintained her original course or if, at that point, the engines had been reversed, the accident would have been avoided; and if the radar screen on the *Chinook* had been closely and accurately observed, the course of the other ship would have been made clear and the risk eliminated. That blind action at the critical moment was primarily responsible for the collision.

APPEAL from the judgment of the Exchequer Court of Canada, British Columbia Admiralty District (1) holding that the *Dagmar Salen* was more at fault than the *Chinook* when the two ships collided in the fog in Puget Sound, U.S.A.

R. C. Holden K.C. and *J. I. Bird* for the appellant.

F. A. Sheppard K.C. for the respondent.

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*PRESENT: Rinfret C.J. and Taschereau, Rand, Estey, Locke, Cartwright and Fauteux JJ.

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Rand J.

The judgment of the Chief Justice and of Taschereau, Rand, Cartwright and Fauteux JJ. was delivered by

RAND J.:—The facts of the collision in controversy in this appeal can be stated shortly. The *Chinook* is a motor ship 273·5 feet in length and of 4,106 gross tons, engaged in a daily service between Victoria and Seattle. The *Dagmar* is likewise a motor ship 405 feet long and 5,000 tons gross. The former was passing through Admiralty Inlet and approaching Puget Sound on the way to Seattle and the latter, well laden, was proceeding north from Seattle bound for Vancouver. The critical time runs from 8.00 o'clock in the evening of September 28, 1947. At that moment, *Dagmar* was abeam Double Bluff Point and about one-half mile off the Horn buoy; equipped with four six-cylinder diesel engines of 1,100 H.P. each and a radar detector screen, she was making about 12½ knots through the water with an ebb tide that may have brought the speed to approximately 14 knots over land. She was then running on a course 328 degrees true. Three minutes later, the radar screen indicated a vessel 4½ to 5 miles distant about one-half a mile northerly beyond Bush Point and approaching that point one-half a mile off. At 8.05, the pilot, concluding the craft to be on a generally south-easterly course along Whidby Island and too close to that land to allow *Dagmar* to pass on the port side, changed his course by five degrees to 323 degrees true for a starboard passing. At 8.07, the vessel entered thick fog and the engines were reduced to half speed; at 8.08, a further alteration of course of 10 degrees to 313 degrees was made; at the same time, the whistle of a vessel was heard from the direction of that indicated on the radar screen and the engines were stopped. At 8.11, an alteration of course to starboard by the unknown ship was detected on the screen and full speed astern was ordered; at 8.13½, the red and masthead lights of *Chinook* were seen about 10 degrees on the starboard bow, the vessel passing from right to left; visibility was about 600 feet. Both vessels blew three blast signals indicating engines at full speed astern. The starboard bow of *Dagmar* at 8.14 came into contact with the forward port side of *Chinook* just aft of the bridge. Neither

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vessel had more than bare way on it and the collision was not severe. After *Dagmar* pulled back, each continued on its course.

The *Chinook,* likewise equipped with radar, had been running through heavy fog for over an hour at 18 knots, and assuming it to be against the ebb tide, was making, say, 16 knots over the land. It claimed to have passed abeam of Bush Point at a distance of 1½ miles and that at that time, 8.04, *Dagmar* appeared on the screen 5 miles distant and at about 30 degrees on the port bow. As this would have placed *Dagmar* to the east of Double Bluff Point, it was obviously wrong and was admitted to be so by the captain. This time of 8.04 is only a difference of about one minute from that of the appearance of *Chinook* to *Dagmar* and it can be taken that they came into view of each other at approximately the same time. *Chinook* claims at 8.06 to have changed its course from 133 degrees to 150 degrees compass bearing, the speed to have been reduced to one-half, and at 8.07 the engines to have been stopped; at 8.08 the whistle of *Dagmar* is said to have been first heard; the white masthead light of *Dagmar* to have been first seen at 8.10; at 8.10½ the engines to have been put full astern; and at 8.11½ the collision. But as of 8.06 and on, these times, taken from the entries on the deck log, were found to be unreliable and were disregarded by the trial judge.

