IN THE GRAND COURT OF THE CAYMAN ISLANDS
CRIMINAL SIDE

IND. NO: 106 of 2019

THE QUEEN

V.

SEAN MICHAEL MCDONALD

Appearances:	**Mr. Richard Matthews QC and Mr. Gregory Walcolm for the Prosecution**
	Mr. Ben Tonner QC and Mr. Oliver Grimwood for the Defence
Before:	**The Hon. Justice Cheryll Richards QC**
Judge Alone trial:	**1st March, 3rd, 4th March, 7th and 8th March 2022**
Written Submissions:	**11th and 14th March 2022**
Verdict Judgment:	**2nd August 2022**

HEADNOTE

Criminal Law *- Section 180 of the Penal Code (2019 Revision), Manslaughter, Section 210 of the Penal Code, (2019 Revision), Endangering Human Life or Safety, Trial by Judge Alone*

VERDICT JUDGMENT

INDEX TO JUDGMENT **PAGE**

INTRODUCTION

1. The defendant Sean Michael McDonald is before the Court charged on an amended Indictment containing three counts. Counts One and Two charge him with the offence of Manslaughter contrary to s.180 of the ***Penal Code*** (2019 Revision).

2. The particulars of Count One are that he on the 11th day of August 2019 in Grand Cayman, Cayman Islands, caused the death of another person, namely John Turner, by culpable negligence in the discharge of the duty to pilot the marine vessel "Pepper Jelly" with reasonable care to avoid endangering the life of other persons, in particular by navigating "Pepper Jelly" at dangerous and excessive speed when approaching the shore and the entrance to a channel during the hours after sunset.

3. The particulars of Count Two are that he on the said date and place, caused the death of another person, namely Emmanuel Brown, by culpable negligence in the discharge of the duty to pilot the marine vessel "Pepper Jelly" with reasonable care to avoid endangering the life of other persons, in particular by navigating "Pepper Jelly" at dangerous and excessive speed when approaching the shore and the entrance to a channel during the hours after sunset.

4. Count Three charges him with the offence of Endangering Human Life or Safety through Reckless and Negligent Acts contrary to s.210 of the Penal Code (2019 Revision).

5. The particulars are that he on the 11th day of August 2019 in Grand Cayman, Cayman Islands, navigated the marine vessel "Pepper Jelly" in a manner so rash or negligent as to endanger human life, including that of Shamilia Wright, in particular by navigating "Pepper Jelly" at dangerous and excessive speed when approaching the shore and the entrance to a channel during the hours after sunset.

6. The defendant was first arraigned on the 24th January 2020 and entered not guilty pleas to the three counts on the Indictment. He elected trial by judge alone pursuant to s.129 of the ***Criminal Procedure Code*** (2021 Revision). He was re-arraigned on the amended Indictment at the start of this trial.

APPLICABLE PRINCIPLES - JUDGE ALONE TRIALS

7. In approaching this case this Court is guided by the Court of Appeal in its judgment in the case of ***K. Richards v. R***.[1] in which the Court stated:-

> *"When a trial judge sitting alone has advised himself of the applicable principles of law and given himself any necessary warning, he must indicate clearly in his judgment his reasons for acting as he did, in order to demonstrate that he has acted with the requisite degree of caution in mind and has therefore heeded his own warning. No specific form of words is necessary for this demonstration. "What is necessary is that the judge's mind upon the matter be clearly revealed": see R. v. Simpson (15) ([1993] 3 LRC at 641, per Downer, J.A.)."*

8. The Appellate Court indicated its adoption of the principles of law as stated in the cited cases and considered that a judge sitting alone is required to provide a reasoned judgment in the case and to demonstrate in so doing an understanding of the following:-

(i) The importance of fully articulating the legal principles which apply to the particular case before the Court;

(ii) The importance of warning himself in relation to any special category evidence;

(iii) The necessity to set out the evidence on which he intended to rely for his decisions;

(iv) Specifically, and specially determining ultimate facts from that evidence and drawing inferences therefrom; and

(v) Coming to a conclusion and judgment based on his ultimate findings of fact and the applicable rules of law.

[1] 2001 CILR 496, paragraph 32

9. Additionally, in the case of ***R. v. Dave Kennedy Whittaker***,[2] the Appellate Court referred with approval to the decision of the Court of Appeal in Northern Ireland from a decision of a judge sitting alone, and stated:-

> *"50 In R. v. Thompson[3] (11), Lowry, L.C.J., giving the judgment*
>
> *"While on the subject I might say a word on the duty of the judge when giving judgment in a trial under the 1973 Act. He has no jury to charge and therefore will not err if he does not state every relevant legal proposition and review every fact and argument on either side. His duty is not as in a jury trial to instruct laymen as to every relevant aspect of the law or to give (perhaps at the end of a long trial) a full and balanced picture of the facts for decision by others. His task is to reach conclusions and give reasons to support his view and, preferably, to notice any difficult or unusual points of law in order that if there is an appeal, it may be seen how his view of the law informed his approach to the facts.""*

10. This case is approached and considered with these principles in mind. My task is to make findings, to give reasons in support of those findings and to address any areas of law which apply. It is not necessary to detail every fact in the case or all the arguments as would be the case in a jury trial.

PRESUMPTION OF INNOCENCE AND BURDEN OF PROOF

11. The presumption of innocence is enshrined in s.7 of the ***Cayman Islands Constitution*** 2009. This provides:-

> *"**7. -** (1) Everyone has the right to a fair and public hearing in the determination of his or her legal rights and obligations by an independent and impartial court within a reasonable time.*
>
> *(2) Everyone charged with a criminal offence has the following minimum rights –*
>
> *(a) to be presumed innocent until proved guilty according to law."*

12. In criminal trials the applicable rule is that the burden of proof is on the Prosecution to prove its case to the required standard, which is so that the judge or jury feels sure of a defendants' guilt

[2] [2010 (1) CILR 29]

[3] [1977] N.I. at 83

before there can be a conviction. That burden remains on the prosecution from the beginning and throughout a case and does not shift. There is no burden on the defendant to prove his innocence.

13. I bore these considerations firmly in mind throughout this case, as I listened to the evidence for the prosecution and the defence and as I considered the verdict.

CASE SUMMARY

14. In the night of Sunday, the 11th August 2019, at approximately 7:44 p.m., in the waters of the North Sound, Grand Cayman, about 1300 yards from the Harbour House Marina in Prospect, there was a collision between two marine vessels.

15. One was a 32-foot Wellcraft Scarab Sport bearing the name Pepper Jelly ("the Pepper Jelly"). It was equipped with two 300 horse power Suzuki outboard engines. The vessel had been inspected by the Cayman Islands Port Authority and found to be in compliance with the applicable vessel inspection laws and regulations. It had been issued with a safety certificate which was current and valid on the night in question[4] and had a current and valid third-party insurance policy. It was owned by the defendant's company, and operated by the defendant, Sean McDonald. On board were two passengers, Joshua Hill and Stephanie Hicks. They had all been to Rum Point and were returning to the Harbour House Marina at the end of the day.

16. The second vessel was a 24-foot Godfrey Hurricane, ("the Godfrey Hurricane"). It is a 1998 model vessel which was equipped with a 200 HP Yamaha outboard engine. The Port Authority had not inspected this vessel and thus no safety certificate had been issued for it[5]. It did not have a policy of insurance[6]. It was operated by Emmanuel Brown. On board were two passengers John Turner who was the owner of the vessel[7] and Shamila Wright. They had all been to Starfish Point and were returning at the end of the day, possibly to the Abbey Way Channel. They would need to pass by the Harbour House Marina Channel to get to the Abbey Way Channel.

[4] Admission 44
[5] Admission 48
[6] Admission 47
[7] Admission 46

17. The Pepper Jelly capsized as a result of the collision. All three occupants swam to shore. Mr. Hill and Ms. Hicks sought the assistance of a householder who lived in the vicinity of where they alighted, Mr. Alfred Tweneboah.

18. The collision of the two vessels caused Mr. Brown to be dislodged from the Godfrey Hurricane. Mr. Brown and Mr. Turner did not survive the collision. Ms. Wright was seriously injured. After the collision, the Godfrey Hurricane crashed into a sea wall by Whirlwind Drive in Prospect.

AGREED EVIDENCE

19. Aspects of the evidence were agreed by way of Admissions pursuant to s.34 of the ***Evidence Act*** (2021 Revision)[8]. These admissions are summarised in large measure below.

20. On the 11th August 2019 the sun set at 6:54 p.m. The moon rose at 4:16 p.m. and would have appeared in the sky at 7:44 p.m.[9] At the time of the collision there was a visible moon which provided lighting of at least 75%[10]. There were no clouds which would have blocked the lighting from the moon[11]. There were no weather issues, and the sea was calm.

21. At 11:03 p.m. the upturned vessel, the Pepper Jelly was located by the Police Marine Unit in the water at co-ordinates of N19 18.360 W81 19.781. Only the hull below the waterline was visible. The starboard engine was fully in the down position and the port engine was in the up position[12].

22. On the 12th August 2019 at 1:57 a.m., the lifeless body of John Turner was found lying on the Godfrey Hurricane[13]. At 12:27 p.m., on the said day, the lifeless body of Mr. Brown was recovered from the water at waypoint N19 18.377 W81 19.786 by Lamoure McDonald[14].

[8] Admissions were received as Exhibit 15 in the case.
[9] Admission 2
[10] Admissions 2 and 3.
[11] Admission 4
[12] Admission 6
[13] Admission 7
[14] Admission 9

23. Postmortem examinations on the bodies of Mr. Brown and Mr. Turner concluded that both died as a result of multiple blunt force injuries[15]. Toxicology reports indicated that each had very low blood alcohol readings. Mr. Brown had 35mg in 100ml and Mr. Turner had less than 10mg in 100 ml of blood. Urine drug screens were negative[16].

24. The medical evidence is that Ms. Wright was found to have suffered post traumatic deep brain injury, diffuse vascular injury and the more serious version of diffuse axonal injury[17].

25. Following recovery from the waters, on the 12th August 2019 both vessels were taken to the Joint Marine Base and secured[18].

26. Between the 12th August 2019 and 2nd September 2019 various underwater searches took place which recovered various items of debris and other items from the vessels[19].

27. The Police recovered footage from Closed Circuit Television cameras ("CCTV") at the Harbour House Marina showing the approach of the Pepper Jelly and the Godfrey Hurricane on the 11th August 2019. They also recovered footage from CCTV cameras at Camana Bay showing the Pepper Jelly in Camana Bay on the said day and footage from cameras at 431 Patricks Avenue showing the Godfrey Hurricane. Footage for the 12th August 2019 was recovered from the Harbour House CCTV cameras showing the recovered Pepper Jelly on that day. CCTV Storyboards were created summarising the relevant portions of the footages[20].

28. It is also admitted that on the 24th February 2022 at 7:15 a.m., Constable Stephen Reed, a Cyber Forensic Operative, created a zoomed version of the Harbour House CCTV footage showing the approach of the Pepper Jelly and the Godfrey Hurricane. The zoomed video file is Exhibit SR2[21].

[15] Admissions 21 and 22
[16] Admissions 23 and 24
[17] Admissions 19 and 20
[18] Admissions 8 and 10
[19] Admissions 11 to 18
[20] Admissions 36 to 40
[21] Admission 39

29. The CCTV footage which was obtained from the Harbour House Marina shows the lights of the two vessels travelling in the dark and what must have been the point of the collision when the lights were extinguished.

30. Global Positioning System ("GPS") data was obtained from the Pepper Jelly for the day of the incident. The GPS powered down shortly after 7:44 p.m. No GPS data was recovered from the Godfrey Hurricane.

31. Mr. Brown's cell phone WhatsApp profile last connected to the WhatsApp signal at 7:43 p.m.[22] Police Intelligence Analyst Joanne Delaney has regularly observed over a 12-year period, discrepancies of 45 seconds, in times recorded between the local Communication Service providers Flow and Digicel[23].

32. The vessels were examined by prosecution expert witness Patrick Michael Neal on the 25th August 2019 and by defence expert witness James Crawford on the 1st July 2021. Both issued reports with some major areas of disagreement which will be detailed below. While there are differences between the experts as to angles of impact of the two vessels, the GPS point of impact (whether at waypoint 862 or waypoint 863) and the movement of the Pepper Jelly after impact), the manner of the collision is that the Pepper Jelly passed over the hull of the Godfrey Hurricane and in doing so struck the three persons on board. There is visible damage from the propeller of the Pepper Jelly on the Godfrey Hurricane.

SUMMARY OF THE CASE FOR THE PROSECUTION AND THE DEFENCE

33. The prosecution's case is that the defendant caused the deaths of Mr. Turner and Mr. Brown by culpable negligence in the manner in which he piloted the vessel the Pepper Jelly. It is that he piloted the vessel at excessive and dangerous speeds when approaching the shore and the entrance to the Harbour House channel after sunset on the day in question and failed in his duty to pilot the vessel with reasonable care to avoid endangering the life of other persons. With respect to Count Three of the indictment it is that he navigated the vessel in a manner so rash or negligent

[22] Admission 5
[23] Admissions 51 and 52

as to endanger human life including the life of Shamilia Wright who was a passenger on board the Godfrey Hurricane.

34. It is accepted that the GPS data from the Pepper Jelly shows acceleration in speed minutes before the collision. It accelerated from 35 miles per hour ("mph") to 50 mph. The prosecution's case is that this was dangerous and excessive given the time of night, the proximity to the Channel and the amount of traffic expected to be on the waters at that time of the night.

35. The defence case is that the prosecution cannot prove that the Pepper Jelly was being operated at a dangerous or excessive speed. It had not yet entered the Channel and was a long way from the shore and the entrance to the Channel prior to and at the time of the collision. It was in open waters without speed limits and regard should be had to the actual traffic on the waters at the material time. It was a quiet night for boats. The defence case is that moreover the prosecution cannot prove that it was the speed of the vessel which caused the collision and the resulting injuries and deaths.

36. The defence case is that the evidence demonstrates that the defendant was not in breach of the relevant Rules as to collisions, that he took evasive action as is required and kept a proper look-out and that it was the operator of the Godfrey Hurricane who failed to abide by the Rules which required him to give way and to be properly lit. The defence expert gives his opinion that the failure to give way was the cause of the collision.

THE LEGAL PROVISIONS

37. Section 180 of the ***Penal Code***, provides that:

> *(1) "A person who, by an unlawful act or omission, causes the death of another person commits the offence of manslaughter.*
>
> *(2) An unlawful omission is an omission amounting to culpable negligence to discharge a duty tending to the preservation of life or health, whether such omission is or is not accompanied by an intention to cause death or bodily harm."*

38. Section 193 of the ***Code*** imposes a duty on persons in charge of dangerous things. It states:-

> *"It is the duty of every person who has in their charge or under their control anything, whether living or inanimate, and whether moving or stationary, of such a nature that, in the absence of precaution in its use or management, the life, safety or health of any person may be endangered, to use reasonable care and take reasonable precautions to avoid such danger; and that person is held to have caused any consequences which result to the life or health of any person by reason of any omission to perform that duty."*

39. Section 210 of the ***Code*** sets out the offence of reckless and negligent acts. It states:-

> *"A person who in a manner so rash or negligent as to endanger human life or safety —*
> ..
> *(b) navigates or takes part in the navigation or working of any vessel, hovercraft or aircraft;*
>
> *commits an offence."*

40. The ***Port Regulations*** (2018 Revision) provides in paragraph 2 that "collision regulations" means the international collision regulations having application to the Islands.

