

1928
 April 4, 5
 and 10.
 April 27.

SINCENNES McNAUGHTON LINES.....PLAINTIFF;

AND

JOHN J. HARRIGAN.....PLAINTIFF;

v.

SS. "STEEL CHEMIST"DEFENDANT.

*Shipping and seamen—Collision—Canal Navigation—"Check" signals—
 Overtaking vessel—Standing by.*

Held, that where a vessel is overtaking another in a narrow channel such as the Welland Canal and signifies her desire to pass by blowing one blast, but receives no reply, she is bound to wait and not attempt to go forward so as to affect the overtaken vessel until permission is obtained. Rule 29 of the Rules of the Road for the Great Lakes is imperative and overrides the General Rules which deal with conditions not covered expressly by said Rule. (*The SS. Helen v. The Donovan*, 1925 Ex. C.R. 114; 1926 Ex. C.R. 59; 1926 S.C.R. 627; 28 Lloyd's List L.R. 165 referred to.)

2. The "check" signal is not recognized by the Great Lakes Rules and its meaning and effect can only be determined by the circumstances under which it is given and received. Rules 28, 29 and 36 are definite in their terms, and where the "check" signal is received by a vessel desiring to pass the onus is upon the overtaking vessel to demonstrate that said signal constituted a permission to pass slowly.
3. The enactment in section 920 of the Canada Shipping Act, R.S.C. (1906), c. 113 requiring the rendering of assistance in case of collision, by the Master of one ship to the other, and providing that in case of default, it is presumed that the collision was due to that wrongful act, is still in force in Lakes Ontario and Erie and their connecting canals.

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Two actions tried together for damages brought by owners of the tug *Escort* and her tow against the defendant ship, caused by collision between them.

The actions were tried before the Honourable Mr. Justice Hodgins at Toronto.

F. Wilkinson for plaintiffs.

A. H. Elder and *A. J. Thomson* for defendant.

The facts are stated in the reasons for judgment.

HODGINS L.J.A., now (April 27, 1928), delivered judgment.

Action for damages to tug *Escort* and her tow the barge *Compton* against the defendant ship for damages caused by a collision between them.

The *Escort* towing the *Compton* was upbound, i.e., going south, and in the narrow part of the Channel of the Welland Canal between the Air Line Bridge and Raney's Bend when the defendant ship, also upbound, attempted to pass them on their starboard side. The barge came in contact with the ship and then hit the tug, which itself ran or was carried against the *Steel Chemist* and was drawn on and steamed with her for some minutes to get loose. This contact injured the tug's forefoot and let water into her so that finally she had to be beached in a sinking condition, the barge also going ashore.

The beam of the tug *Escort* is 15 feet and it draws 11 feet, while the barge is 34 feet wide and, being light, drew 4 to 6 feet. The *Steel Chemist* is a motor steamship of 43 feet beam and is 257 feet long, drawing at the material time 7 feet forward and 11 feet 3 inches aft. She had on board half a full cargo of paper (1,000 tons.)

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The accident occurred at about 11.30 p.m. on the night of October 19, 1927. It was hazy and raining hard with a fresh north-west or north-east wind blowing. It is contended for the defence that the stern light of the barge was unlit at and for some time previous to the accident but no objection is made as to the tug's lights. On the other hand the action of the *Steel Chemist* is denounced by the plaintiffs as a wanton attempt to pass the tug and tow in a narrow channel regardless of the danger to all parties. It is also asserted that the tug after receiving her injuries and making water whistled for help but that the *Steel Chemist* disregarded these signals, and went on her way, leaving the tug and the men on board in danger till rescued by a tug from Port Colborne.

There is a wide discrepancy between the stories told by each side as to what occurred and how it occurred.

[The learned Judge here sets out the accounts given by those on the three vessels].

The width of the level where the collision occurred is stated by the plaintiffs to be about 150 feet from bank to bank (162 feet is the true width) and the navigable channel 100 feet, which by the defence is put at 112 feet wide.

[The learned Judge then proceeds:]

I find it hard to credit the Master (of the *Steel Chemist*) and his supporters when they say that the barge was seen only 75 or 100 feet away. The canal is well lit (see Exhibits and the evidence of the Master of the Tug) and being about 162 feet wide on the surface it may fairly be inferred that the lights, to be useful, would reach the tug and tow when in the middle of it, their sides being not more than about 60 or 70 feet from the bank where the lights stood.