The *Dagmar* puts the position of the collision at a point two miles northwest by west from Double Bluff buoy. As located on the chart, the point is 7/10 of a mile west of a line drawn through the buoy to Bush Point. The *Chinook* places it much farther to the north, at a point 1·1 miles, 210 degrees true, from Bush Point. From an examination of the evidence and the charts, and keeping in mind the fact that Smith J. at the trial remarked both on the frankness of the pilot of *Dagmar* and on the unsatisfactory testimony of officers of *Chinook* and disregarded the deck log of *Chinook,* I have come to the conclusion that the collision took place approximately at the point and time fixed by *Dagmar,* a finding which the trial judge (1) did not find it necessary to make. Disregarding that as well as what he considered other subordinate con-

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siderations, he placed his judgment on two overriding factors: first, the disregard by *Dagmar* of a general practice of vessels on this seaway to pass port to port; and the excessive speed of both. The former, in effect, superseded all questionable behaviour other than speed on the part of *Chinook*, and by reason of it he charged *Dagmar* with two-thirds and *Chinook* with one-third of responsibility. I agree with his findings of excessive speed, but I must qualify in some respects the effect of his finding of a violation of the practice.

It was not contended that the waterway was a narrow channel within the meaning of Article 25 of the Inland Navigation Rules governing the vessels here, and there was, therefore, no rule requiring the vessels to pass port to port. Nor was it contended that there was any invariable custom binding the vessels to a port passing; at most, and the point was mentioned neither in the preliminary Act nor in the statement of claim, it was the "usual practice", more frequent than not; the question itself seems to have been brought up casually or incidentally in the course of the evidence. There was, therefore, no legal or quasi-legal obstacle to a starboard passing; but the practice is a circumstance relevant to the actual navigation of a vessel proceeding on the northerly run.

The *Dagmar* at one-half a mile off Double Bluff buoy was on the course that would ordinarily be taken for a port passing; for two minutes, immediately after the radar indication of *Chinook*, that course was maintained; then for three minutes there was the five degree and for six minutes the 15 degree alteration, the latter with the engines stopped. This seems to me to have been a faulty initiation of a starboard passing. The original indication was of a vessel approaching "pretty fast"; on the testimony of the first officer of *Dagmar* who attended the radar screen, the outline of a ship on the screen at a distance of several miles may take up five or six degrees: her position is thus somewhat approximate: and assuming radar equipment in the other vessel, a departure of five degrees from a course would not at once be apparent. There was nothing to prevent the swing of 15 or even 20 degrees from the first sighting to take *Dagmar* without delay out of the easterly lane preparatory to a starboard passing.

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The result of the failure to do this was that the accident took place within the range of the usual northbound course of *Chinook* itself which may be taken to be that of ships, generally, observing the practice. In the existing conditions of fog and courses, there was an obvious risk of becoming involved with the incoming vessel, whatever her equipment; and to that extent, I agree with the trial judge that the actual position of *Dagmar* introduced an element of potential danger.

On the other hand, *Chinook,* relying on radar and the stopping power of its engines, was travelling at a speed that, in the absence of radar, would have been greatly excessive, and it called for unremitting attention to the screen and the sharpest appreciation of what it revealed. If radar is to furnish a new sight through fog, then the report which it brings must be interpreted by active and constant intelligence on the part of the operator.

It is a general rule as old as navigation that in fog, when by one vessel the course of another within a danger zone is not yet ascertained, without sufficient indication to justify action, no change of course should be made: *Vindomora* v. *Haswell* (1); and in *The "Wear"* (2) Hill, J. used this language:

> It has been said over and over again in this court that when in a fog you sight a ship whose direction or course you do not know the worst thing you can do is to take helm action.

The same principle was applied in *Crown Steamship* v. *Eastern Navigation Co.* (3), *"Lundy"* v. *"Miltistone"* (4), and in the *"Rona"* and the *"Ava"* (5). On the evidence, chiefly of the independent witness, Gordon, a passenger on *Chinook,* I take the fact to have been that the engines of *Chinook* were still working when the exchange of whistle signals was on between the vessels and when *Chinook,* in his opinion, swung to starboard about 20 degrees. With Smith, J., I take this as the change in course of 17 degrees which *Chinook* claims to have made at 8.06, and likewise I take it to be the swing to starboard noticed on board *Dagmar* and recorded as at 8.11 in the order for full speed astern. That change, in the circumstances, would have

(1) [1891] A.C. 1.
(2) (1855) 2 Ecc. & Ad. 256; 164 E.R. 419.
(3) (1918) S.C. 303.
(4) (1920) 3 Ll. L.R. 95.
(5) (1873) 2 (N.S.) Asp. R.M.C. 182.

been bad seamanship in the absence of radar, but it was much more so in the presence of unattended radar and under the speed which radar was felt to have made safe. If the original course had been maintained or if, at that point, the engines had been reversed, the accident would have been avoided; and if the radar screen had been closely and accurately observed, the course of *Dagmar* would have been made clear and the risk eliminated. That blind action at the critical moment was primarily responsible for what took place.