41. Regulation 22 relates to lights at night and states that vessels anchored, moored or maneuvering in the territorial water-ways of the Islands must at all times exhibit the lights required for their class by collision regulations.

42. Regulation 23 provides that boats within the limits of a port shall make way for ships under way and shall, between the hours of sunset and sunrise, exhibit the lights required for their class by collision regulations.

43. Regulation 30 (5) states:-

> *"Except in an area designated under regulation 146 as a watersports area and marked by buoys, no vessel shall exceed a speed of five knots when within two hundred yards of the shoreline."*

44. Regulation 31 (1) states:-

> *"(1) It is the duty of every person having control of a power boat within territorial waters —*

(a) so to navigate such boat as to avoid collision with or injury to every vessel or person present in, on or under the water in the area occupied by or disturbed by the said boat or the wash or wake thereof; and

(b) to navigate such boats with due care and consideration for other persons having regard to the prevailing conditions and the reasonable likelihood of other persons being present in or coming into the area occupied by such boat and the wash and wake thereof."

45. By Admission 50 it is agreed that the Port Authority compiled a booklet dealing with boating safety from the relevant laws and regulations of the Cayman Islands. The Port Authority's Boating Safety Booklet states that it is compiled with safety in mind with regards to the Marine environment. It includes extracts from the laws and the International Collision Regulations. Under general rules it states that no vessel shall exceed a speed of five knots when within two hundred yards of shore or when within fifty yards of any vessel at anchor.

46. Both parties referred the Court to the ***Convention on the International Regulations for Preventing Collisions at Sea 1972*** (Consolidated Edition 2018) and the annexed "Collision Rules". It was accepted that these are of long standing and are incorporated into the rules of the Cayman Islands. The referenced aspects of these Rules are set out below:-

"Rule 1 (a) *- These rules shall apply to all vessels upon the high seas and in all waters connected therewith navigable by seagoing vessels.*

Rule 2 - Responsibility
2(a) Nothing in these rules shall exonerate any vessel or the owner, marshal or crew thereof of the consequences of any neglect to comply with these rules or of the neglect of any precaution which may be required by the ordinary practice of seamen or by the special circumstances of the case.

Rule 5 - Look-out*.*
Every vessel shall at all times maintain a proper look-out by sight and hearing as well as by all available means appropriate in the prevailing circumstances and conditions so as to make a full appraisal of the situation and the risk of collision.

Rule 6 - Safe speed*.*
Every vessel shall at all times proceed at a safe speed so that she can take proper and effective action to avoid collision and be stopped within a distance appropriate to the prevailing circumstances and conditions."

The Rule sets out a series of factors among those to be taken into account in determining the safe speed. They are the state of visibility, the traffic density, the maneuverability of the vessel. At night, they include the presence of background lights such as from shore lights and then the state of the wind, the sea and current and the proximity of navigational hazards and the draft in relation to the available depth of water.

Rule 7 - Risk of Collision

(a) Every vessel shall use all available means appropriate to the prevailing circumstances and conditions to determine if risk of collision exists. If there is any doubt such risk shall be deemed to exist.

(b) Proper use shall be made of radar equipment if fitted and operational, including long-range scanning to obtain early warning of risk of collision and radar plotting or equivalent systematic observation of detected objects.

(c) Assumptions shall not be made on the basis of scanty information, especially scanty radar information.

(d) In determining if risk of collision exists the following considerations shall be among those taken into account: -

(i) Such risk shall be deemed to exist if the compass bearing of an approaching vessel does not appreciably change;

(ii) Such risk may sometimes exist even when an appreciable bearing change is evident, particularly when approaching a very large vessel or a tow or when approaching a vessel at close range.

Rule 8 - Action to Avoid Collision

(a) Any action to avoid collision shall be taken in accordance with the Rules of this Part and shall, if the circumstances of the case admit, be positive, made in ample time and with due regard to the observance of good seamanship.

(b) Any alteration of course and/or speed to avoid collision, shall, if the circumstances of the case admit, be large enough to be readily apparent to another vessel observing visually or by radar; a succession of small alterations of course and /or speed should be avoided.

(c) If there is sufficient sea room, alteration of course alone may be the most effective action to avoid a close-quarters situation provided that it is made in good time, is substantial and does not result in another close-quarters situation.

(d) Action taken to avoid collision with another vessel shall be such as to result in passing at a safe distance. The effectiveness of the action shall be carefully checked until the other vessel is finally past and clear.

(e) If necessary to avoid collision or allow more to assess the situation, a vessel shall slacken her speed or take all way off the stopping or reversing her means of propulsion.

Rule 14 - Head-on Situation

(a) When two power-driven vessels are meeting on reciprocal or nearly reciprocal courses so as to involve risk of collision each shall alter her course to starboard so that each shall pass on the port side of the other.

(b) Such a situation shall be deemed to exist when a vessel sees the other ahead or nearly ahead and by night she could see the masthead lights of the other in a line or nearly in a line and/or both sidelights and by day she observes the corresponding aspect of the other vessel.

(c) When a vessel is in any doubt as to whether such a situation exists she shall assume that it does exist and act accordingly.

Rule 15 - Crossing Situation

When two power-driven vessels are crossing so as to involve risk of collision, the vessel which has the other on her own starboard side shall keep out of the way and shall, if the circumstances of the case admit, avoid crossing ahead of the other vessel.

Rule 16 - Action by Give-way Vessel

Every vessel which is directed to keep out of the way of another vessel shall, so far as possible, take early and substantial action to keep well clear.

Rule 17 - Action by Stand-on Vessel

(a)

(i) Where one of two vessels is to keep out of the way the other shall keep her course and speed.

(ii) The latter vessel may however take action to avoid collision by her manoeuvre alone, as soon as it becomes apparent to her that the vessel required to keep out of the way is not taking appropriate action in compliance with these Rules.

(a) When, from any cause, the vessel required to keep her course and speed finds herself so close that collision cannot be avoided by the action of the give-way vessel alone, she shall take such action as will best aid to avoid collision.

(b) A power-driven vessel which takes action in a crossing situation in accordance with sub-paragraph (a)(ii) of this Rule to avoid collision with another power-driven vessel shall, if the circumstances of the case admit, not alter course to port for a vessel on her own port side.

(c) This Rule does not relieve the give-way vessel of her obligation to keep out of the way.

Rule 23 (d) (i)

A power-driven vessel of less than 12 metres in length may in lieu of the lights prescribed in paragraph (a) of this Rule exhibit an all-round white light and sidelights."

THE LEGAL ISSUES IN THE CASE

47. Both Counsel provided helpful authorities as to the legal principles in this case. The issues raised in the course of legal discussions were twofold. Firstly, whether the statutory position in the Cayman Islands is distinct from the common law position in England and Wales as is set out in more recent judgments. These appear to limit the circumstances in which a criminal charge of negligence could be proven to those in which a serious and obvious risk of *death* arose. Secondly, as to whether a separate element of foreseeability is required to be proven as distinct from a purely objective test of risk.

48. In the case of ***R. v. Percy Bateman***[24], the appeal of a doctor on a conviction for manslaughter was allowed. In discussing the distinction between civil and criminal negligence, the Court stated that however criminal negligence is described in order for criminal liability to be established the jury must find that the negligence of the accused "showed such disregard for the life and safety of others as to amount to a crime against the State and conduct deserving of punishment."

49. In the leading case of ***R. v. Adomako***[25] the House of Lords identified three questions in cases of manslaughter by negligence:-

1. Was there a breach of a duty of care towards the victim?
2. Did that breach cause the death of the victim?

[24] [1927] 19 Cr. App. R. 8
[25] [1985] A.C. 171

3. Whether the breach should be characterised as gross negligence and therefore a crime?

50. The Court held that the ordinary principles of the law of negligence applied and that applying the dicta in the cases of ***R. v. Bateman*** and ***Andrews v. DPP***[26] the third question was necessarily one of degree. Lord Mackay stated:-

> *"The essence of the matter which is supremely a jury question is whether having regard to the risk of death involved, the conduct of the defendant was so bad in all the circumstances as to amount in their judgment to a criminal act or omission."*

51. The Court noted that the defendant in that case was to be judged not by the standard of more skilled doctors but by the standard of a reasonably competent doctor.

52. In answering the question certified by the Court of Appeal, it was further stated that:-

> *"In cases of manslaughter by criminal negligence involving a breach of duty, it is a sufficient direction to the jury to adopt the gross negligence test set out by the Court of Appeal in the present case following Rex v. Bateman, 19 Cr. App. R. 8 and Andrews v. Director 189 of Public Prosecutions [1937] A.C. 576 and that it is not necessary to refer to the definition of recklessness in Reg. v. Lawrence [1982] A.C. 510, although it is perfectly open to the trial judge to use the word 'reckless' in its ordinary meaning as part of his exposition of the law if he deems it appropriate in the circumstances of the particular case."*

53. The House of Lords approved the test set out by the Court of Appeal with respect to gross negligence manslaughter which in part was as to the state of mind as follows:-

> *"However, in accordance with the authorities reviewed above and without purporting to give an exhaustive definition, we consider proof of any of the following states of mind in the defendant may properly lead a jury to make*
>
> *a finding of gross negligence:*
>
> - *(a) Indifference to an obvious risk of injury to health.*
> - *(b) Actual foresight of the risk coupled with the determination nevertheless to run it.*

[26] [1937 AC 576

> • *(c) An appreciation of the risk coupled with an intention to avoid it but also coupled with such a high degree of negligence in the attempted avoidance as the jury consider justifies conviction.*
> • *(d) Inattention or failure to advert to a serious risk which goes beyond "mere inadvertence" in respect of an obvious and important matter which the defendant's duty demanded he should address."*

54. The dicta in the case of ***Adomako*** was considered by the English Court of Appeal in the case of ***R. v. Evans***[27]. In this case the factual background concerned the supply of heroin by the defendant to the victim. The Appellate Court held that the existence or not of a duty of care was a question of law. If such a duty was in dispute the trial judge should first determine whether it would be open to a jury to so find. The jury should then be directed that if particular facts were established then a duty would arise.

55. In the case of ***R. v. Misra and Srivastava***[28], the English Court of Appeal applied the dicta in ***R. v. Adomako***. The Court dismissed the appeal of the appellants which sought to argue that the offence of gross negligence manslaughter lacked certainty and that the element of mens rea which was required for all serious offences was missing. The Court held that the requirement for gross negligence provided the mens rea for the offence. This was a question of fact rather than law as to whether the behaviour of the defendant was grossly negligent so as to amount to a crime.

This was expressed in the following way:-

> *"In gross negligence manslaughter the offence required, first, death resulting from a breach of duty; secondly, that in negligent breach of that duty, the victim was exposed by the defendant to the risk of death. It was clearly established that that requirement was not sufficiently satisfied by a risk of bodily injury or injury to health. Thirdly, it was required that the circumstances were so reprehensible as to amount to gross negligence. The burden on the prosecution went beyond proof of mere negligence giving rise to civil liability. The negligence had to be so bad, that if all the other ingredients of the offence were proved, it amounted to a crime and was punishable as such."*

56. In the more recent case of ***R. v. Kuddus***[29], the Court said that the scope of the duty is fact specific. The factual circumstances raised the question of foreseeability, it being accepted that there was no evidence that the defendant had been notified of the terms of the food order placed on behalf

[27] [2009] 2 Cr. App. R. 10
[28] [2005] 1 Cr. App. R. 21
[29] [2019] 2 Cr. App. R. 16

of the victim. That order included the words nuts and prawns in the comments section. The meal which was prepared in part by the Appellant contained nuts which lead to a severe allergic reaction on the part of the victim and subsequently her death. The Court said that proof of gross negligence manslaughter did not depend on the particular circumstances of the specific victim as to whether she was mildly or seriously allergic. Where this is in issue, the question whether the breach gave rise objectively to a serious and obvious risk of death to the class of people owed a duty by the defendants, the Court said the principle which could be traced through the authorities starting with ***Adomako*** is that:-

> *"The criminal law, however, requires that a reasonably prudent person possessed of the information known to the defendant would have foreseen that the defendant's actions or omissions constituting the breach of duty had exposed the deceased to an "obvious and serious" risk of death."*

57. It was also stated:-

> *"What can be foreseen by a reasonably prudent person, along with the existence and seriousness of risk of death must be determined at the time of [the] breach of duty."*
> *...*
> *"In any case of gross negligence manslaughter there is, by definition, a risk of death, because it must be proved that the defendant's breach caused the death of the victim. Whether the risk of death was obvious is also a question of fact. It is important in two related contexts: first, whether the risk would be foreseen by a prudent person standing in the shoes of the defendant; and, secondly, for the jury to take into account when considering whether the defendant's breach was so serious that it should be regarded as criminal. The seriousness of the risk of death, as an objective fact, is itself a question of fact and is distinct from the question whether a reasonable person in the defendant's position should have foreseen that the risk was serious (and obvious). As we have said, each of these objective facts is distinct from the question of foreseeability that was in issue in Rose (Honey) and Zaman: put simply, you cannot foresee something that does not exist."*

58. In considering the particular case before it, the Court stated:-

> *"To put it more generally, if a reasonable person possessed of the knowledge available to the defendant would have foreseen only a chance that the risk of death might arise, that is not enough to justify a conviction of gross negligence manslaughter. What is required is that the reasonable person would have foreseen an obvious and serious risk of death."*

59. In the instant case the prosecution submitted that the statutory offence in the ***Penal Code*** is intended to apply to both unlawful act manslaughter and manslaughter by omission and that the analysis in ***R. v. Evans*** applies equally to both types of offences.

60. It is also submitted that there is no distinction between the word culpable in the ***Penal Code*** and the word gross as used in the case of ***Adomako***. Counsel notes that in the earlier case of ***Bateman*** the terms are used together. Defence Counsel agrees with this submission that the words are interchangeable. The basis for the agreement is said not only to be the words of the English Court of Appeal in ***Bateman*** which were expressly approved in ***Adomako*** but also research in other jurisdictions with the same statutory formulation as that in the Cayman Islands.

61. There is agreement that the issue to be determined in this case both under s.180 and as per the common law authorities cited in ***Adomako*** is whether the negligence is gross or culpable and therefore criminal.

62. Prosecuting Counsel's primary submission is that foreseeability was not an element of the common law offence of manslaughter by gross negligence in 1975 at the time that s.181 was promulgated. Counsel submits that in the discussions of the Court in the case of ***Adomako,*** both at the Court of Appeal (Lord Taylor of Gosforth) and in the House of Lords (Lord Mackay), the definition of the potential states of gross negligence did not include foreseeability as a distinct element of the common law offence. This distinct element has been developed in the more recent decisions of the Court of Appeal of England and Wales. Counsel argues that for the Cayman Islands, the position is and remains one of a purely objective test of risk. It is the foresight of the notional reasonable prudent person and "potential gross negligence or omission of an obvious and important matter which the defendant's duty demanded he should address."

63. Counsel submitted that the:-

> *"requirement for an objective assessment that the breach of duty must expose the victim to a serious obvious risk of death as distinct from a risk of death or other physical injury postdates the statutory offence."*

64. Counsel points out that while the common law position is now settled, the statutory position in the Cayman Islands is that culpable negligence is defined as an omission to discharge a duty tending to the preservation of life and health. This wording has not been amended by Parliament. Given the existing wording, culpable negligence in the Cayman Islands is not limited to a duty to preserve life. Counsel submits that it is therefore not arguable that the offence requires foresight of an obvious and serious risk of death and that the offence in the Cayman Islands ***Penal Code*** is gross negligence "by way of neglect or omissions of an obvious and important matter which his duty demanded that he should address".