The exhaust of the tug is sworn to be a very loud one which could be heard for about half a mile, according to the evidence of Carr, an independent witness, and certainly ought to have been detected if attention by the lookout and the officer of the watch had been properly directed forward. This fact as to the exhaust receives some confirmation from what the Master of the *Steel Chemist* mentions. He says that the tug having put her stem against the port quarter of his vessel and shoving was "going ahead hard."

As she was then about 160 feet behind the pilot house, it is not difficult to conclude that his knowledge as to just what her speed was was due to the sound of her exhaust. On sighting the barge the speed of the *Steel Chemist* was not checked, because, as the Master alleges, he did not have room enough to reverse and fall behind, and he ported his vessel to go to starboard and sounded one blast. This he says was at "S" on Ex. 9 where the canal is about 326 feet wide between banks with only 276 feet of a navigable channel. Getting no answer, another single blast was blown by him when his bow had got about opposite amidships of the barge. The tug then blew 3 blasts, i.e., a check signal, but he did not regard that signal, which he understood to mean, "go slow", and if so must have meant to go slower than his then speed. He could have gone dead slow, i.e., 2.5 miles per hour.

The Master says he recollects no alarm signals at any time. He also testifies that when the barge and the *Steel Chemist* "rubbed" together at a point marked "T" on Ex. 9, a little above where the tug puts it, his vessel was up parallel to the bank and rubbing it under water, and that he did not carry the barge forward. I cannot think that any helm action on the barge would have helped, as was argued, to avert being carried against the *Steel Chemist* and so far as I recollect no one suggested it. The helm of the barge is largely controlled by the tug's movement and is generally of no use except to enable it to follow that movement.

The lookout of the *Steel Chemist*, Daniel, however admits that he scraped the barge and slid along, and that the tug "came along with us" but seems to wish to attribute this to the working of the tug's engines. That may be so, but the position of the tug was a very dangerous one and the Master of it was justified in trying to prevent his vessel from being capsized after being drawn over to the *Steel Chemist*. The barge and the *Steel Chemist* had parted and were then ten feet apart. The Master of the *Steel Chemist* asserts that the tug went hard ahead working its bow into his port quarter and shoving the *Steel Chemist*, with a view of pushing the stern of that vessel into the west bank and throwing its bow across the canal,

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blocking the channel and lying at an angle athwart the waterway. He says he had to put his helm to port and go full speed ahead to avoid being forced across the canal by this means. He was not able to suggest any motive for this manoeuvre nor advantage to the tug therefrom. After two or three minutes the *Steel Chemist* got into the middle of the canal working up speed and then drew ahead. Her Master heard nothing from the tug, except its exhaust, nor did he see any part of it during this time, except the top of the cabin, he remaining in the wheel-house with the three front windows open, but the other six shut, one of these being on the port side.

He denies that suction had anything to do with the collision, which he describes as merely "rubbing" the barge and his contact with and influence on the tug as being entirely due to the shoving by the tug which I have described. He finally admits that he "had to go past" under the circumstances. In this his second officer agrees, and on cross-examination testifies that when the first blast was sounded they could not have done anything but what they did, no matter what signal was given. This may be so, but the cause was the speed at which the vessel was travelling. From the engineer's log between 10.55 to 11.32, the following is the record: 10.55, slow ahead; 10.06, slow ahead; 11.17, half ahead; 11.20, slow ahead; 11.29, full ahead; 11.29, slow ahead; 11.29, full ahead; 11.30, slow ahead; 11.30, full ahead; 11.32, slow ahead; 11.32, half ahead; 11.32, full ahead; 11.32, slow ahead.

According to the evidence of the *Steel Chemist's* engineer, this half speed means 6 miles per hour, for 3 minutes, 10.17-10.20, and again at 11.32,—full speed ahead in the canal probably 6 or 8 miles per hour, at 11.29 (twice) and at 11.30 and 11.32. In between comes slow ahead which in the canal is 4 miles per hour.

This indicates in the average more than slow speed throughout and casts doubt upon the chief engineer's deductions as to speed from the revolutions of the engines which were not going at any set pace for any length of time, and upon his estimate of the length of time necessary to stop the vessel which I regard as wholly excessive. There was no satisfactory evidence given as to the time within which the vessel could be stopped.