This last circumstance has not, in the attribution of fault, been taken into account by the trial judge. I would, therefore, reverse his percentage findings and hold *Chinook* responsible for two-thirds and *Dagmar* for one-third of the damages. The costs in both courts should be in the same percentages to both parties.

The dissenting judgment of Estey and Locke JJ. was delivered by

ESTEY J.:—These actions arise out of a collision between the motor ship *Chinook* and the Swedish vessel *Dagmar Salen* between Double Bluff and Bush Point in Puget Sound, U.S.A., on the evening of September 28, 1947. The cross actions claiming damages were consolidated and tried in the British Columbia Admiralty District (1).

The learned trial judge found:

> Both vessels must be held blameworthy. Both were proceeding at too great speed, the *Chinook* originally, and the *Dagmar Salen* as she approached the fog-shrouded area. Both failed to reduce sufficiently when their respective radars (properly observed) gave indication of the other's approach on a bearing that changed but little, if it changed at all.

and again:

> I think, however, that the main fault (apart from excessive speed) lay with the *Dagmar Salen*. She knew that the customary rule was for north and south bound vessels to pass port to port, yet she chose to pass starboard to starboard.

The learned trial judge found that two-thirds of the fault rested with the *Dagmar Salen* and one-third with the *Chinook* and apportioned the liability accordingly.

The *Dagmar Salen* appeals, contending that it was not at fault and, therefore, the action should be dismissed or, alternatively, that the *Chinook* be found to be more blameworthy and the apportionment of liability varied accord-

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ingly. The *Chinook* submits that the judgment at trial should be affirmed or, alternatively, that it be exonerated from fault and the *Dagmar Salen* held to be entirely at fault.

The *Dagmar Salen* had left Seattle and was proceeding outward through Puget Sound. She is a motor vessel of 5,000.65 tons gross, length 405 feet, beam 51·3 feet, equipped with four six-cylinder Diesel engines of 1,100 Horse Power each and a single propeller. Upon this voyage she was carrying a general cargo of 7,000 tons.

The *Chinook*, a motor vessel ferrying between Victoria and Seattle, was inbound to Seattle. This motor vessel is of 4,106 tons gross, length 273·5 feet, beam 65.6 feet, equipped with four 1,600 Horse Power Diesel electric engines and twin propellers.

There was no fog at Double Bluff. A mile or two north thereof there was a dense fog which continued northward and covered the area around and beyond Bush Point. The *Dagmar Salen*, therefore, in proceeding outward bound at Double Bluff, was not in the fog, but did enter the fog a mile or two beyond.

Both vessels were equipped with radar.

These ships were, at all relative times, subject to the United States "Rules to Prevent Collisions of Vessels and Pilot Rules for Certain Inland Waters". All courses and bearings given are magnetic.

The collision occurred between Double Bluff and Bush Point and, due to a difference in their respective clocks, the *Chinook* fixed the time at 20.11½ and the *Dagmar Salen* at 20.14.

It will be convenient to deal first with the learned judge's finding that the *Dagmar Salen* was the greater in fault because she violated the customary rule of port-to-port passing. On behalf of the *Dagmar Salen* it is contended that this requirement of a port-to-port passing was not proved and, even if it was, the Pilot had a right, in the circumstances, to attempt a starboard-to-starboard passing.

The Pilot of the *Dagmar Salen* deposed:

. . . it is a common practice amongst the local pilots to follow a course outbound close on the Whidby Island shore, passing Bush Point approxi-

mately half a mile off. Inbound vessels usually steer southbound from Marrowstone, a course to pass Bush Point at least one and a quarter miles off, which always results in a port-to-port meeting.