65. The case for the prosecution is that objectively viewed there was a serious and obvious risk of death in this case but that in light of the wording of s.180, it would be open to the Court to convict on the basis of:-

- Indifference to an obvious risk of injury to *health*;
- Inattention to or failure to advert to a serious risk of injury to health which goes beyond mere inadvertence in respect of an obvious and important matter which the defendant's duty demanded he should address.

DEFENCE SUBMISSIONS ON LAW

66. The defence submit that research indicates that the wording of s.180 of the ***Penal Code*** is contained in many former British Territories. The earliest identified by the research is the ***Penal Code*** of Tanzania (1945). Their submission is that by virtue of s.180 there are five elements to the offence of Gross Manslaughter. These are duty of care, breach of duty, causation, degree of negligence and tending to the preservation of life or health.

67. In respect of the first element, the defence say that there is no issue that the defendant as the operator of a vessel in Cayman waters owed a duty of care to other vessels and their occupants.

68. As to breach of duty, this says the defence requires an objective test which is whether the defendant acted as a reasonable person would have done had they been in his position. As to

causation, proof is required that an established breach of duty must have caused the death. In the cited case of ***R. v. Cheshire***[30], the English Court of Appeal applied the dicta in the case of ***R. v. Smith***[31]. The Court held that a defendants' acts need not be the sole or main cause of the death of the victim. It is sufficient that they contributed significantly to the death.

69. The prosecution refers to Archbold paragraph 19-6[32] and points out that the word "significantly" means no more than *de minimis*. (See ***R. v Henningan***[33]*.)*

70. On the issue of tending to the preservation of life or health, the defence accept that as the prosecution points out there appears to be a difference between the statutory position in the Cayman Islands and the English common law. The latter requires an objective assessment as to whether the breach of duty exposed the victim to a "serious and obvious risk of death." Defence counsel points out that the statutory provision also appears to be different from the test set out in ***R. v. Bateman*** which referred to life and safety. It is submitted however that even if all that is required is a risk to health as opposed to death, then in line with the principles discussed in ***Adomako*** that risk must be both obvious and serious. It is further submitted that the question, whether the risk was obvious and serious and whether the breach of duty tended to the preservation of life or health requires an objective assessment taking into account the information available to the defendant at the time of the breach of duty. (See ***Kuddus v. the Queen.***)

ELEMENTS OF THE OFFENCES

71. Having considered the law, authorities and the submissions the following are the elements of the offence of Manslaughter which must be proven to the required standard by the prosecution:-

(i) The defendant owed a duty of care to the deceased.

(ii) The defendant negligently breached that duty.

(iii) The breach gave rise to an obvious and serious risk of death or injury to health. This is an objective question.

[30] [1991] 1 WLR 844
[31] [1959] 2 Q.B. 35
[32] 2022 Edition
[33] [1971] 55 Cr. App. R. 262

(iv) It was reasonably foreseeable that the breach gave rise to an obvious and serious risk of death or injury to health.

(v) The breach caused (or made a significant contribution) to the death of the deceased.

(vi) The circumstances of the breach were so exceptionally bad as to amount to culpable negligence and requires criminal sanction.

72. With respect to Count Three, they are that the defendant navigated the vessel the Pepper Jelly and that he did so in a manner which was so rash or negligent as to endanger human life or safety.

INTERNATIONAL COLLISION REGULATIONS

73. The position of the prosecution is that the International Collision Regulations are not of primacy in determining the guilt of the defendant as such Regulations would be were this a civil trial. The submission is that the matters which are of direct relevance are the keeping of a proper look-out and maintaining a safe speed which in the context of this case are no more than would be involved in exercising reasonable care and attention. The prosecution's case is that the culpable negligence of the defendant's was a substantial cause of the deaths of Mr. Turner and Mr. Brown.

74. Nevertheless, the Prosecution points to the fact that under those Regulations the defendant's vessel was the stand-on vessel. It was therefore required by those Regulations to maintain course and speed. The Defendant did not do so.

75. The speed at which he operated the vessel was at a time when the Godfrey Hurricane would have been within his sight had he been keeping a proper look-out. There were also changes in speed. It is noted that in his interview the Defendant specifically states that he had not seen the Godfrey Hurricane and that 40 mph would not have been a safe speed for the North Sound.

76. By reference to Rule 11 of the ***Collision Regulations*** the prosecution says that risk of collision existed in that the Rules apply to vessels within sight of one another and that by Rule 3 (k), "vessels shall be deemed to be in sight of one another only when one can be observed visually from the other".

77. Counsel points out that the Rules have been described by Courts as rules not only to prevent collisions but to prevent the risk of collision and for safe navigation at sea. Counsel has drawn to the Court's attention, the cases of ***The Beryl***[34], ***The Bellanoch***[35] and ***The Gulf of the Suez***[36]**,** and to the statements made in the latter case that to involve risk of collision means a period before the risk of collision has matured, meaning the period at which it is probable that there will be a risk of collision if precautions are not taken.

78. The defence position on the ***International Collision Regulations*** is that they apply to watercraft in the Cayman Islands and are directly relevant to the Court's assessment of the elements of the offence. Counsel submits that they are relevant to a determination whether or not the defendant acted as a reasonable prudent person. They are also important to the issue of causation in relation to the actions of the operator of the Godfrey Hurricane.

EVIDENCE AT TRIAL - THE CASE FOR THE PROSECUTION

EVIDENCE OF JOSHUA HILL

79. Joshua Hill testified that he is the brother of Joel, Jeremy, Luke and William. He knows the defendant in this case. In 2019 his brothers were closer to the defendant than he was in particular his brother Jeremy. Mr. Hill said that he had been on the Pepper Jelly before August 2019 on three or four occasions.

80. On Sunday August 11, 2019, he arranged a boat ride for himself and Stephanie Hicks through his brother. He went with Ms. Hicks to the defendant's home. The defendant lives at the top of Prospect Road. They got on the boat, and it was a regular boat ride to Camana Bay where they were to pick up some people and then go on to Rum Point.

81. He was asked about the speed the boat operated at and he said that he did not recollect the speed. Most boats that he goes on are pretty fast. At Camana Bay a few girls came on board. He said that he is pretty sure that he was drinking rum. He had bought a bottle .75 of rum. Stephanie Hicks had probably bought alcohol. He did not see any alcohol bought by the defendant. He said

[34] [1884] 9 PD 137
[35] [1907] PD 170
[36] [1921] P.D. 318

that he was drinking while waiting for the girls to come on the boat at Camana Bay. Stephanie Hicks was drinking as were the girls who came on board.

82. From that first trip, they went directly to Rum Point. There were many boats there. He saw his brother Jeremy and quite a few other friends with boats. He fixed himself a drink, got off the boat at the Sand Bar and went around to other boats. He conversed with people that he knew. He was briefly with the defendant but not throughout the day.

83. There was a second visit to Camana Bay when the boat left to go and pick up Victor at Camana Bay. The trip back to Rum Point was nothing spectacular. It was a normal drive and speed from Camana Bay. He said that usually on a calm day, it is full throttle for just about any boat on the North Sound. He has been around boats for a while. As long as there is a clear path and you feel safe, you can go as fast as the boat is willing.

84. After returning, they stayed at Rum Point that time until almost sunset. They could still see the boat pretty clearly. They went straight back to Camana Bay. He said that he assumes that Mr. McDonald was going at top speed as fast as the boat can go. He assumed that because they were going pretty fast. He did not see whether he had his GPS on. He was not looking.

85. He was shown his witness statement dated 12th September 2019 and identified his signature on it. He said that his memory would be better then than now. He said that he was on the way back at end of the day and he was definitely drunk. He was over the seven units of drink which is when his comprehension would be affected. He was at that point. Stephanie Hicks was definitely 'black out drunk'. He knew that she was drunk from before the crash. He was concerned about her and about making sure she was okay. He said that it is not his recollection now that everyone else was drinking at that point. He does not think that he recollected properly at the time he gave the statement. He was not giving them drinks and they were not showing him what was in their drink. He was asked about his statement:

> *"Q: Well, you tell us. Have a look at the sentence before, perhaps for the record I should read it out aloud. I had a few drinks at this point. I was intoxicated but I wasn't drunk to the point of forgetting things. I'm sure everyone else was drinking at this point?*
> *Ans: That would have been true. That would be true, yes."*

86. For the third trip on the Pepper Jelly, he does not know the speed it was at or whether the speed was appropriate or inappropriate. He would say that the speed was fine.

87. He was shown his witness statement again and he said it does refresh his memory. He said that he recollects going down the Channel to Camana Bay with people to drop off. The speed of the vessel probably would have been over the limit. There was a wake behind them, usually in a no wake zone, you are not supposed to have water.

88. He said that everybody got dropped off at Camana Bay except the three of them, himself, Stephanie Hicks and the defendant. He wanted to go home. He believed that the boat was going to go back to the home of the defendant. He was at the back right of the boat. Ms. Hicks was near to the helm, standing beside the defendant. His impression was that the speed of the boat was a regular safe speed for him. He recollects that there were lights on the shore side and then being flung out of the boat into the air and splashing in the water.

89. He said that if he had been driving the boat he would have been going at that speed. They were probably going 40-45 mph. He was drunk and did not have a speedometer in front of him. It was extremely calm that night. It was dark when the impact happened. There were lights from the Harbour House Marina but they were not enough for him to see everything. The crunch was in front of them, where the Marina was. The Marina was to the right. The closest point to them would have been west of the Marina.

90. He identified and marked on Image 8 the canal adjacent to the Marina where they swam up to the wall. When he came up from the water, he saw Ms. Hicks four to five feet away from him. He then saw a shape come from his left side. The defendant swam towards them, and he asked the defendant what happened. He said that he did not know. He said that he thought it was another boat that hit them and ran away. They grabbed on to a cooler to swim to shore. The defendant said that he did not want to come with them because his leg was hurting. He did come with them on a buoy, and they made their way towards the canal entrance.

91. They swam for quite a while before reaching the sea wall of the canal and he dragged the defendant up onto the wall as well. That is where they saw the palm tree. He, and Stephanie Hicks knocked on a door to try to call for her father. He remembers a guy who was Alfred. He

was referred to his statement. He said that his recollection was that the defendant was hurt. He was complaining about his leg. He said he remembers things differently. He can remember asking the defendant if he wanted the ambulance and he said, no. He cannot remember when in the sequence of events this happened. Once the defendant said that he did not want an ambulance, he just said, "*Send back for me when you leave, when you've sorted everything out"*. He said that he cannot recall if the defendant told him not to call the Police.

92. He said that his impression at that time was that the collision was with another boat and that the boat had hit them and run off. He was not angry, but he was frustrated. Stephanie Hicks was not safe.

93. They did not get through to Ms. Hicks' father. The two of them left Mr. Alfred's home and went to another apartment from which he called his own father. He was unable to help. Mr. Alfred came there and took them to Ms. Hicks' father's house. He did not tell the defendant who was still on the dock of the canal. He was at the Hicks' home for about an hour. He received assistance from his younger brother Luke, and they went to pick up the defendant and dropped him off at his home.

94. The next morning he and others went to Harbour House Marina. He went there to get his bag from the boat. It was obvious where the boat would be going if it was recovered. They did not know for sure that it had been recovered until they pulled into Harbour House Marina. He did see the defendant that morning. Before they went to Harbour House Marina, they stopped at the defendant's house first. It was himself and his friend 'Greggy' and possibly others.

95. He was shown various stills from the CCTV footage and identified himself and others at the Marina that morning. He said that his brother Jeremy retrieved his bag from the boat. After being handed his bag he left to go on with his day.

CROSS-EXAMINATION OF JOSHUA HILL

96. Joshua Hill was cross-examined, and he said that he owns a family boat. He used to operate it quite a bit, almost every weekend for a year after he returned from the United Kingdom. He operated it often in the North Sound. On Sundays, he took it to Rum Point

in the night time after dark. The vessel has lights which he would turn on after dark. It is a cabin 21-foot, mercury 200 single horse power, and it goes 40-45-50 mph. He did sometimes operate it at 50 mph in the Sound and considers that he did so safely.

97. He said that the defendant was operating the boat on the third trip to Harbour House Marina. He cannot recall if the boat had red and green lights. He can recall the all-round white light being on because that was the only way he could see him. He cannot say if it was on before the crash.

98. To him the defendant appeared sober and to be in control of the vessel prior to the crash. The defendant appeared to be travelling at what he regards as a safe speed. In terms of traffic, it was very quiet before the collision. He said that he did not see who hit them. After the collision he saw the shape of a boat. He did not see anyone operating the boat. He was not looking for lights. His initial thought was that this was a hit and run and it looked like the boat was being driven away. He did not see anybody else in the water. He had no reason to think anyone else was hurt. He said that he does not know where the buoy and bumper came from. When he collected the defendant out of the water, he tried to call 911 and police information. He told the person who answered that another vessel was involved in the collision, that it is night and there had been a hit and run.

99. In re-examination he said that he was angry about it being a hit and run. He regrets that when he learnt what happened. He cannot recall when he knew that it was a tragedy on the other boat.

100. There were inconsistencies between the account given in his witness statement and in his evidence at trial. Some of these appeared to be material, in particular as to the persons who were consuming alcohol at the time.

EVIDENCE OF WITNESS ALFRED TWENEBOAH

101. The next witness was Alfred Tweneboah. He testified that on the 11th August 2019, he lived at Harbour Point, at an address in Prospect. He was shown Image 8, and he said he lives right on the water opposite Harbour House Marina in the canal.

102. At about 9:05 p.m. at night, he heard a knock on his door. When he opened the door, there was a young woman there. She was wet and looked to be in a state of shock and distress. When he first opened the door, she was the only person he saw. She said that their boat had broken down and could she make a phone call. He asked her to come in. She came just inside the front door where he takes off his shoes and she stood there. He gave her the phone on speaker and the call did not connect. Then there was another knock on the door. The door had been closed behind her. He opened the door, and a gentleman was there. He remembered he spoke to him more than she did. He did not know their names. The name that he got was Big Josh. He asked the gentleman if he wanted a light and he said, no, just a towel. He asked for a towel for someone else and after he received it, he went outside to the right side where there is the dock, which made him think that there was something happening.

103. Mr. Tweneboah said that he went outside to the dock after he gave the towel to Josh and that is when he saw a third person. The person was on the dock lying down on his own. He had the towel underneath his head. Mr. Tweneboah asked him if he was okay and where the others were. He seemed exhausted. He said he was okay. He told Mr. Tweneboah they had swam in, that is, the three of them. When asked, he said that his name was Sean and that the other two were gone to get help.

104. Mr. Tweneboah said that he walked to the entrance of the building, and he could see the other two were just getting to the top of the road. He got the keys to his car and drove towards them. They had gone to the house at the top of the road. He offered them a lift if they needed to go anywhere and drove them to the home of one of them. When he returned to his own home, he saw Sean who was still on the dock and told him what he had done and that they said they would be coming back for him. He went back into the house and an hour later, Josh returned his towel. Subsequently he was contacted by the Police.

CROSS-EXAMINATION OF ALFRED TWENEBOAH

105. Mr. Tweneboah was cross-examined and he said that Josh asked if they could have a lift. Josh and the young lady appeared wet and both appeared in shock, more so her than him. When he first spoke to Sean he appeared to be exhausted.