It must be noted in this connection that if the distance necessary to stop was 100 feet, the tug and tow would at three miles per hour have gone 75 feet while the *Steel Chemist*, at 4 miles per hour would traverse 100 feet, so that it would allow 175 feet, or more than enough for a stop before the barge would be reached. This accords with Stinson's evidence that he could stop sufficiently to stay behind if 25 to 50 feet distant from the barge, provided she was going 1 mile per hour slower. I should say that to assume an average of 5 miles per hour for the *Steel Chemist* would not be unfair, but as the *Steel Chemist* could travel at 2½ miles dead slow there was no excuse for passing these vessels at a greater rate, either at 4 or 5 miles per hour, regardless of the safety of the other craft.

The speed of the tug and tow is given by the tug master at 6 m.p.h. and by the master of the *Steel Chemist*, as I recollect it, at 10 m.p.h. while the tug was, as he says, shoving his vessel's port quarter. I do not think such speeds were ever attained. If the tug and tow were making 6 miles per hour and the *Steel Chemist* at 4 or 5 m.p.h. the latter would never have caught up to the former and I imagine the tug master is giving his engine revolution speed instead of his progress over the ground. His engineer estimates the tug's speed at 5 to 6 m.p.h. and that of the *Steel Chemist* at 10 m.p.h., both rather absurd estimates of speed in a canal by either vessel.

The absence of the stern light on the barge at the Air Line bridge just before the collision is affirmed by all the defence witnesses and denied by those called by the plaintiffs.

I have little doubt that the stern light on the barge was out more than once during the evening. The description of the light, the anxiety of the Captain of the barge and his frequent visits to it, the force of the wind, and the unanimous evidence of those on the *Steel Chemist* whose duty it was to look ahead and who saw her ahead, all point to its failure at the critical time.

I think I must accept the evidence against its existence as a warning signal as outweighing that of its continuance during the approach to Raney's Bend. Whether this finding must result in condemning the tug and tow for a breach

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of Rules 5, 12 and 38 of the Great Lakes Rules, as causing or contributing to the collision, I will deal with later.

But whatever the proper conclusion on that point may be, I am unable to hold that it forms a sufficient excuse for the action of the *Steel Chemist*. The tug and tow were clearly seen by those on that vessel when passing through the Air Line Bridge, and they say she then carried no stern light. These vessels had been in evidence on two occasions just before passing through the Air Line bridge, and there can have been no misapprehension as to the fact that both were proceeding upbound, the tug towing the barge. That they were just ahead of the *Steel Chemist* is patent, and when that vessel got through the Air Line Bridge and proceeded, its navigators were well aware that in the stretch of some two miles before the canal narrowed, on which they were entering, this tug and tow were in advance and must be passed, or, when caught up with, would be in a position demanding care and caution. Both overtaken and overtaking vessels were in fact proceeding up the centre of the canal, the tug and tow at 3 miles per hour and the *Steel Chemist* at, at least, between 4 or 5 miles per hour or at speeds differing by one mile per hour. When the tow came into sight later in the night the *Steel Chemist* at once signified her desire to pass by blowing 1 blast, and not having received a reply was bound to wait and not attempt to go forward so as to affect the tug and tow until permission was obtained. This is the effect of Rule 29 of the Great Lakes Rules which with Rules 28, 29, 34, 35 and 36 controls Canal Rule 18. Rule 29 is imperative and distinctly applicable to the situation here and overrides the general rules which deal with conditions not covered expressly by Rule 29. These navigation rules have been held to be binding on vessels navigating Canadian canals, see for example, the *Honoreva* (1), and *The Beechbay* (2). The *Steel Chemist*, however, while still going on, again blew a blast when passing the barge, repeating her desire, and received a signal of three blasts from the tug, denominated as a "check signal", and I have to determine whether this can be considered as

(1) (1916) 54 S.C.R. 51.

(2) (1925) Ex. C.R. 23.

signifying assent to the passage of the *Steel Chemist* under Rule 29—it was not the signal required by navigation Rule 28.

