TORONTO ADMIRALTY DISTRICT

1925
Dec. 13.

BETWEEN:

THE POPLAR BAY STEAMSHIP CO.....PLAINTIFF;

AND

THE SHIP *CHARLES DICK*.....DEFENDANT.

Shipping—Collision—Inevitable accident—Duty of Master—Negligence

Held, that in a case of collision, in order to succeed under a plea of "inevitable accident" it must be shown that the accident could not possibly have been prevented by the exercise of ordinary care, caution and maritime skill.

2. That a defendant with such a plea must show what was the cause of the accident, and that the result of that cause was inevitable or must show all the possible causes, one or other of which produced the collision, and must further show with regard to every one of these possible causes, that the result could not have been avoided.

3. That careful navigation requires the Master of a ship, in a narrow channel in leaving the bank, with another vessel oncoming, should first test his helm, and if he decides to trust his engines and steering gear, he should make provision for a possible breakdown or the unanticipated force or effect of the current from the oncoming ship, and his crew should be so placed as to be prepared to meet the consequences of such a contingency.

This was an Action brought by the plaintiff against the ship *Charles Dick* for damage by reason of collision between the said ship and a ship owned by the said plaintiff.

Toronto, December 8 and 9, 1925.

ACTION now tried before the Honourable Mr. Justice Hodgins at Osgoode Hall.

W. Lawr and *A. M. Garden* for plaintiff.

R. I. Towers, K.C., and *F. Wilkinson* for defendant.

The facts are set out in the reasons for judgment.

HODGINS L.J.A., now (13th December, 1925), delivered judgment.

Action arising out of a collision between the SS. *Poplar Bay* and the defendant ship on the 7th August, 1924, in

the Welland Canal just below Humberstone bridge, a mile and a half north of Port Colborne. No complaint is made with regard to the navigation, crew or actions of the *Poplar Bay* (though charged in the Preliminary Act). The *Charles Dick,* which ran into her, sets up inevitable accident, due to the jamming of the steering gear, as being responsible for the collision. This defence, if established, involves the proposition that there was no negligence before or after the time when the helm jammed nor in the jamming itself. The *Poplar Bay* is a steel vessel of 1,263 gross and 664 net tons, 236 feet long, 36 feet beam and was laden with wheat, drawing 14 feet. The *Charles Dick* is a steel vessel, built in 1922, of 1,774 gross tons and 654 net tons, 260 feet long, 43 feet beam, drawing (light) 5 to 6 feet forward and 11½ feet aft.

The *Charles Dick* was coming through the canal on her way up (south) and having heard the signal of the *Poplar Bay* above the bridge, went into a bight on her starboard side of the canal, some 1,200 feet below Humberstone Bridge, where the canal is about 150 feet across (one witness says 175 by plan but this is not correct), and lay there about twenty minutes. When the *Poplar Bay,* coming down (north), had passed through the bridge, and was her own length from the *Charles Dick,* the *Poplar Bay* ported and swung to the right to pass. When the *Poplar Bay* was about fifty or between fifty and seventy-five feet away, the Master of the *Charles Dick* started her engines ahead slow. He then gave an order to the wheelsman, Doucet (the wheel being amidship), to port a little, when the steering gear, it is said, jammed. The Master then ordered hard a port with no result. The vessel, he says, had started when the order, ahead slow, was given. On the second failure of the wheel to act, the Master gave five blasts as a danger signal—the *Poplar Bay* being about 30 feet away—and then rang the engines full speed astern. He then tried the wheel himself, and ordered the mate, Foote, to let go the starboard anchor and to go to the lower wheelhouse to disconnect the rod connecting the lower wheel with the upper wheel on the bridge. The mate says he found it useless to anchor, but that the lower wheel was able to operate when he had disconnected the one above. On his reporting this, the Master sent the wheelsman to

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the lower wheel. By that time the vessels had come together. This is the order of events given by the Master of the *Charles Dick*. The mate, Foote, and the wheelsman, Doucet, corroborate him. The mate says it was too late to anchor when he got to the starboard anchor, and that the Master then sent him to the lower wheelhouse, but believes his going earlier would not have averted the accident. The wheelsman says he got two orders to port helm before the direction hard a port. The bow of the *Charles Dick* had swung out to port and struck the *Poplar Bay* on her port bow, and, as her witnesses said, forced the vessel to the bank on her starboard side, the *Charles Dick* slipping along the side of the other vessel for between thirty and fifty feet. Apparently the *Poplar Bay* did all she could to avoid the accident, so that it is not necessary to discuss her movements further.