As to his own practice he stated:

> Also due to the fact in running a course from Double Bluff to Bush Point I considered it good seamanship to stay on the right side of the channel, which I follow at all times, . . .

and then as to the trip in question he stated:

> Well, I am sure I must have realized it was a vessel approaching before I ever altered course. If it was a vessel going the same way I was, I don't think I would have made any alteration, because I was on a track that I have followed out there ever since I have been piloting, and before that.

The Master of the *Chinook* deposed that vessels pass "port-to-port as a rule" and when questioned as to the northbound vessels he stated:

> All the vessels steer the same course. It does not make any difference in the size, close on Double Bluff and approximately half a mile off Bush Point.

This evidence is not in any way contradicted. While it does not establish a port-to-port passing as an absolute rule, it supports the learned trial judge's finding that there existed a "well-established practice" requiring a port-to-port passing.

At 20.00 o'clock visibility was fair. The *Dagmar Salen,* as the Pilot estimated, was then three-tenths of a mile off the buoy at Double Bluff. At 20.03 the Chief Officer informed the Pilot of a target in the vicinity of Bush Point at a distance which he fixed to be four and one-half miles. The target was in the fog and this information was obtained from the radar screen. The Pilot himself examined the radar. At first he could not determine what it was. Then he thought it might have been "a small craft in on the point bound for Mutiny Bay". However, he soon concluded that it was "a vessel approaching" and the Chief Officer estimated that it was passing a half mile off Bush Point. (The approaching vessel was, in fact, the *Chinook*).

In that position off Bush Point the *Chinook* would be following the usual course of outbound vessels and, therefore, well off its usual inbound course. Both the Pilot and the Chief Officer of the *Dagmar Salen* make it clear that from the radar they could only approximately determine the position of the *Chinook* off Bush Point. The

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latter thought he could do so within four or five degrees. The Pilot himself deposed: "it was hard for me to estimate her exact position." The truth of this statement is emphasized by the fact that when asked, at his examination for discovery, the position of the *Chinook* off Bush Point he replied:

> I truthfully don't know; I don't want to answer the question.

He also stated that "it is impossible to tell on a radar if it is on a parallel course at that distance." Nevertheless he concluded that the *Chinook* was proceeding "on a parallel course, following the left-hand channel southbound," which he described as "a peculiar course." In these circumstances, at or about 20.05, the Pilot, having concluded the position of the *Chinook* to be half a mile off Bush Point and that the *Dagmar Salen* was drawing 24 feet aft, decided he must keep away from the shallow water which he described as "the 4-fathom spot approximately 2½ miles, or 3 miles south of Bush Point" and that he should make a starboard-to-starboard passing. It was at 20.05 he entered the fog and altered his course five degrees to port, or from 305 to 300 degrees.

The Master of the *Chinook* determined by his radar that he passed one and one-quarter miles off Bush Point. The learned trial judge thought "it was rather less—certainly not more than one mile." This distance of a mile would not have made it difficult for the *Dagmar Salen* to pass Bush Point upon her regular course outbound and would not have interfered with a port-to-port passing, which apparently the Pilot of the *Dagmar Salen* intended and only abandoned because he thought the *Chinook* was a half mile off Bush Point.

It was contended that the area here in question constituted a narrow channel within the meaning of Art. 25 under which a "steam vessel shall, when it is safe and practicable, keep to that side of the fairway or mid-channel which lies on the starboard side of such vessel." However, it is important to note that the general rule followed in this area is to the same effect. Vessels outward bound follow the east and those inbound the west side of this channel. If the *Dagmar Salen* was right in fixing the

location of the *Chinook* off Bush Point she was well over in the outbound channel and, as the Pilot of the *Dagmar Salen* stated, she was following "a peculiar course."

Moreover, at Bush Point the *Chinook* was following a course of 133 degrees and at Double Bluff the *Dagmar Salen* was following a course of 305 degrees. The learned judge stated that at that time their courses intersected at an angle of only eight degrees and added: "I think there can be little doubt that the *Chinook* then had the *Dagmar Salen* closely on her port bow, while the *Dagmar Salen* had the *Chinook* very slightly on her starboard bow."

The *Chinook* was in the fog, but would be emerging therefrom in a few minutes. The *Dagmar Salen* did not enter the fog until it was aware of and had concluded that the *Chinook* was upon a peculiar course. In these circumstances it would have been, as the learned trial judge points out, good seamanship on the part of the *Dagmar Salen* to have proceeded with caution and not to have altered her course, as she did, to port. *The Vindomora* (1); *The Counsellor* (2); and 30 Halsbury, 2nd ed., p. 733, para. 944.