Now a check signal is not recognized by the Great Lakes Rules and its meaning and effect can only be determined by the circumstances under which it is given and received. The *Steel Chemist* had lapped up, as I find, on the barge when this signal was given and was therefore committed to passing the tug and tow. It is certainly a warning notice and in the case of *Keystone v. Ottawa* (1), meant “stay where you are till I get past.” In the *Norwalk* (2), it meant, “check down and wait below altogether.” See pp. 443 and 447, 460. Here it is said to mean “go slow” or “go past slowly.” As Rules 28, 29 and 36 are very definite in their terms, it is incumbent on the *Steel Chemist* to demonstrate that the meaning of that check signal when given was permission to pass slowly and this she has not done. But when it was given, it was an appropriate warning against excessive speed and a demand that the *Steel Chemist* should at once moderate her then speed, if she intended to force her way past. It is not a signal with a definite authorized meaning and the onus is on those asserting that it signified assent and that the other party knew and agreed to or was bound by that meaning. The tug and tow did not follow Canal Rule 18 in drawing in to their side of the canal at the first blast from the tug, and the *Steel Chemist* should have realized that the proper inference from that circumstance was one inconsistent with consent. The *Steel Chemist* was not entitled to construe the signal as she did and it does not excuse her. *The Ravenna* (3). Indeed she had, by her rapid approach, put herself where, as her Master and his second officer expressed it, he “had to go ahead” and try to pass irrespective of any signal.

The navigable water where the accident occurred is between 100 and 112 feet in width and the channel is under 500 feet wide (see Rule 29).

(1) (1927) Ex. C.R. 123.

(2) (1909) 12 Ex. C.R. 434.

(3) (1918) P. 26.

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It is argued that if the tug and tow had moved over to the bank on their port side the passing would have been accomplished in a navigable channel 212 feet wide or more. I am of opinion that Rule 29 is imperative and that if refusal to allow a passage is given, as I believe it was here, in good faith, no right to pass can be established. But assuming such a position as is contended for, I find the distance traversed before the canal narrowed to about 100/12 feet is about 1,000 feet (xx to Station 1,255) which is much too short a distance to allow of a vessel at 4 miles per hour passing successfully one going at three miles per hour, giving only about a boat length of the *Steel Chemist* in which to pass the bow of the moving tug and tow before getting into the middle of the narrowed channel. This alone would render the passage (which would and did occupy about 10 minutes) dangerous, and demonstrates the difficulty which I should think would follow even from the situation argued for in this respect. The tug did not increase her speed until some minutes after and then when compelled to do so for her own safety.

The beam of the *Steel Chemist* is 43 feet, and, accepting her Master's rather curious statement that she was exactly parallel to the bank in moving past the tug and tow, that left only 6 feet (or 18 feet if the width of the navigable channel is taken at 112 feet) beyond her to the centre of the channel for the tug and tow. As the tow is 34 feet wide and was in the middle of the channel she would occupy some 17 feet of that half, which shows what an extraordinarily dangerous attempt was made by the *Steel Chemist*. If the tow had been right up against the other bank that would leave only, on the evidence of the Master of the *Steel Chemist*, from 22 to 26 feet clear between the vessels, and as she was not close to the bank, but further out, the *Steel Chemist* must have got well within a distance where suction would operate. It is admitted in the written argument for the defence, that when the check signal was blown from the tug, there, it was impossible for the *Steel Chemist* to pass with safety to the other vessels unless they had hauled to port.

I have discussed the distance at which suction operates, in *Merlo v. SS. Jones* (1), and the *Poplar Bay v. SS. Charles Dick* (2). It has also been considered in *Cadwell v. SS. Bielman* (3) (where the evidence indicated that what happened here might be expected to occur); and in *The Steel Motor* (4), and I have no hesitation in finding that what brought the vessels together was the effect of the water pressure and suction set up by the *Steel Chemist*. When the evidence of the experts who testified as to how that force would act under the circumstances here is examined, it will be found from that on behalf of the tug and tow that these two vessels made movements quite in accordance with the expert opinion of what was likely to happen. What is said to have occurred is that the barge hit the star-board quarter of the tug after the collision with the *Steel Chemist*, and threw the bow of the tug against the side of the latter, damaging the former's fore-foot below the water line, causing her to take in water.

The larger vessel's proceedings are not, in my judgment, in any way excused by the absence of the stern light of the barge. However negligent that was, it only deprived the Master of the *Steel Chemist* of visible notice of what he already knew, and his position when he did make out the tug and tow ahead was due to his keeping up too great a speed, which his knowledge of what was ahead of him should have caused him to modify considerably. I find his speed from the Air Bridge to have been between 4 and 5 miles an hour over the ground, and that he could have got along with safety at dead slow or 2.5 miles per hour.