106. Following the witness refreshing his memory, he said that he thinks it was he who asked Sean where the others were and he said, they have gone to get help. When he saw Sean for the final time, he told him that his friends were coming back for him.

EVIDENCE OF JOHN BRIGGS

107. The witness John Briggs provided evidence of the recovery of the bodies and the vessels. He testified that he is a boat yard manager at Harbour House Marina, and he was employed in this capacity in August 2019. On Sunday, 11th August 2019, at about 10:30 p.m., he was at home when he received a phone call. He went to see what was happening and met Inspector Yearwood at the Marina. At that stage, he understood that a boat had struck a channel marker or another boat and had overturned in the sea. Over the course of the following hour, he helped as debriefing was being received by the Police and Fire Department boats. The crews of the Police boat, the Typhoon, were sending pictures to Inspector Yearwood. Mr. Briggs also learnt that an overturned vessel was found in the Sound and some of the pictures were sent of the Pepper Jelly. When he saw the pictures, he realised that it was the Pepper Jelly which was known to him. It was owned and operated by Sean McDonald. He told Inspector Yearwood that the boat stays across from his own house on the canal, so he sees it every day when it is there.

108. At 12:30 a.m., Mr. Briggs was contacted by Superintendent Brad Ebanks to tow the Pepper Jelly to the Harbour House Marina and salvage it. Mr. Briggs, David, and his son Christopher Alberga went out in a vessel from Harbour House Marina. At about 1:00 a.m., they arrived at the location where Pepper Jelly was in the North Sound. It was just an overturned vessel at that time. They towed it in to just outside the north slip at Harbour House Marina to leave it there until daylight when he could continue to salvage it.

109. While towing it, he got a message that a vessel was overdue with three persons on board. A short time after that he was told that the Police had found the missing vessel up against the sea wall. At 2:40 a.m., he proceeded to where he saw the Police helicopter. When he got there, the boat was against the sea wall and it was badly damaged. The body of a man was lying on the port side. He stayed there in order to offer any assistance. There came a point where he could see that the boat was beginning to sink. He was instructed to pump out the water and keep it afloat.

This was about 15 minutes after arriving at the location. While pumping it out he decided to take it to the dock, 30-40 feet away, so that the bodies could be recovered and be removed by ambulance. Inspector Yearwood told him to take it to the Harbour House Marina. He physically tipped it to the side of his boat. He kept using the pumps. At 4:15 a.m., he arrived at Harbour House Marina. It was a slow journey so as not to lose the vessel.

110. At 8:30 a.m., that morning on the 12th of August, after he went home and slept, he restarted the salvage of the Pepper Jelly. He inspected it at that time. Charles Ebanks is a member of the Salvage Team and is also a diver. The two of them pulled it in closer to the end of the slip way. He tied a hose on to it to try to turn it. He asked his manager, Jonathan Cox to take photographs of it. As the Pepper Jelly was righted, he noticed the throttles. He personally saw that the throttles were wide open. A photograph of this was shown to the witness, and he said that this is what he saw. He said that they did not touch anything and did not touch the throttles. He took some photographs, and he thinks Jonathan took some.

111. Charles Ebanks and himself, boarded the vessel to pump out the water. Some of that would have involved moving the throttle. The photographs were taken when they first righted the vessel. Once it was righted, they de-watered it, that is, by pumping it out and then took it around to the trailer slip.

112. He said that he recognized Jeremy Hill who he knows, came up to the trailer slip. Mr. Hill went on to the vessel and took two back packs off. He talked to him briefly and he left. He also saw Joshua Hill and there was another female with him.

113. He said that he and Charles had to isolate the electricals and turn the batteries off on the Pepper Jelly. There was smoke coming from the left side over the back end of it.

114. The Police were not there right away but they finally showed up about 10:30 a.m., that morning. Charles Ebanks and Trent Jackson left Harbour House Marina on board the vessel, Mr. Moore Two. He went in his own boat, Ellie B. They got to where the Pepper Jelly had been recovered in the North Sound and placed a marker there. They knew the GPS location and gave it to other

boats who were also searching for the body of the missing person. Other workers from Harbour House Marina also joined the search.

115. Just after midday, he received information that they had found the body of the missing person. At about 12:30 p.m., he joined the others where they had found the body. His boat assisted in bringing up the body. The body was placed on his boat. The body had on a red long-sleeved shirt. He took the body to the Marine Base. About 12:40 p.m., the body was removed from his boat by the ambulance crew.

CROSS-EXAMINATION OF JOHN BRIGGS

116. The witness was cross-examined, and he said that he knew Sean McDonald before the incident. He lived across the canal from him, and the Pepper Jelly would be docked there.

117. He said that he knows that Jeremy Hill would sometimes captain the Pepper Jelly. He would see them come to Harbour House Marina for supplies. He would see them leave and come back on a regular basis.

118. When he observed the Pepper Jelly, it was always displaying its lights. It had LED lights which are very bright lights, and they never malfunction. They flicker on and off. The Pepper Jelly's speed in the canal was always appropriate.

EVIDENCE OF NEVRON BRADSHAW

119. DC Nevron Bradshaw testified that he first spoke to the defendant on the 15th August 2019 at the George Town Police Station. The defendant had already made previous contact with the Police on 12th August 2019. He attended the Police Station in the morning and would have spoken to an Officer who would have recorded a statement from him. When he saw the defendant on the 15th August, he saw that he was walking with a pair of crutches. The defendant said that this was due to injuries which he sustained during the collision.

120. On Monday the 26th August 2019 he and PC Clarke interviewed the defendant. This was a voluntary interview conducted under caution at the Police detention facility in the presence of the defendant's attorney. The interview was received in evidence as **Exhibit 13.**

INTERVIEW OF DEFENDANT

121. In the interview the defendant confirmed that he is the owner of Pepper Jelly which was involved in the accident. He said that he had the vessel for a year. He had bought it from a person in West Bay in order to start a charter company. When he bought it, it was in good working order. It is a 2018 Suzuki vessel with twin 300 horsepower engines. He said that it is a Scarab and was pretty fast. It is meant to go fast. Based on a lot of his tours and the fact that it is a nice fast boat, people like to go fast. Asked about the top speed of it, he said that it will probably do about 42 mph an hour on a good day depending on whether there are a lot of people in it, weather, and sea conditions.

122. He said that once you go faster than 42 it starts to get scary so that there is no reason to have a boat that does anything more than that.

123. He said that the boat was equipped with proper navigation lights as per the Port Authority Law and he was not aware of any mechanical issues with it. He had insurance for the liability of his customers which was current at the time of the incident and the boat was equipped with all the safety equipment required by the Port Authority. As is, without refitting the engine, the boat's maximum speed that it is capable of is 40-42 mph which is about 5000 RPMS.

124. He said that he had been the captain of the boat for the past year that he had owned it. He said that he has no formal qualifications as a boat captain. These are not required in the Cayman Islands. He has experience. He has been a boat captain for fifteen years with the total years' experience on the water of thirty-one years. Almost his entire life has been about or around the water. He has thirty-one years' experience in Cayman waters. He is pretty familiar with the North Sound, meaning that he has been navigating them for most of his life.

125. He was asked about the North Sound in relation to boat traffic density particularly on a Sunday night and said this:-

> *"Ans: On Sunday nights… usually around dark there's lost if boats going back home.*
>
> *Q: When you say lots?*
> *Ans: Well, at Rum Point. It could be ten, it could be fifty, it could be a hundred.*
> *…*
> *It depends how many people at Rum Point on a Sunday."*[37]

126. He said that he employs Jeremy Ebanks who is the brother of Joshua Ebanks. Joshua was on his boat at the time of the incident.

127. He said that he believes that he is familiar with the rules to prevent collision at sea as adopted by the Port Authority Law.

128. He said that on the 11th August 2019 he left home at about 1:00 p.m. He travelled on the boat to Camana Bay and waited there for a while for some people. He went to Rum Point and returned to Camana Bay to pick up a gentleman, Victor and then went back to Rum Point. He stayed at Rum Point until just before dark. He then went to Camana Bay and dropped everyone off except Joshua and Stephanie. It was about forty minutes before dark when he left Rum Point that last time. He arrived in Camana Bay half an hour or forty minutes after that. He was on his way home when the incident happened. Joshua and Stephanie were going to his house.

129. He drew a sketch showing his house in Omega Drive, the Camana Bay Channel and the start of the Harbour House Channel.

130. He said that he had lights illuminated on the boat during the trip. He had the bow or red and green navigation lights and the anchor light is very bright. It illuminates the whole deck.

131. He was in front of the steering wheel, Stephanie was standing next to him and Josh was sitting in the back. Stephanie was up and watched for buoys. There are lots of buoys so they were both watching constantly. He was asked:-

> *"Q: What was lighting like in the North Sound?*

[37] Trial Bundle, page 164

Ans: It was pretty dark. Very-very calm but it was kind of dark."[38]

132. He was asked about his responsibility while operating a vessel at night. He said:-

> *"…you just have to have all the relevant lights on and be watching, be attentively watching your surroundings. Don't operate ay excessive speeds as usually and it it's pretty much the same in the daytime except you have the lights really."*[39]

He said that there might be a visibility issue at night, so he makes sure the running light is brighter and that it illuminates the deck, so the deck is bright too and it is not just one little light.

133. He said that, that night was 'pretty dark'. He does not know what his GPS bearing was when he left Camana Bay. He tends not to use his GPS because he knows the waters. He knows what the whole shoreline looks like and knows where everything is. Usually if you look down at the GPS your eyes are not adjusted as much to the darkness, so it is harder to see after you look down. So, he tends not to look at it often because usually he does not have or need to.

134. He was asked about his speed of travel and gave the following responses:-

> *"Q: And what was your speed whilst travelling towards the.. Harbour House Channel*
>
> *Ans: …the boat was just on a plane so like I said—twenty/going twenty five because if the boat is on a plane the bow is… high so you can't see above the bow so it's harder to see so the boat was just on a plane, so it was flat…"*

He said power is required to get the boat on a plane, with nobody on board it's going twenty - three to twenty -six miles an hour and then he said this:-

> *"And I usually don't go any faster that I have to at night because there's a lot of buoys and a lot of other crafts to possibly hit, so I always stick to …at nighttime…"*[40]

135. He said that he asked Stephanie to help him to look out for buoys. He did see a couple in the distance, but he avoided them. Sometimes you can see the silhouettes along the shoreline, or you

[38] Trial Bundle, page 178
[39] Trial Bundle, page 179
[40] Trial Bundle, page 180-181

can see the glare from the buoy. The Harbour House Channel has markers that are illuminated so that you can see them from far away, they are navigational buoys. There are other buoys that you can't see while you are out there like anchor buoys and fish pots so that is why you have to watch out for them. He could see the Harbour House buoys from the Camana Bay Channel.

136. He said that he did not collide with the vessel, the vessel collided with him, it just came out of nowhere. When he saw it, it was five feet from him coming full speed like it was just a flash. He did not see it before it happened, it was on his port side. He thinks it had two colors like blue and white and he did not see any lights. His speed at the time was on a plane so probably about 20/25 mph. His throttle was more than a quarter but less than half. It all happened very fast. He realised a collision was imminent at five feet away. The boat hit him right in the rear behind where he was sitting, He does not know what happened exactly because it all happened very fast. He just remembers being in the water. He does not think he had time to take any evasive action.

137. He said that he was almost positive they did not have any lights on. The other boat was going so fast and just came out of nowhere. He was attentively watching and if it was in front of him, he would have seen it and would not have missed it. If it was anywhere at an angle that he could have seen it if they had lights on[41].

138. He said that he realised that his boat flipped when he woke up in the water. When he left Camana Bay Channel and was on route to Harbour House Marina Channel he does not remember observing any other vessels in the vicinity. There may have been one or two other anchor lights at Rum Point. There may have been a sailboat in the distance but nothing close to him. When he was midway to his intended destination, he does not think that he saw any signs of any other vessel within his near or far range.

139. He said that he had a broken leg after the incident and was in a lot of pain. He swam for about two hours to get back to shore and the other two persons went to get help. They went to try and get a phone to contact the Police and Stephanie's parents. He did call the Police using someone's phone and got an answering machine, so he went down to the Police station.

[41] Trial Bundle, page 188

140. He said that he only had one drink at 3:00 p.m., that afternoon. He does not usually consume alcohol when taking a trip because it is representing the company and that day, he had a possible investor on the boat. He said also that usually he has to take care of all the people that had a few drinks. He was sober at the time and was not under the influence of anything.

141. The defendant was interviewed on a subsequent occasion on 18th October 2019. He was again represented by his attorney and was cautioned. He exercised his legal right and answered no comment to the questions asked of him.

WITNESS STATEMENTS READ

142. The statements of eleven witnesses were read by agreement pursuant to the ***Evidence Act*** and are summarised briefly below.

1. ***Charles Ebanks- undated, dated 6th September 2019 and 13th September 2019***

143. Charles Ebanks stated that on Monday the 12th August 2019, he received a phone call from Chris Briggs and went to assist with the salvaging of the Pepper Jelly. They went out to the vessel where it was in the sea. Mr. Ebanks said that when he "dove the vessel", he saw that the ignition switch was in the on position and the throttles were in the "full ahead" position. He reminded Mr. Briggs to take pictures of this. He and Mr. Briggs righted the vessel, and he boarded it to open the hatches in the floor in order to pump the water out. At no time did any member of the salvage team touch any of the controls. After the vessel was pumped out it was stowed to Harbour House Marina in order to be placed on the Marine Police trailer.

144. He said that while waiting for the trailer to arrive, he saw smoke coming out of the port engine of the Pepper Jelly. He sprayed it with water and Mr. Briggs turned off the battery switches. While they continued to wait, five persons came to the trailer ramp, one female and four males. Two of the males went on board the Pepper Jelly. One male took off two backpacks and the other male turned off the ignition switch key and moved the throttles from the full ahead or full throttle position to neutral. He told the men that they should not be on board the vessel. When the Police came there the five persons moved away from the vessel. Mr. Ebanks said that he and Mr. Briggs

and another person then left there to assist with the search at sea. He was present when the body of Mr. Brown was found and assisted with removal from the water.

2. ***Sonia Ferrari - dated 13th August 2019***

145. Sonia Ferrari is the daughter of John Turner. She states that he was seventy years old and semi-retired. He was friends and in business with Mr. Brown. Together they operated the "Jungle Gym" which is a boat that had been located at Star Fish Point. On the day in question her father was with Mr. Brown, Shamilia Wright and others at Star Fish Point. They were working on getting out some diesel fuel, which had been accidentally placed into a Jet Ski belonging to Mr. Turner. She last saw him at the Kaibo ramp where the Jet Ski was placed on a trailer. Attempts to contact him by phone at 7:36 p.m., 7:37 p.m., and thereafter were unsuccessful. There was no answer to her calls. Following further checks at various places she received certain information from the Police.

3. ***Alan McKay – dated 15th August 2019 – edited***

146. Alan McKay is a Conservation Officer for the Department of Environment. He was at Star Fish Point at about 4:30 p.m., in the afternoon of the 11th August 2019. He saw Mr. Brown and Mr. Turner as they worked on the Jet Ski. He left them there at about 5:30 p.m. He returned to the area at about 6:30 p.m.