The Pilot's decision to make a starboard-to-starboard passing was made, therefore, just before he entered the fog, in relation to a vessel, itself in the fog and approaching him upon a peculiar course, the position of which was at most only approximately ascertained. This explanation on the part of the Pilot in justification of his decision was described by the learned trial judge as "unconvincing."

Not only was the decision of the Pilot of the *Dagmar Salen* to attempt a starboard-to-starboard passing not justified in the circumstances, but, having made that decision, he continued to conduct his vessel in a manner that, upon the evidence, cannot be accepted as good seamanship.

Art. 16 of the above-mentioned Inland Rules reads:

> Art. 16. Every vessel shall, in a fog, mist, falling snow, or heavy rain storm, go at a moderate speed, having careful regard to the existing circumstances and conditions. A steam vessel hearing, apparently forward of her beam, the fog signal of a vessel the position of which is not ascertained shall, so far as the circumstances of the case admit, stop her engines, and then navigate with caution until danger of collision is over.

(1) [1891] A.C. 1. (2) [1913] P. 70.

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Neither at 20.05, when the *Dagmar Salen* entered the fog and altered its course five degrees to port, nor at 20.08, when it altered its course a further ten degrees to port, was the *Chinook* an ascertained vessel within the foregoing Art. 16, as explained by Lord Macmillan in *Nippon Yusen Kaisha* v. *China Navigation Co.* (1):

> In order that the position of a vessel may be ascertained by another vessel within the meaning of the Article she must be known by that other vessel to be in such a position that both vessels can safely proceed without risk of collision.

The Pilot, notwithstanding that the *Chinook* was then an unascertained vessel, altered its course to port and attempted a starboard-to-starboard passing which, under the circumstances of fog, and having regard to the usual courses of vessels and the passing rule in this area, would tend to confuse the Master or Pilot of an approaching vessel and be more likely to increase than to diminish the possibility of a collision.

This alteration in course was contrary to the rule as expressed by Lord Watson in *The "Vindomora"* supra at p. 8:

> . . . that when a vessel at sea, overtaken by a fog, becomes aware that another vessel is in her neighbourhood she ought, whilst complying with the regulations as to speed, to keep on her course unless she has some indications more or less reliable that it would be proper or at least safe to change it.

It cannot be said, upon the Pilot's own evidence, that he had indications "more or less reliable" that justified his alteration to port in order to make a starboard-to-starboard passing. He, of course, knew the *Chinook* was in the fog, but, upon his own evidence, he did not know, with a reasonable degree of certainty, its position off Bush Point, nor did he have, at any relevant time, sufficient, if, indeed, any, reason to believe that the *Chinook* would not follow the usual course and pass port to port. His evidence that he concluded the *Chinook* was half a mile off Bush Point is a part thereof which the learned trial judge described as "unconvincing." A reading of this evidence leaves the same impression. His statement that he concluded the *Chinook* was half a mile off Bush Point must be read with the other portions of his evidence, which have already been mentioned, to the effect that it was hard for him "to

(1) (1934) 104 L.J. (P.C.) 34 at 37.

estimate her exact position" and his earlier statement, upon discovery, that he did not know her position off Bush Point. That appears to be the only point at which he attempted to determine her distance off shore, being thereafter content with his conclusions from the radar that the *Chinook* remained on his starboard bow. Apart from the difficulties he had in determining the exact locations on the radar, he himself had altered the *Dagmar Salen* twice to port, which would appear to leave the *Chinook* upon his starboard bow for some time even after she would be attempting a port-to-port passing. All these circumstances of fog, the *Chinook's* unusual position and the practice of a port-to-port passing, would require, as prudent and seamanlike conduct, that the *Dagmar Salen* should have proceeded with caution and upon the expectation that the usual practice would have been followed by the *Chinook* at least until such time as she had given sufficient indication to the contrary. *Toronto Railway Company* v. *King* (1). In this connection the words of Lord Wright are also appropriate:

> Nor does any one doubt that it should not be lightly assumed that a wrongdoing ship might not correct her error in time, and that it is not desirable to prejudice her repentance so long as action can properly be deferred.
>
> *S.S. Heranger* (2).