Experts were called on both sides, whose evidence I summarize thus:

Stinson, who is very familiar with the canal, says that the barge would be carried on to the tug, unless the latter increased its speed (as I find it did) and that if the tug was unable to escape the suction by her speed, it would go towards the passing vessel (as I find it did here) and that the only thing for the tug to do then was to run her engines to keep away from the barge and avoid being sucked under

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(1) (1925) Ex. C.R. 183.

(2) (1926) Ex. C.R. 46.

(3) (1906) 10 Ex. C.R. 155.

(4) (1925) Ex. C.R. 147.

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the passing ship. He also says that attempting to pass would be quite unsafe.

Mann, who knows this particular part of the channel quite well, would not have attempted to pass at all under the circumstances here, and considers that to attempt it would be unsafe.

Rinn, called for the defence, would not have tried to pass unless he had got an answer consenting and if he could not see a boat's length ahead would have blown fog signals.

Baxter, also called for the defence, would reverse and put his vessel's nose into the bank rather than attempt to pass at 100 feet, and he admits that at "X" on the chart, even if the tug and tow pulled over to the other bank, an attempt to pass would be taking chances of an accident. There is evidence from Stinson and I think from the other experts, that the bank on the starboard side is soft mud, and Carr says that on the following day he was able to tow the barge away on attaching his tug to it. There was no evidence of rocks on that side of the canal or on the bottom injuring the barge or that would have injured the *Steel Chemist* if she had followed the view expressed by *Baxter*.

The duty of an overtaking ship has recently been considered in the case of the *SS. Hellen v. The Donovan* (1) which was carried to the Privy Council.

In the Supreme Court Mr. Justice Newcombe said:—

If the *Hellen* had the obligation of an overtaking ship, as both the learned judges find she had, she was under absolute obligation to keep out of the way of the *Donovan*.

He cites, as authority for this wide statement, the *Saragossa* (2), where Lord Esher M.R., said:—

If the ships were an overtaking vessel and a vessel being overtaken, then the first rule is this: "Every ship, whether a sailing ship or a steamship, overtaking another, shall keep out of the way of the overtaken ship." That is an absolute rule, equivalent to an Act of Parliament. If that rule stood alone, whatever the overtaken ship did, however much she might deviate from her course, the other is bound absolutely to keep out of her way, and nothing can excuse it except inevitable accident. There was a case in the House of Lords in which the nautical advisers found that a man was put into such a position with regard to the other ship by the fault of that ship that any sailor of ordinary care and skill would have

(1) (1925) Ex. C.R. 114; (1926) Ex. C.R. 59; (1926) S.C.R. 627; 28 *Lloyds L.L.R.* 165. (2) (1892) 7 *Asp.* 289.

done just what the man did. The House of Lords held, nevertheless, that he was within the rule, and was bound to keep out of the way. It was a severe finding, I think—it overruled the Court of Appeal—but it shows that the rule is absolute. What is the effect of it? Why say to a man, “You are to keep out of the way. We don’t tell you how to keep out of the way. It may be by starboarding or by stopping and reversing, or going at full speed. It may be in any way you please. You are to have the choice; you have the obligation of doing it which way you will, but do it you must.” It was thought right that if you put that tremendous obligation upon the overtaking ship you must give him all the means to carry it out, and therefore there is another rule: “Where by the above rule, one of two ships is to keep out of the way, the other shall keep her course.” That is, that the ship on whom the heavy obligation lies may not be hampered by anything the other does. He must have his full liberty to go ahead of you, astern of you within ten feet of you on one side or the other. If he is to have that obligation you must keep your course, so that he may not be hampered by you in any way as to his choice. Then it seems to me that that at once makes the rule correlative, and that the obligation on the one and the obligation on the other exist at the same time.

I cite these observations not only for the establishment of the rigid rule laid down, but to show that the course of the tug and tow being in the middle of the channel they were, in the absence of agreement, bound and entitled to pursue their way and their speed without alteration till consent was given or became unnecessary. See also *Macdonald v. The Atlantic Salvage Co. Ltd. et al* (1).