The question I have to decide is whether the jamming of the steering gear proved to be unavoidable and brought about the collision and also whether it and the handling of the ship before or after it occurred, establish "inevitable accident."

To succeed under the plea of "inevitable accident" the *Charles Dick* has to show that the collision could not possibly have been prevented "by the exercise of ordinary care, caution and maritime skill," per Dr. Lushington in the *Virgil* (1), an expression approved in the cases of the *Marpesia* (2), and *The Schwan* and *The Albano* (3), and in many other English and Canadian cases, to some of which I shall refer later.

In the *Merchant Prince* (4), the Court of Appeal laid it down that to make out such a plea the defendants

> must either (1) show what was the cause of the accident and show that the result of that cause was inevitable, or (2) they must show all the possible causes, one or other of which produced the effect, and must further show with regard to every one of these possible causes, that the result could not have been avoided.

The steering gear of the *Charles Dick* is the Ligerwood Steam Gear, and the brass top or cover of the indicator on the topmost bridge is produced (Ex. 3). The jamming is said to have been caused by the teeth of the lower sprocket

(1) [1843] 2 Wm. Rob. 201, 205.
(2) [1872] L.R. 4 P.C. 212, 220.
(3) [1892] P. 419, 433-4
(4) [1892] P. 179.

wheel under the indicator cover failing to mesh properly with the steel worm on the shaft. This shaft is moved by the action of the wheel. The sprocket wheel in question is welded on the lower end of a brass tube which revolves, when properly in contact with the worm, round a spindle threaded into the brass top. The brass tube has, as its upper end a smaller wheel which meshes into a brass segment which moves the indicator on top of the cover. The whole object of transmitting motion to the sprocket wheel from the shaft on which the worm is fixed, is to move the indicator as the wheel moves, and the disablement of the sprocket wheel alone would in no way affect the steering gear, unless it retarded or stopped the movement of the shaft on which is the steel worm.

The evidence suggests that the jam occurred as described above because when the rod connecting the upper wheel with the lower wheel, immediately under it on the main-deck, or with its gearing, was disconnected, the lower wheel operated the rudder. The evidence as to the cause of the jam was given by Donaldson, Chief Engineer of the *Charles Dick,* backed in certain portions by the evidence of Henry, foreman machinist of the Collingwood Ship Building Co., which built and equipped the *Charles Dick.* Both swore that the Ligerwood Steering Gear was one in common and recognized use. The steel worm was not produced, and Donaldson being recalled testified that it was not damaged at all when examined after the jamming had occurred.

I am not completely satisfied upon the point that the jamming at the important moment, as it is accounted for, was unavoidable or irremediable. The chief engineer's log is not produced, and the entry made by him on the margin of his weekly report reads as follows:

> Aug. 7. Note. Collided with SS. *Poplar Bay.* Steering indicator put out of order after collision.

This entry as it reads is quite contrary to his testimony.

Donaldson's evidence in chief is, at first, confined to stating that having found the indicator two points out, it showed that the sprocket wheel had jumped the worm on the steering shaft.

He further says that on examination of the gears he found the spindle on which these sprocket wheels revolved was loosened in the cover

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and that the spindle, which screws on threads in the brass cover, was slackened off, making the sprocket wheel disengage from the worm, with the result, that "when the wheels (sic) are passing over the worm, on top of the gears" it would tend to jam. The play of the lower end of the spindle just where it carries the sprocket wheel, when loose from its threads in the top of the cover to the extent of $\frac{1}{32}$ of an inch, is given as $\frac{1}{4}$ of an inch or $\frac{1}{8}$ each way. Later on the explanation is that if the worm comes on top of the gear, i.e., the sprocket wheel, it comes out of mesh and locks the sprocket wheel against the worm on the steering wheel shaft. The teeth of the worm are $\frac{1}{8}$ of an inch deep and those on the sprocket wheel about the same.