The Pilot of the *Dagmar Salen* did not know how long it would take to stop that vessel, but he did know, as he stated, that it was "heavily loaded, and she carried her way." Its engines were stopped at 20.08 and, notwithstanding that his radar indicated only the approximate position of the *Chinook,* the Pilot waited until 20.11 when he heard the first fog signal from the *Chinook* before putting his engines full astern, with the result that the *Dagmar Salen* had headway at the point of collision. The Pilot was, therefore, proceeding without knowing whether he could avoid the *Chinook* once it might come into sight. His conduct was in disregard of the general rule requiring that only such speed should be maintained in the fog after the presence of a nearby vessel is known as will permit the avoiding of that vessel once it is seen. *The Campania* (3); *The Oceanic* (4); *The Counsellor* (5).

(1) [1908] A.C. 260.
(2) [1939] A.C. 94 at 103.
(3) [1901] P. 289.
(4) (1903) 88 L.T. 303.
(5) [1913] P. 70.

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The *Chinook* was also at fault. It was, at all times material hereto, in the fog. The Master admits that he observed upon his radar screen a vessel which he subsequently found to be the *Dagmar Salen* when he was off Bush Point. The learned trial judge was not convinced that the Master of the *Chinook* "paid any proper attention to the radar screen during the vital eight minutes preceding the collision;" and further that he did "not altogether accept the evidence given by the *Chinook's* Master and Chief Officer." These comments are fully justified upon the evidence. It is, however, clear that the learned trial judge accepted the Master's evidence that he altered his course from 133 to 150 degrees, but did not accept his evidence as to the time of his making this alteration, in regard to which he stated: "The exact time when the *Chinook* made this alteration is one of the unsettled features of her evidence."

The appellant's contention that the *Chinook's* alteration from 133 to 150 degrees was not more than three minutes before the collision was not established by the evidence. The learned trial judge has already indicated that he did not accept the evidence of the officers of the *Chinook* that it was made at 20.06, nor does he accept the evidence of other parties who sought to fix that time. The evidence of Gordon, upon which the appellant laid great stress, goes no further upon this point than to state that when he heard the fog whistle of the *Dagmar Salen* the *Chinook* was swinging slowly to starboard and he estimated it was a twenty-degree swing up to the moment of the impact. It was only an estimate and he did not speak with certainty as to any time. All of the evidence upon this point supports the view of the learned trial judge that the time of this alteration cannot be fixed.

Apart, however, from the exact time of the making of this alteration, it was admittedly made after the Master of the *Chinook* was aware of the near presence of the *Dagmar Salen,* which vessel, upon his own evidence, could not be regarded as ascertained. Whether he was or was not upon his usual course and notwithstanding the customary rule of a port-to-port passing, his vessel was in the fog and, in these circumstances, this alteration constituted negligence on the part of the Master of the *Chinook.*

The contention that the practice of a port-to-port passing does not obtain in the fog is well founded to the extent that, instead of their following the rules as where visibility is such that vessels can be checked, good seamanship requires that every move must be determined by the circumstances and one of the primary rules appears to be that, once a vessel is known to be nearby, engines should be stopped and no change in course should be made until such vessel is ascertained. Neither of the vessels here observed this rule. The action of the *Dagmar Salen* in entering the fog when the approaching vessel was pursuing a peculiar course upon which it was not ascertained, and in making the alteration to port in these circumstances, constituted the greater negligence.

The appellant's submission that the entire cause of the collision should be attributed to the conduct of the *Chinook* cannot be supported upon the evidence. In support of this contention it is submitted that had the *Chinook* used reasonable care it would have observed the *Dagmar Salen's* alteration to port and realized it had decided upon a starboard-to-starboard passing and would not have altered its course seventeen degrees to starboard, or from 133 to 150 degrees. It is not established at what time the *Chinook* made this alteration. Even if the Master of the *Chinook* had been giving sufficient attention to his radar and observed the *Dagmar Salen* had altered her course to port, it does not at all follow that the reasonable man in the Master's position would, as he first noticed that alteration, have concluded that the *Dagmar Salen* had decided upon and was making a starboard-to-starboard passing. It was an unusual course and there was no reason therefor so far as the *Chinook* was concerned. At what time, in these circumstances, the Master of the *Chinook* ought to have concluded that the starboard-to-starboard passing was being attempted by the *Dagmar Salen* it is not possible to determine, nor can it be determined whether at that time he could have done more than he actually did do. Moreover, there would be a period after he noticed the *Dagmar Salen's* alteration during which the Master of the *Chinook* would be apprehensive lest at any moment the *Dagmar Salen* would again alter its course to effect the usual port-to-port passing and should, therefore, stop his engines. We cannot know, because the learned trial judge