It was urged that in another important respect the *Steel Chemist* must be held to be blameworthy and sec. 920 of the Canada Shipping Act, R.S.C., 1906, c. 133, was referred to. That section requires that in case of collision the Master should render such assistance to the other ship as was practicable and necessary to save them from any danger caused by the collision with his ship, etc. It further provided that if he did not do so it would be presumed that the collision was due to his wrongful act.

This requirement was not complied with and the tug was left in a sinking condition with a crew on board without the slightest assistance being given or tendered. There was danger, how much or how little is not of vital consequence, and need of assistance, and I find there was a total disregard of the duty imposed by the events which happened by the Master of the *Steel Chemist*. This enactment is still in force in Lakes Ontario and Erie and their con-

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(1) (1925) Ex. C.R. 209.

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necting canals. See 4-5 Geo. V, c. 13, s. 5 (2) in force on 1st July, 1914, by proclamation. The section as to other waters is found in R.S.C., 1927, c. 186, s. 902.

The evidence of the Master of the *Steel Chemist* was to my mind extremely unsatisfactory. Apart from contradictions of his former answers on discovery, he does not seem to have noticed, or if he did he did not betray it, much of what one would expect to have been seen by an experienced navigator in the circumstances in which he found himself. He was aware of contact with both tug and tow, though the officer on watch with him saw no contact with the barge and felt nothing. He did not move out of the pilot house, nor did his second officer or Chief Engineer, to see or hear what was going on, and he failed to realize that he might have caused serious damage to these two smaller craft. He heard no signals said to have numbered ten in all, although they were, as I find, blown, and that notwithstanding that the tug's alarm signals were heard at Port Colborne about a mile away. No one appears to have done anything except the lookout, Daniel, who followed the tug down the side of the vessel, and when it was clear so reported. He admits hearing the Master of the tug cursing and the noise of the exhaust. The Master of the *Steel Chemist* admits that the night was such that he could see the banks (which were further from his vessel on each side than the distance at which he saw the tow), and that if he could not see ahead owing to the rain and misty atmosphere he ought to have blown a fog signal (see Article 16), but he did not do so. These observations may also well be applied to Brown, the second officer then on watch, and those in the wheel house with them.

I am unable to see that the absence of the stern light, in view of the knowledge of the presence of the tug and tow immediately in front of him, on the 2 miles stretch, lured the *Steel Chemist* into danger, much less into a trap, because knowledge of all the actual conditions existed, and was not used as a prudent and careful navigator would have done, but was, in my judgment, recklessly disregarded by the Master of that vessel.

The cases of *Cayser, Irvine & Co. v. Carron Company* (1), and *Anglo-Newfoundland Co. v. Pacific Steam Navigation Co.* (2), have application here. In the first case Lord Blackburn described the cause of the accident as being "that the Margaret knowing where the *Clan Sinclair* was, attempted to pass between it and the *Zephyr* where there was not sufficient room." In the latter case Lord Shaw, in language quite appropriate here, says, at p. 420:

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I take the principle to be that, although there might be—which for the purpose of this point I am reckoning that there was—fault in being in a position which makes an accident possible yet, if the position is recognized by the other prior to operations which result in an accident occurring, then the author of that accident is the party who, recognizing the position of the other, fails negligently to avoid an accident which with reasonable conduct on his part could have been avoided. Unless that principle be applied it would be always open to a person negligently and recklessly approaching, and failing to avoid a known danger, to plead that the reckless encountering of danger was contributed to by the fact that there was a danger to be encountered. There is a period of time during which the casual function of the act or approach operates and it is not legitimate to extend that cause backwards to an anterior situation. The anterior situation may be brought about either innocently or by some mistake; but if it has nothing to do with the subsequent operations which contributed to produce an accident or collision, it is not legitimate to treat it as a contributory in liability for the result thus produced.

I find knowledge of the presence ahead of the tug and tow, neglect to take precautions not to get too close to them, and, failing such precautions, an attempt to force a passage at excessive speed where there was not sufficient room to accomplish it without danger.

I also find disregard of the requirements of Section 920 already quoted which entitles me to find that the collision was due to the wrongful act of the Master of the *Steel Chemist*.

The plaintiffs should have judgment condemning the defendant ship in damages and directing a reference to the Registrar at Toronto to assess the damages, all with costs.

Judgment accordingly.

(1) (1884) 9 A.C. 873.

(2) (1924) A.C. 406.