The Chief Engineer then proceeded at my request, to indicate the three teeth of the sprocket wheel which showed evidence of this jarring and they are marked on the exhibit by a rubber band round them. On cross-examination he said that it was the spindle coming off the thread that caused the jam, that it had worked loose without his notice, but how he cannot tell. As to repairing it he is asked:

Now since you had to rivet that it showed that it worked loose considerably,

and he answers,

Yes, sir.

This rivetting is merely hammering the rim of the hole in the brass cover against the head of the spindle, so as to bind them together.

On examination of Exhibit 3 it will be found that if the indicator moves two points (the distance it was found to be out), it will only cause three teeth of the sprocket wheel to engage the worm and that those pointed out by Donaldson to me and marked are just that number. On examining these three there will be noticed a slight groove on the top of each of the teeth running along their length, which grooves were said to be caused by the action of the steel worm on these brass teeth when in contact with the top instead of enmeshing. I can see similar marks on 12 or 13 more out of the whole 18. Neither the worm nor any photograph or model of it was produced to enable me to check the statement that the worm could and did produce these marks, nor was any evidence given as to the position or shape of the worm, or in what exact way or angle it made contact with the sprocket wheel.

These marks on 15 or 16 out of 18 of the teeth of the sprocket wheel are not consistent with the theory that this jamming had never occurred before. The steering wheel was only moved, on this occasion about 4 or 5 inches to port and the indicator only two points or something under ¾ of an inch, so that there is no foundation for suggesting that this particular jam affected more than three teeth pointed out to me. It much more clearly indicates that this jamming or jarring had occurred before (neither the master, mate nor wheelsman were interrogated on this point), in the same way and from the same cause. If not, how were all these grooves cut in the teeth of the sprocket wheel? If I accept the evidence proving how and why this jam occurred on this occasion, I must also conclude that it had happened before or since the collision. No suggestion that it has occurred later than the 7th August, 1924, has been made.

If, then, it is open to the conclusion that this has happened before, what is the inference to be drawn as to care and caution before the collision. So far as the Chief Engineer is concerned, he swears he examined this contrivance carefully five days before. His log is not produced but his reports to the head office (ex. 4), which he takes or copies from his log, show numbers of entries in reference to the overhauling or inspecting of the steering gear, the last being 15 and not 5 days before the accident.

These reports cover the whole season of 1924, from April 27 to November 23. According to them an inspection of the steering gear was made on June 24 and on 28th June the steering engine broke down and was repaired temporarily. A thrust collar was fitted on the 29th June and on July 3 a new one was fitted to the port side of the engine. On June 17 an inspection was made, and an inspection and overhauling took place on July 22. On 26th July the steering engine pulleys were readjusted, and on 28th July a new controlling wire was put on steering gear and tightened up on 30th July.

This record, while not shown to involve attention to the particular gear now in question, indicates trouble with the engine dating from its breaking down on 28th June until the 26th or 28th July about 10 to 12 days before the accident. The ship had grounded four times in May and

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June, the propellor striking bottom on June 5. After the accident on August 7, the steering gear was inspected three times, the last being on October 10, and overhauling of the steering engine was done on October 19 and 28. There is nowhere, before or after the 7th August, any mention of the indicator, or its sprocket wheel, or the spindle requiring or getting attention, and the last inspection of the gear before the accident was made on July 22, when according to the evidence there was no indication of trouble.

On the best consideration I can give to this point, the evidence would suggest (in the absence of any light from the master, mate or wheelsman), that the gears had jammed before but that either it had been at once overcome by reversing the motion of the wheel or the use of more force without any adjustment of the teeth or sprocket wheel involved, or else that the marks now pointed to as indicating the jam are quite indecisive as to the time when they were made. According to his testimony, the chief engineer's services had not been called in before for the purpose of repair or adjustment to this part of the steering gear. The absence, however, of any evidence of the master, mate and wheelsman which might assist, on this point, leaves the matter in a very unsatisfactory state, and I shall deal with the other questions involved before finally dealing with this question.