4. ***Mark Ferrari - dated 20th August 2019 and 26th August 2019***

147. Mark Ferrari is the son-in-law of John Turner. He says that at around 7:25 p.m., that day he went to Kaibo ramp with Sonia to collect the Jet Ski which was placed on a trailer. He last saw Mr. Brown, Mr. Tuner and Ms. Wright at that time. They were in the boat. The weather was good, visibility was good and the sea was very calm. They drove from there to their home, unhitched the trailer with the Jet Ski and left home for an outing. At about 11:20 p.m., they returned home to find that Mr. Turner had not been home. Mr. Ferrari made various searches for him until having followed an ambulance in the Prospect area, he received certain information from the Police.

148. In his later statement he clarified that when he left Kaibo, Mr. Brown was at the helm of the boat with Ms. Wright near to him. Mr. Turner was on shore. The boat had not left.

5. Magda Embury dated 23rd August 2019

149. Magda Embury is the mother of two of Mr. Brown's children. They resided together. She last saw him at about 7:00 a.m., when he left the home with their daughter. At 12:45a.m., on the 12th August 2019, Mark Ferrari came to the house. Ms. Embury began sending messages to Mr. Brown but received no answer. She made efforts to contact the Police to inquire after Mr. Turner and Mr. Brown.

6. Sylvia A. Green Leslie dated 13th August 2019

150. Sylvia A. Green Leslie is resident at 261 Whirlwind Drive in Prospect. While inside the house during the night of the 11th August 2019 sometime after 7:00 p.m., she heard a loud bang, voices outside the house in the vicinity of the jetty and the sound of an engine struggling. She called the Police and Officers attended. The following morning, she noticed that a section of the wall was damaged. The wall in the area of the jetty had not been damaged previously. She found a black clipboard floating in the water with the words "Jungle Float" on it.

7. PC Royal Brown dated 28th August 2019

151. PC Royal Brown states that at about 8:31p.m., on the 11th August 2019, he and other officers attended at 261 Whirlwind Drive in response to a suspicious activity report. They spoke with Ms. Leslie but found nothing suspicious. They left the house and made various checks as directed by Inspector Ian Yearwood. Sometime later a vessel was located at the end of Whirlwind Drive. The location was at the house just after 261 Whirlwind Drive to the rear. PC Brown assisted with crowd control at the font of the residence.

8. ***PC Neil Mohammed dated 12th August 2019***

152. PC Neil Mohammed stated that he is attached to the Air Operations Unit. On the 12th August 2019 at 12:22 a.m., he was called to report for duty. He did so and with other team members got airborne in the Police helicopter which made its way to the North Sound. They commenced a search of the area and shortly before 1:50 a.m., he observed the bow of a vessel in the shore, close to a dock in the vicinity of 285 Whirlwind Drive. On getting closer he shone a light on the vessel and observed that it appeared to be damaged on the right side. He also saw what appeared to be a motionless person lying on the vessel close to the bow. He also saw a small light source close to the person which was only visible by using his night vision goggles. He advised the Joint Marine Unit vessel of his observations and continued a search in the area until 3 a.m. No other person or thing was found.

9. ***Hugh Bush dated 13th August 2019***

153. Hugh Bush is a Police Constable attached to the Joint Marine Unit. He has thirty-five years' service in the Royal Cayman Islands Police Service, twenty eight of which have been served in the Marine Unit. He is a licensed boat captain for the past nineteen years.

154. On Sunday the 11th August 2019, he was called out from off duty as a result of the boating incident in the North Sound. At 11:11 p.m., he along with other Officers boarded their marine vessel and traveled to a location in the vicinity of the Harbour House Marina Channel. There he observed the Pepper Jelly in an overturned condition. He observed several scrapes and gouges to the fiberglass near the bow eye and several scuff marks running the length of the port side bottom of the vessel. There was damage along the port side near to the hard chine where the bottom and side meet.

155. He and other officers engaged in searches. At 01:46 hours with the assistance of the Police aircraft, the second overdue vessel was found. There was a male and female lying in the bow area which area had major damage. He observed major damage to the sea wall directly in front of the vessel. A part of the wall was missing about three feet long and two feet high and a piece of rock of the same type as the wall was in the bow area of the vessel.

156. A salvage crew from the Harbour House Marina assisted by towing the overturned vessel, the Pepper Jelly. The two people were removed from the second boat and assisted by ambulance crew. That vessel was later secured at the Marine Base. On Tuesday the 13th August 2019, PC Bush inspected the two vessels. He observed multiple areas of damage to the Pepper Jelly. There was in his opinion no evidence of a direct impact to either side of it. He observed the center console of it, that the navigational lights and flood lights switches were in the on position.

157. The Hurricane had major damage to the entire bow area with much of it missing and appeared to have been crushed under a heavy weight. There were other areas of damage. There were a number of switches in the on position, but these were not labeled so that he cannot say if any lights were illuminated at the time of the incident.

158. He says that he has been involved in a number of investigations in maritime accidents and has good experience and understanding of the behavior of vessels in collisions. He said that from the damage which he observed on both vessels: -

> *"…it indicates that a collision occurred between the two vessels with Pepper Jelly, the 32 foot Wellcraft Scarab impacting the 248 Hurricane deck boat just forward of [the] operator's console on the starboard forward quarter and riding up onto and over the vessel. The Pepper Jelly continued riding across [the] width of the Hurricane with her starboard side riding along the extreme bow area of the Hurricane. At the same time the port side of the Pepper Jelly would have been riding across the console area of the Hurricane deck boat causing the Pepper Jelley to list to her starboard and turn over ejecting the persons on board into the sea.*
>
> *If anyone was seated in the front of the Hurricane deck boat they would have [been] hit by the bottom of the Pepper Jelly as it passed over the vessel…*
>
> *… it appeared that the Hurricane deck boat continued under its own power …the vessel eventually crashing into the sea wall at the end of Whirlwind Drive causing further extensive damage to the bow of the vessel. This is consistent with finding a rock of the same type as the wall is made of, in the bow area of the vessel."*[42]

[42] Trial Bundle, page 40

10. ***Nicholas Rivers dated 14th August 2019***

159. Nicholas Rivers is a Senior Customs Border Control Officer. On the 11th August 2019 he was seconded to the Joint Marine Unit. He was a member of the team on board MV Luke which responded to the calls about the incident. He assisted with the recovery of the two persons on board the second vessel (the Hurricane) and was present when the male was pronounced dead by ambulance crew. He assisted to lift the female from the vessel and to take her onshore where she was placed in an ambulance.

11. ***Ian Yearwood dated 17th August 2019***

160. Ian Yearwood is an Inspector of Police. At 11:08 p.m., on the 11th August 2019, he received information from 911 as to a capsized boat. He also received calls from the father of Stephanie Hicks and at 1:10hours from Magda Embury. He initiated and coordinated searches at sea through to 3:50 a.m., on the 12th August 2019 and remained on duty until 6:50 a.m. that day.

EVIDENCE OF THE EXPERTS

161. Two experts were called as to marine incident/accident re-construction. Mr. Patrick Michael Neal for the prosecution and Mr. James Crawford for the defence. The main areas of disagreement are in summary the following:-

- The approximate location of the collision with the defence expert opining that the Pepper Jelly changed course to avoid a collision and the prosecution expert opining that the change in course was as a result of the collision.

- What the damage to each vessel indicates, as to the level of speed of both vessels and the likely movement of each vessel in the immediate aftermath of the collision. The prosecution expert's view is that Pepper Jelly heeled to starboard and the defence expert that it heeled to its port side.

- The timing and distance at which a risk of collision arose. The defence expert's view is that this is at the discretion of the captain of the vessel and would not have

arisen until close to the point of collision. The prosecution expert's view is that this is dependent on the conditions at the time and the risk is more pronounced the closer the vessels are to each other.

- Whether there had been any breach of any of the Rules on the part of the defendant. The prosecution expert's view is that there had been a breach of Rule 6, duty to operate at a safe speed. The defence expert's view is that the defendant was in open waters in the North Sound where there is no speed limit.

EVIDENCE OF PROSECUTION EXPERT PATRICK MICHAEL NEAL

TRAINING AND EXPERIENCE

162. Patrick Michael Neal testified that he is a marine conservation warden for the State of Wisconsin, Department of Natural Resources in the United States. In that State he instructs Staff in Accident Investigation and the requirements and also assists staff on more complex investigations. In giving an overview of his experience and qualifications in boating and seamanship generally, he said that he has been around boats his entire life. Since about 1991 he has been involved in this field. He began his employment as a seasonal boating officer, enforcing the boating regulations in the State. As his career continued, he was assigned to Lake Michigan out of Milwaukee which is the largest city in the State. In that city they had a lot of boating traffic and boating incidents so this was a big part of his job. Eventually he transferred to the Door Peninsula which had significant boating activity. Since 1998 he has been involved in teaching the accident investigation curriculum to the staff.

163. Beginning in 1994 and again in 1996 or 1997, he undertook the Underwriters Laboratories Accident Investigation training. That curriculum then went to the National Association of State Boating Law Administrators or NASBLA. NASBLA is an organisation of State boat law administrators who oversee and help craft the curricula for training regarding boating. This includes crash investigations, GPS, other training such as search and rescue and basic seamanship. It encompasses all fifty States and the territories of the United States.

164. In 2006/2007 he became a certified national instructor to teach boat incident investigation. He eventually moved on to instruct on basic crewmanship, the search and rescue curricula and then the tactical courses that are used for security zones and other protections.

165. He has been the lead instructor on the national level since 2018 and has contributed to various publications including the field training manual, the National Boating Accident Investigation Field Guide. He also co-authored a paper in 2014 on the use of engine control module data for incident investigations. He has personal boating operational experience as well as recreational and professional experience. Professionally, he has operated a varied number of patrol and rescue boats, everything from a one-person canoe to a 78-foot vessel. He holds a United States Coast Guard Captain's license. This is for fifty gross tons including towing and near coastal areas.

166. There was no challenge to Mr. Neal's expertise. It was accepted that he has the relevant expertise. Mr. Neal testified as to his examination of the vessels. He referenced the nine reports which he had prepared as a result of his examination. These were received in evidence as **Exhibit 17**, as well as CCTV footage from various areas which were received as **Exhibits 5 to 10**. He also referred to 65 Images and photographs produced by the prosecution and exhibited as **Exhibit 2**.

EXAMINATION OF VESSELS BY PATRICK MICHAEL NEAL

167. Mr. Neal testified that he arrived in the Cayman Islands on the 25th August 2019 and over a series of days and weeks he carried out an investigation. He inspected the Hurricane vessel and the Pepper Jelly including its underside. He assisted in placing bits of debris that were recovered from the sea onto or near the boats to recreate what they effectively looked like, especially the Hurricane.

168. He said that he took the initial missing pieces that were recovered and "like a jig saw puzzle" started putting them back together until things appeared to be correct and they fit and then he analysed the damage observed to both boats.

169. Mr. Neal referred to his first report[43] and the images therein which show the damaged Godfrey Hurricane vessel and bits of debris in the foreground. He said that he went on to place those in an appropriate position. He found that this boat had what is referred to as "conflicting damage". There was damage that is consistent with one boat being struck by another boat and then the damage that is conflicting which is the compression damage when it impacts the sea wall. He said that even by looking at it on the first day he could see evidence which was consistent with another boat completely overriding or going over it.

170. He pointed out on page 4 of his First Report, the top left-hand image which is the helm area where the operator would be located. There is a small oval dark colored window in that area and just in front of that there are a series of parallel cuts which are from the propeller of a boat.

171. By reference to the images on page 5 of the First Report and on Image 30, he said that on the left hand side of the Pepper Jelly there were missing areas of gel coat and fibrous delamination, meaning that the layers of fibre glass and gel coat were coming apart rather than being sandwiched together.

172. A second photograph on the said page 5 and on Image 34 showed a close up of the hull cap, separation and fractured fibre glass delamination on the port side. He said that significant damage was observed at the port or left side of the Pepper Jelly indicating that a significant amount of energy had been transferred to it during the collision. He explained this by saying that when the collision occurred, energy was transferred from boat to boat and there are fractures on the inside of the boat along the decking up towards the helm that are vertical and then come also parallel to the deck indicating that the deck had flexed, creating all the damage seen.

173. He explained what he meant by flex by then referring to his Third Report[44]. He said that the image shown on page 20 of that Report shows that there are fractures up on top of the gunnel along the cap of the boat, and then the bottom two images are looking down at the deck. Those are all fractures that run parallel to the keel along the side where the bottom of the boat or the

[43] Tab 1 of bundle, Report dated 15th September 2019
[44] Tab 3 of Bundle - dated 19th September 2019

side of the boat and the decking come together. He said that where the side of the boat or the bottom of the boat is 'chine', that is one of the strongest points of the boat.

174. He said that it is correct that the fractures and delamination which are shown are consistent with the collision that involves a higher rate of speed of the impacting boat against another boat or object.

175. He said that the photographs at the top on page 21 of the said Report, is a view of the Bimini top of the Pepper Jelly with its round white light in the upward position. Both show that the console entrance hatch and Bimini cover are bent to the port or left side. He said that this indicates to him, based on the damage he observed and since he knew that the boat had capsized, that when the boat heeled, (meaning rolling either to the right or left) it entered the water with the hatches open, the Bimini top caught water and everything started to bend and twist.

176. He said that the bottom photograph on page 21 shows scratches, gouges, striations and colour transfer indicating an override scenario along the port side of the Pepper Jelly. He said that Image 30 is an overview of that side of the boat and there are a number of striations from the collision with the other boat. There are transfer marks, likely from upholstery and that is the blue green colouring seen on the side of the hull. Above that there is a mark that looks like a letter L that is reversed. That appeared to be fibrous material similar to hair. The next piece back is a red spot. That appeared to be nylon, like a shirt because it has a low melting point and then behind that there was another one which looks like an L turned at a slight angle. That again appeared to be more material similar to hair.

177. Using model boats, the witnesses demonstrated as he gave evidence. He said that as the two boats approach each other, the first impact or the first point they touch is up forwards of the bow about a 65 degree plus or minus 10 degrees angle. This boat yaws or rotates. The impacting boat, the Pepper Jelly in this case starts to override, so it comes up. It impacts the helm area and it starts to yaw. As it continues the engines strike just in front of the helm, it continues across and then exits out the opposite side of the boat.

178. He said that in his opinion there are numerous marks and striations on both boats that support what he just described from the first contact through the engagement and then disengagement of the two boats.

179. He was referred to his Fourth Report[45] at page 29 and Image 43 which show the underside of the Pepper Jelly. He said that while that image is oriented 90 degrees off from the one in his Report, what he observed were numerous striations and transfer marks on the underside of the scarab (Pepper Jelly) which tell him it had passed over the top of the other boat. On that image he can see some of it but he also sees a change in directionality with the striations. A lot of the striations are not perfectly parallel to the lifting strakes or keel but they are in the same direction. On the backside of the lifting strap, there are a series of striations that now run at an angle which is that change in direction. As the boat came in, it went across and then it started to heel off to one side.

180. By reference to images from his Second Report[46] on page 9, Images 20 and 21, he said that the direction of travel was forward of the helm. This indicates that the boat that struck the Hurricane was on the right or starboard side of the Hurricane. As it travelled there are a series of parallel cuts which were from the propeller. They have a curvature to them. They have an arcing that goes to the directionality of the propeller. The curvature of the cut, the apex or top of that curvature gives the direction of its travel. The image of the Godfrey Hurricane[47] shows that forward of that, there are a series of striations that are almost perpendicular to the keel, so it is before all the rotation starts to occur parallel to the hull. Image 21 of the damage to the Godfrey Hurricane shows a stronger point on the Hurricane. It is of the bathroom area or salon which would be structurally re-enforced. The effect of Pepper Jelly passing over the hard point, could likely cause the Pepper Jelly not to yaw but to heel, the Hurricane would yaw or rotate away. Pepper Jelly would heel or start to rotate in a clockwise motion and then as it continued over it would re-enter the water at an angle.