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did not accept his log nor his evidence, at what point he did stop his engines. This, however, is established, that at some time before the *Dagmar Salen* came into sight some 400 yards distant the *Chinook* had stopped its engines and placed them in reverse so that at the point of collision the *Chinook* had no headway. Under these circumstances the evidence does not establish that the *Chinook* is entirely to blame, but rather, when read as a whole, supports the view that both were negligent and that such negligence continued up to and contributed to the collision.

While the learned trial judge's finding "that at the time of the collision neither vessel had more than trifling headway, that each was blowing the appropriate fog signals, and that each gave the full astern signal" is generally supported by the evidence, a careful reading thereof indicates an important difference between the *Chinook* and the *Dagmar Salen* in this respect, that the *Chinook* was either dead in the water or proceeding slightly astern at the time of the collision, while the *Dagmar Salen* still had a slight headway. Not only is this to be gathered from the evidence of the various witnesses, but the point of collision and the consequent damage make this rather clear. The stem of the *Dagmar Salen* collided with the *Chinook* "right at the wing of the bridge on the port side" and the nature and character of the damage would indicate that the *Chinook* was not making headway at that time. Gordon and Holmes, who, in their respective positions, had an opportunity to observe the vessels as they approached each other, both agreed that the impact on the *Chinook* was aft of where they thought it would be—Holmes says to a point of 25 or 30 feet—which would indicate that the *Chinook* was dead in the water, or slightly astern. This is rather important in assessing the degree of fault to be attributed to each of these vessels, as it tends to show that at the critical time the officers of the *Chinook* had the better control of their vessel. It is true the evidence establishes that the way of the *Chinook* could be run off rather quickly. That, however, was only a circumstance to be taken into account by those in charge. Against this the Pilot of the *Dagmar Salen* did not know how much time it would take

to run off the way of that vessel and did not adequately provide for either his lack of knowledge in this regard, or the fact that he had a two-knot tide in his favour.

The parties differed as to the place of the collision. They respectively placed it at points separated by a distance of one and one-half miles, each locating the place of the collision upon or close to their respective courses, as they had deposed to them. The *Dagmar Salen* contended that, having regard to its speed and distance, it could not have reached the place where the *Chinook* said the collision occurred until some time after it admittedly did occur. The same contention was made on behalf of the *Chinook* in relation to the place of the collision as fixed by the *Dagmar Salen.* In fact, the discrepancies in the evidence were such that, having regard to the fact that all distances are more or less approximate and the respective times questioned, it is impossible to draw any conclusion of assistance to either party from the evidence as to the point of collision.

Both of these vessels were equipped with radar. The learned trial judge was of the opinion that the Chief Officer on the *Chinook* had "paid no attention to it" after 19.50 and, as to the Master, he did not pay "any proper attention to the radar screen during the vital eight minutes preceding the collision." On the other hand he was satisfied that the Chief Officer on the *Dagmar Salen* did pay proper attention to the radar but on this ship, while they made more continuous and accurate observations, "they, too, changed too narrowly to permit of a safe distance for passing in fog." The radar is no doubt of the greatest assistance to navigation in the fog, provided the reading of the screen is made with care and that, having regard to what is there disclosed, reasonable precautions are taken. In this case it would seem that on the *Chinook* sufficient attention was not paid to the radar, while on the *Dagmar Salen,* although greater care was exercised in the use of the radar, the Pilot did not exercise the care that the radar indicated to be reasonably necessary.

Both of these vessels were at fault, but the greater must rest with the *Dagmar Salen.* In my opinion the learned

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trial judge arrived at the proper conclusions and his judgment should be affirmed and this appeal dismissed with costs.

Appeal allowed.

Solicitors for the appellant: *Campney, Owen, Clyne, Murphy and Owen.*

Solicitors for the respondent: *Locke, Guild, Lane, Sheppard and Yule.*