The evidence of Capt. John Williams, called in reply, seems to me to be rather important on the question of careful navigation. His position and experience (32 years) lend weight to his statement that before a vessel in the position of the *Charles Dick* should start away from the bank, in presence of an oncoming steamer, in a narrow channel, the helm should be tested. The reason for this, as I gather it from his testimony and that of Capt. Stinson, is that in getting away from the bank the tendency is for the stern to "suck the bank" throwing the bow out, see *Export SS. Ltd.* v. *SS. Iocoma* (1), and that to start before the vessels are bow to bow is to invite danger, giving more play and force against the starting ship to the water from the oncoming ship; and that 50 feet away is too soon to start, and that if the vessels were abreast when

(1) [1923] Ex. C.R. 119, at p. 127.

the start was made they would not be likely to collide. Stinson agrees with Capt. Williams that the *Charles Dick* could not come out safely unless the rudder acted, and that he would have had it hard a port before starting his engines.

If, however, the master of the *Charles Dick* thought he might start and trust to his engines and steering gear, he should at least have made provision for a possible breakdown or an unanticipated force or effect of the current from the moving ship coming down to pass him. There was no reason assigned, and I can think of none, requiring or justifying the position of the mate, who was standing on the upper bridge on which were both the master and wheelsman. His place should have been where the master sent him when the gear jammed, that is by the anchor. Much time was lost, if the master's account of his actions as he narrated them are taken as accurate. The mate corroborates the master's evidence as to the order in which they occurred. The wheelsman adds that one additional order was given by the master before the mate was despatched to the anchor. Had the master ordered his engines full speed astern at once on hearing of the jam and had the mate been where he should have been, in my judgment the collision might have been avoided or its effects much modified.

Too many accidents occur in our canals due to lack of judgment or taking too many chances and I have consulted many authorities to ascertain if the views I have above indicated are in accordance with good navigation as understood here and in Great Britain and the United States.

In the case of *Merlo* v. *SS. Jones* (1), I considered the effect of suction and the distance within which it may operate, and need not repeat what is there said. The distance between the vessels here was very small. The width of the canal where the depth of 14 feet, can be found is only about 100 feet, and the beam of the two vessels is 79 feet. This gives only 21 feet of space between them when passing or perhaps a few feet more as the *Charles Dick* was only drawing 11½ feet. In that situation the master should have taken all reasonable precautions to

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

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secure his vessel when exposed or likely to be exposed to the influence of that force.

As to the duty of waiting the passing of another vessel in a narrow channel, as indicated in the evidence I have quoted, reference may be made to the *Geo. Hall Coal Co.* v. *SS. Beechbay* (1), in which such an attitude is stated to be the part of good seamanship under circumstances somewhat analogous to those here. The Supreme Court of Canada in the *Canada SS. Lines* v. *SS. Ketchum* (2) has discussed the difficulties that may be caused to an oncoming steamer by a meeting vessel altering her course instead of stopping and waiting, and these are well pointed out by Mr. Justice Newcombe. In *The Talabot* (3), the local rule of the River Thames is adopted as being of general application, namely, that where two vessels going in opposite directions will meet at a point where there is a strong bend in a river, the vessel with the tide should wait till the other vessel has passed clear. The same rule was applied in the *Ezardian* (4). In *The Union* (5), the Judge of the Quebec Vice Admiralty Court laid it down, as to inevitable accident, that

> Before she can have the benefit of her plea of inevitable accident she must shew an overruling force, a *vis major*, which could not have been avoided either by waiting at her mooring berth until such time as the promoter's boat had passed or was out of the eddy, or the whirlpool as some of the respondent's witnesses have termed it, and further, that after she left her mooring it was impossible for her to keep out of the way of the boat.

In the American case of *Sherman* v. *Mott (The Clara)* (6), Blatchford J., in the U.S. District Court uses these words:

> The act of the schooner, in being adrift, was, on the pleadings and proofs, a voluntary act on her part. It was wilful and deliberate. It was done to save herself from a greater peril, by endeavouring to incur a less one. It is established by the proofs, that, if she had not cast herself loose, she would have remained where she was, only, perhaps, sinking, and would not have collided with the brig. A collision would have been impossible if she had not cut herself loose, as a matter of voluntary choice.