[45] Tab 4 – dated 19th September 2019
[46] Tab 2 dated 26th August 2019
[47] Image 20 of the presentation bundle

LIGHTS OF THE GODFREY HURRICANE

181. As to the lighting on the Godfrey Hurricane at the time, he referred to his Second Report[48]. He said that the images there show the navigation light filament which would be on the port side of the boat. When he first looked at it there was the base of a light bulb. On a light bulb there are two pedestals and then the tungsten filament, which is what blows. That was still in place. When it broke, because the glass had broken, there was what is called a hotshot, those filaments were no longer smooth and curved. He would describe it like the blob on the end of a welding rod and that is an indication to him that the navigation light was on at the time of the impact when the collision occurred.

SPEED OF THE GODFREY HURRICANE

182. In relation to the speed at which the Godfrey Hurricane was travelling at the time of the collision. Mr. Neal produced a photograph[49] of its throttle position as he found it at the start of his examination. He said that he then marked it with a magic marker from the housing on the hand control of the throttle back to the fixture that the throttle or the hand control was against, so he had a point of reference. He then extended that line up onto the side above the throttle control. He brought that back to neutral where there is a detent. There is an actual catch that puts the engine into neutral gear so it is not moving. He marked that. He then went back to operational and went all the way to forward. That distance was about a third to half throttle compared to being operated at full throttle.

183. He produced performance data which he obtained from the manufacturers of the boat[50]. Due to the age of this engine, there is no engine control model that data can be collected from so recourse was had the manufacturer's performance bulletin. There was no bulletin issued in 1998 the year of the Godfrey Hurricane. The earliest available was 2002. Using that data and drawing a parallel between the two engines, he concluded that at half power with the throttle halfway forward towards full, the speed in these tests that generated in this similar boat for 2002, it is just over 20

[48] Tab 2, dated 19th September 2019, page 11
[49] Tab2, - Second Report dated 19th September 2019, page 13
[50] Tab 10 in the documents bundle

mph. The boat would have been doing about 21.3 mph. If it was one third of the way to maximum, it would probably be over 2000 revolutions which would be less than 20 mph.

DAMAGE TO THE ANCHOR OF PEPPER JELLY

184. Mr. Neal testified that there was significant damage to the shank of the anchor of the Pepper Jelly. It is bent to the right as shown on Image 29. The housing just above the bow eye where the anchor would be set that is pulled away and inside that anchor housing the whole reinforced section was fractured. When boats are manufactured, the bow and the keel are virtually the strongest points of the boat. It takes a substantial amount of energy to bend that shank that way and to break reinforced fiber glass in that area. The force that created that bend would have come from the left side of the Pepper Jelly which would be caused by the impact of the Hurricane.

185. The image at page 16 of the report[51] indicates that the principal direction of force was generated to the port left of the center line of the Pepper Jelly. This would have been one of the initial impact points between it and the Godfrey Hurricane.

186. As to the impact that bending the shank that way would have on the direction of travel of the Pepper Jelly, Mr. Neal said that as the two boats come together, the force from the Hurricane moving is exerted onto the Pepper Jelly. It would also start to cause that boat to change direction. This is something which is familiar to him as a boat accident investigator, and which is seen pretty consistently with that yawing and change of direction.

187. He stated that his conclusion from all of that damage is that it demonstrates three things:-

- passing of the Pepper Jelly over the Godfrey Hurricane
- yawing of Godfrey Hurricane
- based on the impact of that area of the Godfrey Hurricane, the Pepper Jelly heeling to the right and changing direction.

[51] Document Bundle, Tab 3

STAGED COLLISION - 12TH APRIL 1989 VIDEO

188. Mr. Neal produced a 12th April 1989 video made in Florida of a staged collision which was done in order to understand accidents. On this video one boat goes from making contact, angling to the left, to heeling over to the right.

189. In response to the question why does any boat such as this one heel over to the right in this situation, he stated that in this particular situation as the boat contacts the target boat, it strikes a structural hard point. Due to the shape of the hull that redirects the direction of the boat to the right, as that boat tends to climb up, the propeller rotation causes it to heel because it is pushing on the water. It is turning in a clockwise motion.

190. There are two differences between boat in the video and the Pepper jelly. In the video the striking boat is actually a stern drive and lacks a Bimini top. The Pepper Jelly has two outboards and a Bimini top. He said that as you add items to boats, the higher you go, the center of gravity makes it tip one way or the other easier.

191. He showed the approximate area on the model boat that he referenced in his report as being the area of initial impact on the Godfrey Hurricane from the Pepper Jelly, an approximate impact angle of 65 degrees plus or minus ten degrees based upon the center line of the Godfrey Hurricane. This would be up towards the bow.

VIDEO/CCTV EVIDENCE

192. Mr. Neal was shown the image of the Pepper Jelly on page 53 of the bundle[52]. He said that the all-round light is required to be visible 360 degrees. It is referred to as a two-mile light which means it has to be visible from a distance of two miles away. The navigation lights are red and green. Those are referred to as one mile lights so they have to be visible from at least one mile.

193. He produced and played a video showing the cut-off angle of the navigation lights. He said that when you see the boat turning, at first all you see is a white light that is up on the Bimini of the

[52] Tab 7, Seventh Report dated 1st October 2019

boat. As the boat continues to rotate, you see a very faint light in the starboard side which is green in color. As the boat continues to turn the intensity changes, the green light is brighter and starts to bleed over to the red light which gets very bright and then it gets weak as you are starting to move away from that angle that those lights are required to project. Then it gets back to the all-round white light that is visible.

194. The Pepper Jelly was found with the white light pushed down and not up. The video footage of the Pepper Jelly coming into Camana Bay a third time between 7:14-7:18 p.m. was played.

195. Mr. Neal said that one can see a combination light at the bow of the boat, you do not see a light there at the dark Bimini top. The portion of the video showing the Pepper Jelly leaving Camana Bay at 7:35 p.m. was played. Mr. Neal said that it appeared that the Pepper Jelly backed away from the dock, came out, reversed and then started to make a clockwise rotation. At the front of the boat he could see a combination of the red and green navigation light and it appeared that there is a white light on top of the Bimini at this time, that was not illuminated before or visible.

196. A video close-up of the Harbour House Marina CCTV footage was shown to Mr. Neal. It was paused 38 seconds into the footage. Mr. Neal said that he could see on the video to the left of the marine travel lift which is in the foreground, that there is a light out on the water which would have been the Godfrey Hurricane. The video was next paused at 1:10 seconds. Mr. Neal said that the other light which he could see appears to be the navigation light from the Pepper Jelly, you could see the white coloured hull and then you could see the navigation light which appears to be almost the same height or similar height as the one from Godfrey Hurricane. He said that there appears to be a difference in intensity between what can be seen from the Pepper Jelly and the Godfrey Hurricane in that it does not appear to be as bright or as brilliant.

197. The video footage up to the collision was played. Mr. Neal said that it appears that there is a light there which is coming and going. This could be the navigation light from the Pepper Jelly, as it began to capsize, it was bobbing. So you are seeing that change in intensity. Potentially this could have been the navigation light from the Hurricane, but there is a light that does seem to keep moving so in his opinion it is probably the boat that capsizes because it does not move. It does not keep travelling. After the initial collision the Godfrey Hurricane travelled a distance until it impacted the sea wall at Whirlwind Drive.

GPS CALCULATIONS/ SPEED OF THE PEPPER JELLY

198. Mr. Neal testified that on Thursday 29th August 2019 he was involved with the Garmin (GPS) unit from the Pepper Jelly. His understanding is that Police personnel removed the GPS and dried it because it was full of water after being capsized. The GPS will power off when it hits water. He retrieved a history of track lines and data which had been recorded[53].

199. Track line 14051 is the travel line for that day, 11th August 2019. Mr. Neal produced what he described as six Images that were retrieved from Google Earth. The GPS track in question was imported into Google Earth so that one can follow where the boat had been with the landmarks in what Google Earth has captured in a satellite image.

200. He said that the bottom four Images on the page which are part of track line 14051 show the Harbour House Marina earlier in the day, the operation of the GPS unit as the boat left where it was docked, and it was heading out into the North Sound. He detailed the markings on the images as being, 13 mph at 133 feet from the shore leaving the Harbour House Channel, 19 mph at 288 feet from the shore, 25 mph at 393 feet from the shore and 27 mph at 395 feet from the shore.

201. He said that the data indicates that the boat equipped with the GPS unit violated the speed restriction of 5 mph within 200 yards of shore as the boat and GPS left the Harbour House Channel.

202. He identified three logs for the vessel as it entered Camana Bay during the day. The first active log for the vessel on Image 5 at about 1:33 p.m. This shows early in the track line history from this GPS unit. This would have been the first time that day the GPS on the vessel entered Camana Bay. He said that what the data indicates to him is violations of the 5 mph speed limit restrictions, that is throughout Camana Bay and within a 200-yard buffer zone of the shoreline.

203. The second log is shown on Image 6 at 3:23 p.m. to 3:48 p.m. The data on the track line indicates that the GPS unit is traveling anywhere from 40-51 mph in violation of the 200 yard restriction of shoreline and within that 5 mph speed restriction in Camana Bay. The third leg (Image 7),

[53] Tab 6- Sixth Report - page 35

showing the GPS data, is the recorded position or points on the track line as it enters Camana Bay in violation of the 200 yard speed restrictions of 5 mph and within the Camana Bay Channel which is also 5 mph. Speeds are anywhere from 42 mph to 47 mph and then they extend over half the distance of that Channel before it gets to the docks at Camana Bay in excess of 5 mph.

204. He said that Image 9 shows the collision track which is on the Harbour House Channel. The CCTV shows the Godfrey Hurricane light coming from the right over 30 seconds and then in his opinion the weaker light from the Pepper Jelly approaching from the left and the collision. This is the collision track in GPS terms over the last one minute of operation before the crash. At 7:42 p.m., the Pepper Jelly was operating at 47 mph. At the next data point it slows down to 40 mph. It slows down to 37 mph and maintains that speed for three data points. At 7:43 p.m., it slows down to 35 mph. It maintains the same course. It accelerates to 42 to 47 to 50 mph.

205. Mr. Neal said that he would not agree that this change from 35 mph to 50 mph was a change of a few knots. In his opinion a few is two or three, 35-50 mph is a substantial increase. The vessel maintains the course it is at. It slowed a little to 48 mph, the next data point to 46 mph, with a course of 120 degrees at 7:44 p.m.

206. He said that data point 860 indicates that it is a leg distance between two points of 0.1 mile or $1/10^{th}$ of a mile. It lasts 8 seconds. The speed is 46 mph. The course is 120.4 degrees true north. The date is August 11, 2019 at 7:44 p.m., and 31 seconds. The next point is at 861, 50 mph, the course is 125.2 degrees. The next data point is 862, the vessel is travelling at 44 mph and that is at 7:44 p.m., and 46 seconds. So it is seven seconds later than data point 861.

207. Mr. Neal states his opinion that at data point 862 that is right at the point of the collision. The boat is starting to slow down as it interacts with the other boat. It is starting to change direction which is why the next point it is going from 125 degrees to 158 degrees. The boat changes direction. It slows down as it engages with the Godfrey Hurricane and then as it enters the water, it is starting to slow down even more because of the water. As it is coming into the water it heels, it is dragged. It is filling up with water because the water comes over the side and it is hooked or pulled through the water, so it starts to slow down.

208. Data point 863 is at 7:44 p.m. and 51 seconds. This is five seconds after point 862. That is the point that the GPS appears to shut down. He would say that the distance between the two points 862 and 863 is just over 300 feet. At page 59 of his report[54], he said that he believes that it is approximately 325 feet.

209. Mr. Neal was asked about an earlier opinion which he had given that said that at data point 862, there is an obvious compass point change from 125 degrees to 158.5 indicating a significant turn to starboard right which is consistent with an avoidance manoeuvre prior to a collision. He said that subsequently he expressed a further opinion in which he stated that:-

> *"I say that I believe the change in direction of the boat being operated by SM is actually a result of the impact of the Pepper Jelly with the Hurricane. This impact is what redirected the boat's path and not a steering correction or evasive maneuver. When the impact of the Pepper Jelly with the Hurricane occurred, both boats were in motion. As the Wellcraft began to override the Hurricane, the attitude of the Wellcraft would have heeled turned to the starboard right. After the override occurred, the Pepper Jelly re-entered the water. Due to the angle of the boat upon re-entry, it changed direction and eventually capsized. Capsizing would not have occurred immediately and the momentum of the boat as it travelled would account for the distance recorded on the GPS unit before it eventually powered down."*[55]

210. He said that this is his opinion of what we are looking at in this GPS plotted Image. He explained the differences in his opinions in the following way. He said that when he first looked at the GPS data, he was strictly looking at the data and the numbers. He did not take into account any external input on the boat. When he looked at only the numbers and did not factor in its interaction with another boat or object, he would assume that to be a correction or an evasive manoeuvre. He was preparing to teach a class on incident or crash investigations, and he was reviewing. He watched one of the videos after the first report had been submitted and he watched it again and again. It started to make more sense. He was seeing the interaction between the two boats, and it became clearer that it was likely interaction with the other boat that caused that change in direction.

[54] Tab 8
[55] Tab 8- Eighth Report dated 29th October 2019

RECOVERY OF MR. BROWN

211. Mr. Neal said that based on data point 862 and understanding the interactions, the videos and where Mr. Brown had been recovered that is consistent with where the incident would have occurred. When people drown or go to the bottom, they are literally like a stone. From his years of recoveries, they are within feet of where they were last seen and are very close to where they go down or where they enter the water. The fact that Mr. Brown's body was recovered that close to that data point is a very good indication that this is in very close proximity to where the crash would have occurred.

212. Mr. Neal said that Mr. Brown was knocked out of the boat as the Pepper Jelly passed over the Hurricane. He said also that while he is not a medical expert he had been through enough crashes and investigated enough of these to realise that a head injury like that suffered by Mr. Brown, he was likely rendered incapacitated. He would not be swimming or struggling. He was not wearing a life jacket. He said that the first body recovery which he did was in 1992. He does not have an exact number, but it is more than he cares for. In one of his first years in Dora County, he had six fatalities in one week. Unfortunately, he has become 'that guy in his agency' to help other officers locate these victims.

213. There is learning as well in the form of the encyclopedia of underwater investigation. While he does not know what the water temperature was that day or the depth of the water, you can fairly calculate when bodies will come to the surface. The fact that the body was found close to GPS point 862 means it is the likely location of the crash.

COLLISION REGULATIONS - RULE 6

214. Mr. Neal was taken through aspects of the ***Collision Regulations*** referenced above. With respect to the rule as to safe speeds. Rule 6, he said that when he sees speeds in the low, mid 30s that does not cause him a lot of concern. Boats operating at night can be controlled at that speed relatively well. He said that boats do not have brakes or brake lights. They do not have seat belts. When approaching a shoreline, a harbour entrance, a break wall, anything where there is a higher probability of other boats or other people, he looks at an increase of speed and does not

understand the reason to increase speed. He gave the example of equating this to an increase in speed at a school zone or a yellow traffic light.