Sir Gorell Barnes P., in *The Kaiser Wilhelm de Grosse* (7), when discussing the relative duties of ships meeting, in coming out of and into Cherbourg harbour, applying the

(1) [1925] Ex. C.R. 23-27.
(2) [1925] S.C.R. 81.
(3) [1890] 6 Asp. 602.
(4) [1911] P. 92.
(5) [1876] 2 Q.L.R. 186.
(6) [1871] 5 Benedict 372.
(7) [1907] P. 36.

narrow channel rule in the light of good seamanship, observes that while there would be difficulty in following out that practice or rule, adds the remark that

there is no difficulty whatever, so long as you know there is a vessel entering the port, in either waiting a little while or else slowing down so as to be able to come round on a port helm and thus comply with what I think ought to be done.

In the *SS. Coniston* v. *Walrod* (1), the propriety of stopping and waiting in the face of an approaching vessel is emphasized. It seems to me that the reason of Rule 22 relative to vessels passing at a lock, requiring the later one to tie up and wait till the other has passed, as well as the decisions adopting local rules in the cases I have cited as applicable to vessels meeting at a river bend, are only illustrations of what good seamanship demands under certain circumstances. They both indicate the good sense of remaining quiescent when tide or a narrow channel, or the force of suction or bow wave enter into the situation.

Upon the question of having the officers and crew properly stationed and standing by when intending to undertake a manoeuvre involving risk or danger, I refer first to an interesting case (in which the judgment is given by a judge who afterwards became a Justice of the Supreme Court of the United States), *Adam* v. *The Ontario* (2), where the plaintiffs failed because, when the steering gear on their ship became disabled, there was no one standing by to use the additional steering gear with which she was equipped. The court placed its decision upon two grounds, namely, because,

her steering gear in use was not properly secured, watched, or inspected; and because, when sailing through such a long, narrow and shoal channel as the South pass she did not keep her after steering gear in readiness for instant use in case of emergency.

In the *Merchant Prince* (ante) it was held by the Court of Appeal that,

the defendants were liable, as they had not satisfied the burden of proof, for, in order to support the defence of inevitable accident, and disprove the *prima facie* evidence of negligence, it was necessary for them to shew that the cause of the accident was one not produced by them, and the result of which they could not avoid, but the defendants knew of the tendency of new chain to stretch, and therefore that an accumulation of links at the leading wheels might possibly cause jamming, and, considering the crowded condition of the river where the accident occurred, the use

(1) [1918] 19 Ex. C.R. 238, 250. (2) [1889] 39 Fed. Rep. 118.

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—or readiness for immediate use—of hand, instead of steam, steering gear, was a means by which the result could have been avoided.

In *The Turret Court* (1), the President, Sir F. H. Jeune, in dealing with steering gear says:

> I do not say there was any suspicion of the steam steering gear, although I think there was suspicion, or should have been, of the bevelled wheels. Therefore I do not put this case so high as to say it is a case of defective machinery which a person knows to be defective. I put it in this way—that where you have steam steering gear, which is necessarily a delicate instrument liable to accidents of various kinds, and a vessel going up a narrow stream and in a place of difficulty, then I venture to say, after very careful consideration with the *Elder Brethern,* that it is the duty of the captain of that vessel not to neglect the means of safety which he has at his command; in other words, to have his hand steering gear available for use—I mean somebody standing by, so that at a moment's notice the hand gear may be attached and used.—What I desire to indicate in this case is the complete failure to have the hand gear available, or to have anybody there to use it or make any employment of it as substitute in case the steam gear failed.

To these may be added *Taylor* v. *SS. Prescott* (2), where lack of promptitude in the officers and of proper stationing of the crew before and at the moment of the accident was held sufficient to prevent the vessel having the benefit of the doctrine of "inevitable accident;" also *The Jessie* and *Zaanland* (3), where a vessel, run down by another and caused to drift down on a third ship riding by one anchor, was held to blame because her starboard anchor was not so placed as to be let go at once if necessity arose, the place being the Downs where a number of vessels were brought up.

Tremblay v. *Hyman* (4), reviews the cases and hold that where mooring cables part through the violence of the storm, yet in order to show inevitable accident it must be proved that

> the breaking of the moorings was due to the irresistible force of the wind and waves, but also that all ordinary care, caution and maritime skill was exercised in mooring the vessel and in the handling thereof.