215. He said that with respect to Harbour House Marina and the channels there on a Sunday night after sunset, he would assume that boat traffic is similar in the Cayman Islands as where he lives and works. At the end of the day, after sunset, there is a boat traffic congestion issue as everybody is trying to return to converge into one point of exit or entry. He said that in his view, Rule 6(a)(ii) traffic density, fits within the situation of the area in the vicinity of those channels as does Rule 6(a)(i) with stated visibility. If he remembers correctly, this night there was minimal light from the moon. It was a relatively dark night. So, it would make things harder to see. There was not ambient light.

216. He said that Rule 6 (a)(iv) also fits, as at night the presence of background light would make things harder to see if you are approaching a shoreline. Boats that have slowed down as they enter a harbour entrance or channel, it is all-round white lights. The navigational lights would blend in with background lighting such as vehicle lights, house lights, street lights and decorative lighting on docks and houses.

COLLISION REGULATIONS - CROSSING SITUATION

217. With respect to Rules 7, 8, 14, 15 and 16, Mr. Neal stated that based upon the damage that was observed on the Hurricane with that impact angle of approximately 65 degrees plus or minus that would be a crossing situation. In this case, Mr. Brown's boat would have been the give-way vessel, and Pepper Jelly would be the stand-on vessel meaning that Mr. Brown's boat should slow down, try and go behind the other boat, if he can see it. The Pepper Jelly on the other hand should maintain a course and speed.

218. In response to the question, what does keeping a watch mean, in relation to boats on a collision course the witness stated that when they teach people how to operate boats, they talk about keeping your head on a swivel and always looking. The reason is that unlike operating a car, there are no real lanes of traffic until one gets into specific channels. If you are out in the Sound or in the ocean or a lake, boats can come from your right, your left or behind you.

219. In response to the question, if the Godfrey Hurricane was displaying an all-round white light and the red and green navigation lights, at what point in that collision track should someone keeping a proper watch out be aware of the Godfrey Hurricane, Mr. Neal stated that when they investigate incidents, they always back them up at least a minute. In that minute someone should be focusing on what is in their immediate vicinity.

220. In this case the minute before the collision, the Pepper Jelly would be at 35 mph but, not increasing speed and at that approximately 121, 125 degrees for travel. They also have a responsibility to attempt to avoid the collision, which means slow down, change direction, anything to avoid it.

221. He said that at Image 10 he had plotted the distances that would have been covered and the position, the same moment at 7:44:46 p.m., where the boat Pepper Jelly would have been, if it had maintained its speed and course at 35 mph. He said that he used different coloured track lines to illustrate his view that if the Pepper Jelly had maintained its speed the collision would not have occurred. The yellow track is 35 mph and if the Pepper Jelly a minute before had maintained its course and speed, at the moment when the collision happened it would be only at where we see the 46-mile per hour marker. If it had maintained a course of 40 mph, it would have been on the blue track. The red line indicates a speed of 45 mph.

222. He said that for the Godfrey Hurricane which was the give-way vessel, the operator would be looking west towards that Camana Bay area, where there is a lot more background lighting. So to see the navigational lights is more difficult. He said that if the Pepper Jelly was not displaying its all-round white light, it would be even harder to see it. The difference in intensity between a one-mile light and two-mile light is a mile. So that all-round white light will be much brighter or brilliant and easier to see. He said that when he works at night, routinely the first light seen is always the all-round white light rather than the red and green combination lights.

223. He agreed that Rule 16 presupposes that one can see the other vessel and said that taking Rule 5 which is the look-out Rule and Rule 16, if you cannot see the other boat, you do not know how to react if it is there. You cannot take action to avoid something you do not see. He said that unfortunately, in this case, we do not know from anybody on the Godfrey Hurricane what was

observed. He said that one aspect that he does know about on the Pepper Jelly is how bright the GPS screen was. If that screen was turned up very bright, it would be harder for the operator to see.

224. He said that from his experience in operating at night, he operates at bare minimum planing speed, and the reason being is that he just cannot see as well as he can in the daytime and he has to have room to stop. He said that if you think about, for example a speed of 55 mph that is 80 feet per second, so someone who is attentive, focused, everything is right, it takes them three quarters of a second to a second and a half to identify something, perceive it, make a decision what to do about it and then react. In that second and a half, they have travelled 80 to 120 feet. Thus, he likes to have a cushion or safety net. Typically, most of their incidents at night are at higher speeds. Boats run up on Islands, shoals or hit buoys.

225. He said that his opinion is and remains as set out in the last paragraph of his report:-

> *"Based upon the evidence that has been reviewed and examined the operation of the Sport was reckless in nature and showed a disregard for the safety of the passengers on his boat and for others on the waters of the North Sound. The mere fact that he had increased his speed one minute prior to the impact with the Godfrey Hurricane is the most compelling pieces of evidence that can be looked at as it relates to the reckless nature of his behavior."*[56]

226. He said that it is also his opinion that based upon the speed of the Pepper Jelly, it is reckless in nature to be operating at that speed as a vessel approaches shore or the entrance of a channel. This is based upon the average perception and the reaction times of individuals being able to perceive a danger and act accordingly.

[56] Page 56 in the Report

CROSS-EXAMINATION OF PATRICK MICHAEL NEAL

227. Mr. Neal was cross-examined by defence Counsel. He agreed that in his Seventh Report he did say that:-

> *"Evidence in this incident shows that there a number of contributing factors. While there is fault by both operators of the boats in this event, the most predominant factors I believe are to be errors in judgment related to the operation of the Scarab".*

228. He said that it is correct that we know the final track of the Scarab because we know it left Camana Bay after 7:00 o'clock in the evening and it was heading we believe towards Harbour House Marina. We do not have a GPS record for the Hurricane.

COLLISION REGULATIONS - CROSSING SITUATION

229. He said that he had the opportunity to read the Police file which was provided in the bundle. He is aware that Mr. Brown was somewhere in the vicinity of the area of Star Fish Point or Kaibo during the day time. It is correct that if one were to draw a line from Star Fish Point to Abbey Way Channel and another line from Camana Bay to Harbour House Channel those lines should cross. He said that in the present case both himself and Captain Crawford agree that the rules as to a crossing situation apply. He said that the crossing situation is governed by Rule 15 of the ***Collision Regulations*** and that in this case we do have two power-driven vessels. The vessel which had the other at the starboard side, was the Hurricane.

230. He said that it is correct that according to this Rule, the Hurricane, which was the give way vessel, was required to keep out of the way, and shall, if the circumstances of the case admit, avoid crossing ahead of the Scarab. This is working on the assumption that both vessels could see each other. He said that there was a duty upon the operator of the Hurricane to keep out of the way of the operator of the Scarab in this crossing situation, providing that each could see each other and there was a duty to take early and substantial action to achieve that. He said that it is correct that we know that the Hurricane did not keep clear and that on the available evidence, there is nothing that indicates when points of manoeuvre were taken.

231. His attention was directed to Rule 17, Action by Stand-on Vessel. He said that it is correct that it was the Pepper Jelly or the Scarab that was the stand-on vessel in his view and as such it was required to keep its course and its speed in accordance with this Rule. The logic of that, is that if one vessel is required to keep a steady course, this means that it is predictable, and it allows the other vessel that is required to move to make decisions. It is correct that this Rule then assists both boats, one must stay as constant as it can and the other is on duty to move.

232. He said that the GPS data that was recovered from the Scarab does show an increase in speed right before the collision. In his professional opinion, that means that Rule 17 which requires the stand-on vessel to maintain its course and speed has been breached.

233. Mr. Neal agreed that he did say in his Eighth Report that: -

> *"As I had stated above, Mr. MacDonald also failed to follow the Navigation Rule regarding Navigation Rule 17 as it relates to 'keep her course and speed' while the Wellcraft was being operated. GPS data indicated an increase in speed from approximately 35 miles per hour to 50 miles per hour over one minute prior to the collision. Additionally, Navigation Rule 8 indicates 'a succession of small alterations of course and/or speed should be avoided'".*

234. He agreed that the primary point is that he is suggesting a breach of Rule 17 and a supporting point is that it is also a breach of Rule 8. He accepted that the course that was being travelled was constant and said that his concern is the change in speed. The GPS data showed acceleration from 35 mph at 7:43 p.m. to 42, to 47 then up to 50 mph one minute prior to the collision.

235. He said that given the circumstances, with minimal lighting, no ambient lighting from the moon or anything else, where boats are traveling at night at increased speeds, it turns into the perception reaction when something is in front of them whether it be another boat, a buoy, something floating in the water, they typically do not have ample time to react to avoid a collision. Increases in speed are the catalysts for similar events that they have had where people are coming into harbours.

236. He was asked a series of questions:-

> *Q: So from what distance away from another vessel should an operator hold their speed constant?*

Ans: *When they first can perceive the other vessels in the area or during something whether it be an entrance, typically if there is another vessel they should start to maintain that course and speed.*

237. He said that in his opinion based on thousands of encounters, if boats are within half a mile of each other, because boats do not have brakes that is when operators should be focusing on maintaining course and speed.

238. In answer to the question, at what point in our scenario should Mr. McDonald have perceived that these vessels were in a crossing situation, he said that he could not give an exact distance and does not know the potential background lighting inside the Pepper Jelly but at half a mile the light is very visible.

239. He said that it is correct that the relevance of the navigation lights plus the all-round light means that you can determine, if you can see both, which way the vehicle is facing. He said that navigation lights are on boats so people see you, not so that you can see. Each light conveys a message to other boats on the water or on the craft, depending on what colour they see. If they see a red and green and a white, they can assume a boat is coming directly at them. If all they can see is a white light, they can assume that the boat is going away from them. Off to either side you either see a red or a green so should be able to orient whether there is the right or starboard side or whether the port or left side.

240. He agreed that if everything is perfect you would be able to see a navigation light a mile away, which is the legal requirement, and could monitor the other vessel for at least a period to form a view of which direction it is going and how fast. He said that speed is difficult to judge at night.

241. In response to the question, at what point should Mr. McDonald have perceived that there was a risk of collision, he said that anything from quarter mile to a tenth of a mile, that risk is starting to increase and depending on the speeds of boats and the operators' experience and abilities and there may be other factors. He said that in his estimation Mr. McDonald would not know that those power-driven vessels were crossing until half a mile out if both vessels are perceived. There are different ways that things can unfold depending on the speeds being travelled. He agreed that one cannot comply with a rule until you perceive the situation you are in.

242. He said that he would agree that Mr. McDonald should have appreciated that he was in a crossing situation half a mile out and he should have realised there was a risk of collision a quarter of a mile out. Both of those two conditions are only met a quarter of a mile away from the collision. At that quarter of a mile, he was thereafter required by law to maintain his course and speed.

243. He agreed that at the point Mr. McDonald changed his speed from 35 mph to 47 mph, he had referenced 8/10 of a mile. That would be beyond a quarter of a mile. It was over half a mile that he made that speed change.

244. He explained that this speed change at this distance was nevertheless in breach of Rule 17. He said that this is because when they look at crashes, they back them up a minute when boats should be able to perceive each other. They try to get at the range of the lights, because it is a night-time collision, they go back one mile. If everything was perfect and those lights were visible at a mile out, the issue is to increase speed from 35 to 50 mph as you go towards a harbour entrance or an area of potential congestion. He said that the crossing situation occurs early on. It is not when they are 20 or 100 feet from each other. A minute out the crossing situation is already in existence, but the risk of collision has not occurred until they are closer.

245. He disagreed that when Mr. McDonald changes his speed, he is not in breach of any rules whether Rule 15 or 17. He said that going back to a minute before the collision, the risk increases the closer they get to each other, but the crossing situation was in effect before a quarter mile or a half a mile which is when they should perceive each other.

246. He said that it is correct that the Scarab may take discretionary rather than mandatory action to avoid collision by her manoeuvre alone as soon as it becomes apparent to her that the vessel required to keep out of the way, the Hurricane, is not taking appropriate action in compliance with these Rules. It should have become apparent to Mr. McDonald operating the Scarab at a tenth of a mile that the vessel required to keep out of the way is not taking appropriate action. At a tenth of a mile, it is still possible for both vessels to do something.

247. He agreed that unlike Rule 17 (a) (ii), Rule 17 (b) is a mandatory section. This is where the stand-on vessel finds herself so close that unless she moves there is going to be a collision.

248. He said at that point where you are so close, the chance of collision is very high and the operator of a stand-on vessel, would be simply doing the best to aid in avoiding that collision, or mitigate the impact. Given that boats do not have brakes and everything on the water keeps moving even after boats are brought to a neutral, that point could be a hundred yards or more, depending on the style of boat, conditions, how the boat performs and its manoeuvrability.

EVASIVE MANOEUVRE OR CHANGE IN DIRECTION

249. He said that he had stated that the Scarab did not take any evasive action at all and that the change in direction is from the interaction with the Hurricane and that he is very confident that he is right in his opinion about that. It is correct that initially he stated in one of his October 2019 reports - specifically the GPS report, that the GPS information was consistent with an evasive manoeuvre. By 2021 further thought had led him to a different conclusion that there was no evasive manoeuvre taken.

250. He said that he concluded that the Pepper Jelly passed over the Hurricane and it caused the Hurricane to yaw or rotate. His opinion is that the force then caused the Pepper Jelly to heel to its starboard. He found in his examination that the marks on the Hurricane were consistent with its doing so. This was both for the yawing and heeling based upon damage in front of the helm or operator's area, and then on the opposite side of the Hurricane. In his opinion the force of the collision therefore caused the Pepper Jelly to change direction, so that after the crash, the Pepper Jelly was moving on a different course than it had been before the crash. That ties in with the line that is seen on Image 9. In his view GPS point 862 is the second-to-last point. GPS point 863 would be the very last point when the GPS unit powers off. Before the collision at point 862 the Pepper Jelly was on a course of 125 degrees. When it came out of the collision, it is then on a course of 158 degrees. This led him to take all of those things together to say in his opinion that the collision is much likelier to have taken place at approximately waypoint 862. He found that the vessel then continues in motion for over 300 feet.

251. Mr. Neal was cross-examined at length about his conclusions as to angles of engagement. He explained that he had used a protractor and made various measurements as to the angles of engagement and disengagement. From his measurements, the first point of contact was at

approximately 65 degrees, which is within a margin of error 10 degrees either way. The striations shown at page 20 were almost 90 degrees. At that point in time, part of the bottom and sections of Pepper Jelly are passing over the Hurricane at almost a 90-degree angle. The change, he would say is approximately 25 or 30 degrees, from 65 to 90 and then the GPS track changes from approximately GPS 120 to approximately GPS 158. He said that this does not mean that on his evidence, the Pepper Jelly disengages from the Hurricane at the same 90-degree angle.

252. He agreed that both vessels were in motion and that both brought energy into the collision. He agreed that there was significant damage to the Scarab which indicated that a significant amount of energy had been transferred to it during the collision. However, he disagreed that the energy transferred to the Scarab came from the Hurricane. He explained this by stating that mass times velocity squared multiplied by 034 equals energy. So that while a vessel may be heavier, the vessel or the object with the most velocity would have more energy. The Hurricane is putting its energy onto the Scarab. He agreed that he had said that the force which caused damage to the anchor of the Pepper Jelly must have come from the Hurricane.