In reference to the lack of prompt action by the master in this case in waiting a second or perhaps a third trial of the wheel and then giving five blasts as a danger signal before reversing his engines, I refer to the *Santanderino* (5), where the steering gear broke, causing the vessel to strike

(1) [1900] 69 L.J. Adm. 117.
(2) [1908] 13 Ex. C.R. 424.
(3) [1917] P. 138.
(4) [1920] 20 Ex. C.R. 1.
(5) [1893] 3 Ex. C.R. 378; 23 S.C.R. 145.

a schooner at anchor. The master's evidence was as follows:

At the moment when the officer informed me that there was something the matter with the wheel, the rudder, I immediately went myself to the wheel to see if it was possible to manage the wheel, and seeing that the wheel was obstructed. I immediately gave orders to the second and third officers to go down and see what was the matter, and to advise and inform the engineer at the same time that I myself went to the telegraph to start the engine, and to give orders to anchor.

On this the learned trial judge, McDonald C.J., says:

According to the evidence of the latter (Master), and of his officers, most valuable time was lost by the master and his officers in the endeavour to ascertain the cause of the accident instead of taking instant measures to obviate its effects, while according to the pilot's evidence the master acted most promptly and in the right direction. It may be that the fact of the master and his officers speaking through an interpreter may have occasioned the discrepancy. However that may be, it is clear that if the captain's evidence be adopted as the true statement of the occurrence he was guilty of want of promptitude, foresight and seamanship, as well as a violation of rule 17, which under such circumstances required him to stop and reverse at once.

A valuable American case is *The Olympia* (1), where the court adopted the rule in the *Merchant Prince* (ante) and states it thus:

It is not meant by the expression "inevitable accident" one which it was physically impossible, from the nature of things, for the defendant to have prevented. We only mean that it was an occurrence which could not be avoided by the degree of prudence, foresight, care, and caution which the law requires for every one under the circumstances of the particular case. The rule in maritime law does not differ from that at common law, where there is no contractual relation between the parties. The able proctor who has appeared for libelants has himself defined an inevitable accident as an occurrence which could not possibly be prevented "by exercise of care, caution and maritime skill."

Applying these cases I think I am bound, even assuming that the jamming of the steering gear was unexpected and not due to negligence, to hold that the *Charles Dick* has not brought the result of that occurrence within the term "inevitable accident." I do so even apart from authority because I think that while the *Charles Dick* should probably have remained stationery till the *Poplar Bay* was lapped up on her bow, yet if her master determined to do otherwise, he should have tested his steering gear before getting into motion ahead, and stationed his mate in such a position that he could have either let go the anchor at once or used the lower wheel. The master was also negligent in not

(1) [1894] 61 Fed. Rep. 120.

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taking proper action by reversing at once, on the jamming occurring, instead of waiting till he did other things, and that the mate should not have been on the upper bridge but below near the anchor or lower steering gear. Whatever may be said as to the propriety of starting when the *Charles Dick* did, there can be no question of the risk existing and if so it is no answer that the unexpected happened, if the ship is found unprepared to deal with it because of want of forethought and proper system. In addition to this my conclusion is that the evidence, such as it is, as to the cause of the jamming of the steering gear, fails, in the absence of any evidence from the master, mate or wheelsman on the point, to deal with the condition of the sprocket wheel, indicating as it does either that jamming had occurred before in the same way and apparently without evil result, or that the cause alleged cannot be inevitably assigned to the time of the accident. The result of this would be that inevitable accident is not proved. There is also the probability that, without the engineer being called in, some manipulation of the wheel or the use of more force had on other occasions freed the gear. This leaves the matter in doubt, assuming the cause assigned is true, whether if similar methods had been used on August 7, the collision would have taken place. I must therefore on all the grounds I have mentioned adjudge the defendant ship to be to blame for the collision, and refer the quantum of damages to the registrar to be ascertained. On his report of the usual judgment may go. The defendants must pay the costs of the action and reference. I may add that the defendants' Preliminary Act is so drawn as to ignore completely the cause of the accident as it is now alleged to have happened. It states none of the means used, as now set up, for avoiding the collision.

Judgment accordingly.