SPEED OF THE GODFREY HURRICANE

253. He said that the position in which he found the throttle when he examined the Hurricane, it was in gear, "and the throttle appeared to be a third to half of its full operational range. This would likely allow the boat to travel at a speed fast enough to maintain its operational planing speed, about 20 mph. He agreed that on that particular engine, the position of the throttle does not reliably indicate the amount of rpms that the engine is producing, it is not an affirmative or absolute that that engine was operating at that time, it could have been going faster or going slower.

254. He said that it was the crash into the sea wall that caused the Hurricane to accordion or compress. This is typically caused by an impact with an immoveable object such as a sea wall or shoreline at a speed fast enough to keep the boat upon an operational plane.

255. He said that his assumption is that at some point in time, after the collision, that vessel maintained or went back up to an operational planing speed. He explained that the throttle on the Hurricane is the old cable style throttles, meaning the operator has to pull, as in move the operational lever

with the cable all the way back to the engine. Where there is impact and the operator leaves the helm but the throttle is at whichever position it is in, as the boats continues to run, it starts to build back up to speed to whatever that throttle was at and then the boat will continue without an operator until it is either stopped by another vessel or there is a collision. He said that it is not more likely that the vessel continued to plane rather than went back into plow mode and then back up to planing. There would have been a decrease in speed at the time of the collision as the Scarab overrides the Hurricane, it is depressed in the water. It yaws, changing directions. There is a rapid de-acceleration. The exact amount he does not know. That boat then continues to run and builds back up speed as he stated.

256. He said that he inspected the port engine mount of the Pepper Jelly which was broken. That would mostly likely have been as a result of it contacting the Hurricane. The force that the Hurricane brought into the collision, from the angle of the boats, that force would have been from lower than the Scarab and applied to the Scarab below the Scarab's center of gravity.

TRAVEL DISTANCE OF PEPPER JELLY AFTER COLLISION

257. Mr. Neal accepted that from the 1989 video which was shown, there are multiple differences between those vessels and the vessels in this case. These include the positions of the operators and angles of approach. The biggest difference is that one vessel is stationary in the video. He maintained however that the actions are similar and consistent.

258. He agreed to the summary description, that the Scarab leaves the water, it travels over the top of the Hurricane, it leans to its starboard side and then it re-enters the water. When it re-enters the water, the Bimini top hits the water. He said that when boats impact structural hard points and they see those boats heel and they re-enter the water, depending on the angle that they enter the water, they will either right themselves or they will capsize. That is going to happen quite quickly, when the boat re-engages with the water. For a complete capsize, he would not be surprised if it were to travel that distance of over 300 feet.

259. It was suggested to him that it is unlikely that the boat's re-engagement with the water, and its capsizing would shift its Bimini top and that it is more likely to have been caused when the boat was recovered during the recovery operation. He agreed that this is also a possibility, that the

shifting of the Bimini top was caused when the boat was recovered during the recovery operation. It could have dragged on the bottom as they pulled it in. He said that he remembered seaweed and other types of vegetation being around the top of the Bimini. He said that he could not remember at this point whether there are also scrape marks in places on the top.

260. He was asked to explain how he says that the Pepper Jelly gets from waypoint 862 to 863. He replied that when they have observed boats that capsize, the boats do not capsize instantaneously. It takes a little while for them to complete that action. If the boat enters the water as it is drifting, it may travel a couple hundred feet. They have seen boats that have sank a mile later, then they finally capsize. They call it being swamped. The boats are filled with water and eventually due to wave actions or other actions, they will eventually capsize and be upside down.

261. Mr. Neal was referred to the Garmin log of the Pepper Jelly which shows the waypoints traveled[57]. He said that the distance recorded at waypoint 862 of 325 feet would be the distance that was recorded from data point 861 to 862. It is not the distance between waypoint 862 and 863. He said that on Image 9 the penultimate data point where it says 44 mph, course 158 degrees, that is where, in his opinion, the collision happened at data point 862, and that this is after discussions also as to where Mr. Brown's body had been recovered. He referred to Image 8, an image that was produced by the Police services with a data point for Mr. Brown's body, which is right next to waypoint 862. He said that waypoint 863 is the location where the GPS shuts off. It shuts off five seconds after data point 862.

262. It was suggested to him that he had got it wrong, how could the vessel have travelled between those two waypoints, 862 and 863 at 44 mph a distance of 325 feet for a time of five seconds if as he says, it was in the process of capsizing on its side.

263. He answered in part that we are missing the leg distance, the leg time, speed and the course. All that is there is the data point for 863. It is an assumption that if the math was done. At data point 862 the boat changes course to 158 and continues to travel until the GPS shuts down, approximately five seconds later. Another data point, data point 864 would be needed in order to complete that data line. Unfortunately the GPS powers down.

[57] Tab 11, page 151

264. He did not agree that the data is consistent with an avoidance manoeuvre and not with the capsizing which he described. He said that he does not believe it is such a manoeuvre. He did not see that in the video, and when he thinks of the overall dynamics of the collision, he would expect a change in direction from the impacting boat versus the impacted boat.

265. He said that he did say in his Eighth Report[58] that while reviewing the closed-circuit TV videos obtained from Harbour House Marina, there were no observable changes in direction of the boats operated by Mr. McDonald or Mr. Brown. He observed that both navigational lights maintained a constant course until the impact. In response to the question, whether he was saying by this, that he could discern that from the CCTV at Harbour House, he said that he would expect to see a change in the viewpoint of the lights. He said also that he could see in the video the hull of the Scarab as it travelled. He did not remember seeing the change until after the collision had occurred.

266. He had continued in his Report to say that it was not until after the impact that there is a noticeable change in the direction of the boats on the video. This confirms that the directional change recorded on the GPS unit in Mr. McDonald's boat was a result of the impact. If there had been a change in the directional course of the boat operated by Mr. McDonald prior to the impact, one would expect to see a visible change in the alignment or location of the navigational lights in the video.

267. He did not agree to the suggestion that he would have been unable to see all this with the naked eye and was drawing a conclusion by looking at 'the little blob of light on the CCTV screen'. He replied that based upon the videos that he had watched, even when they have been enhanced and after seeing thousands of boat lights, you tend to pick up the little changes. He would expect to see it in the direction, as it is travelling and the intensity of the lights. That was after seeing the second half of the video which was produced. He said that any expertise he has is from over the last thirty years of watching boats.

268. It was suggested to him that he was overreaching on this point and that this is simply not credible evidence. He disagreed with this suggestion.

[58] Page 2, second paragraph on page 60

RECOVERY OF MR. BROWN

269. In relation to the recovery of Mr. Brown's body, Mr. Neal accepted that he is not an expert in the movement of bodies in water. He said however that they are very close to where they go below the surface of the water. Based upon training that they had received with their public safety diving, that is the kind of the rule of thumb that had been conveyed to them that it would be something in the region of, for every ten feet of depth, no more than one or two feet to either side would be the area in which they would move.

270. He agreed that in this case, this is a piece of open water. It is the North Sound in Grand Cayman which is tidal and is not a lake. The weather conditions were fair on the evening. There was not much wind. The water was quite calm. He accepted that no information is known about the currents on the surface or below the water at the time of the collision. He said that he did not know anything about a drift test that was performed some hours later. He said that he has limited experience with drift in the Cayman Islands or any other type of environmental factors. He could not speak competently on any of those circumstances. He said that he did not know that the vessel itself moved from waypoint 863 to a different location before it was recovered and did not have the coordinates of where the Pepper Jelly was recovered. He said that it would not surprise him to know that it was in the region of about 700 feet away from waypoint point 862 that the Pepper Jelly was recovered. He said also that he does not know the time when Mr. Brown's body was recovered.

271. He was asked whether it is possible that the same forces that might have been operating on the Pepper Jelly may have been operating to move Mr. Brown during that time period after the collision and recovery of his body. He replied that without knowing the position in which the body was recovered and the conditions of the currents and other variables, he could not speak confidently about that.

COLLISION REGULATIONS- RULE 2

272. He accepted that he had said in his Report that if there was no video evidence available another possible reason for the change in the direction of the Scarab, as identified by Mr. Crawford or

Mr. Lipian, in the GPS track, is that Mr. McDonald may have actually turned into the path of Mr. Brown as he operated the Hurricane. He said that while this was another possibility, based upon the damage that he observed to both vessels, he does not believe that such a turn occurred. He said that if the two boats are approaching each other and suddenly the Scarab turned right, the damage would be different.

273. He agreed that Mr. McDonald was under an obligation to do something in those final moments and pointed out that under Rule 2 (b), boats can deviate from the Rules in order to avoid the immediate danger of a collision.

COLLISION REGULATIONS - RULE 5, THE ISSUE OF LOOK-OUT AND VISIBILITY

274. Mr. Neal said that unlike Rule 17, Rule 5 as to keeping a look-out applies to everybody who is operating a vessel. He agreed that a key question, in order to assess whether the operators of the vessels were in compliance with Rule 5 is the state of the lighting of both vessels. This is why in a situation after dark, the lighting of the vessels is important. He also agreed that if both vessels had been properly lit, then the operators of the vessels should have seen each other. If the Pepper Jelly was not properly lit, it would hamper the ability of the operator of the Hurricane to see the Pepper Jelly and vice versa.

275. He said that for the two vessels with which we are concerned the proper lighting required according to the ***Collision Regulations***, Rule 23 (d)(i) would be an all-round white- light and combination red and green lights.

276. The Hurricane was equipped with one of the sidelights. He said that he did not remember if the starboard side (the right sidelight) was still present, and that there was an all-round white light fixture in the framing for the Bimini top on the Hurricane. The Hurricane which is a 1998 model also had a housing for a docking light up towards the bow on each side.

277. The requirement is that one light[59] should have been visible from two miles away. Mr. Neal said that he did not know whether it was visible from two miles away prior to the crash. In the CCTV

[59] Shown in a red circle on page 65 of the bundle.

footage, all he sees are two lights moving towards each other. He cannot differentiate if it is two lights, or one light based upon the angle on the footage because they are in relatively close proximity with each other. He did not turn anything on when he examined the Hurricane. He did not inspect the wiring harnesses for the boats.

278. He said that he does not know the exact distance that the Hurricane's lights were visible prior to the collision. He agreed that these lights become cloudy over time with the sea spray and the salt. They can and will get darker the older they are, and will be less visible if they are not maintained. He said that he does not know if these lights were maintained. There were not enough pieces to look at the lenses. Those were not there.

279. He agreed that one cannot tell the colour of the lights from the Harbour House CCTV footage. The angle that it was facing meant that from the CCTV camera one would be looking at the port side red light of the Hurricane.

280. He said that he had reported seeing hot shock to the port side navigational light. That hot shock was likely sustained as a result of either the collision with the Scarab or with the collision with the sea wall. It could also have occurred if there was another collision before. He never saw the boat prior to this event, so he does not know if there was a collision prior to this. He said that even if the port side light with the hot shock had been illuminated it would not have been visible to the operator of the Pepper Jelly. From the angle at which the Pepper Jelly was approaching the Hurricane, the only navigation light it would have seen if it was illuminated would be the Hurricane's starboard light. He does not know whether this was illuminated on that day.

281. He said that the image on page 23 shows one docking light on the starboard side of the Hurricane just above a ladder. The docking lights face forwards only and are not all-round lights. If you were standing in the shoes of the operator of the Pepper Jelly, those lights would probably be white coloured lights projecting forward. From the CCTV footage, the camera has picked up a light on the Hurricane, he cannot say what light this is.

282. He agreed that in his Report he does question the lighting on the Pepper Jelly and offered two possibilities for not seeing an all-round white light on the vessel in the Camana Bay video when

it entered at 7:35 p.m. He had said that this *"is potentially due to the orientation/placement of the all-round white light or the all-round white light was not actually illuminated."*

283. He agreed that at the time of the video of entry of the Pepper Jelly into Camana Bay, it was then twilight, not completely dark and that one explanation why one cannot see the all-round white light is that the captain had not turned it on at that time. He also agreed that at a later point as the boat turns to leave the all-round white light can be seen.

284. He said that what they typically observed when making contacts for lighting violations on boats, is either that the all-round white light is not functioning due to poor connections or corrosion. Thus, as the boat operates, the light will flicker. The other common reason is that the light sits in a fixture and as the boat is operated, especially at higher speeds, the light tends to fold down. Typically, they see the flickering occurring at speeds above slow. If it has a bad connection, vibrations at higher speeds cause the light to turn on and off. He agreed that there is no evidence that this happened in this case. He was then asked whether there is evidence that this happened anywhere else. He replied, *"Just the first part of it when we see the boat come in and the all-round white light is not illuminated."*

285. In response to the question whether these lights are made for boats that go at higher speeds, he said that they are a generic fixture for a variety of boats and overtime they become worn or if they are not adjusted by tightening. It is not uncommon for an all-round white light that is worn to fall down due to the pressure of the air pushing on the fixture as the boat is moving at high speeds. If the light was in the down position and partially blocked by the rod holders on the Bimini top of the Scarab the light would not project as it was intended and not be as visible to other individuals as it should be.

286. It was put to him that photographs show that when the Scarab was recovered by the Police the all-round white light was in the down position. He said that he did not recover the Scarab. He does not know whether it was up or down when it was recovered. He said that he was suggesting by this that the all-round white light may have become horizontal during the final journey. He does not know. This is just a possibility. If it was down when the boats was recovered, it could

have been pushed down by a force in the collision. It could also have been pushed down by being dragged along the bottom as it was recovered.

287. He said that while the Harbor House CCTV footage shows at least one light on each vessel, he cannot say if it was the all-round white light which was illuminated or not. He agreed that this is not helped by the fact that there is a very bright light in the foreground that slightly obscures the Pepper Jelly as it comes into view.

288. In relation to Rule 6 and the reference to the state of visibility, he accepted that this would include weather conditions such as fog, moon light and other hazards. He said that people who use the waters are required to use lights after sunset and are entitled to expect other users of the waters to use their proper lighting.

289. He was asked this question:-

> *Q: It is not a requirement of operators of vessels that they must always go slowly just in case another vessel hasn't got its lights on?*
>
> *Ans. The way we describe it is reasonable and prudent, meaning that they can operate safely to avoid a collision.*

290. He said that he is not overly familiar with the local waters where this took place. He cannot from his own experience comment on the density of traffic.

291. He did not agree that those shore lights would not affect an operator unless you are closer to shore than there is in the instant case. He said that they routinely have incidents that are in excess of a mile offshore because individuals were unable to see navigational aids indicating the opening of a break wall or a channel or harbour entrance. As the navigational aids had lights that would illuminate to indicate where the channel is, they would blend with the background lighting whether it be house lights, traffic, or other lights onshore.

292. He was asked whether putting himself in the shoes of Mr. McDonald, there would not have been background light behind the Hurricane, because it was coming from an area with little light. He said based on what was described to him there would be minimal lighting to the east. There would

be more background lighting visible to the operator of the Hurricane than there would be to the operator of the Pepper Jelly. Potentially this might have hampered the ability of the Hurricane operator to see the Pepper Jelly.

293. He said that dashboard, console lights or if lights are mounted or positioned, you would actually get glare from them inside the boat. He did not test the console on Mr. McDonald's vessel and does not know how bright those background lights were.

294. He agreed that the two vessels were operating in open water and that he is not aware that there is a prohibition on somebody going at 50 mph in open water. It is just that they have to be going at a safe speed in all the circumstances.

COLLISION REGULATIONS – RULE 6, SAFE SPEED

295. Mr. Neal said that he understood that the Scarab was heading on a course towards a channel. He did not calculate the distance between the collision spot and the channel. He believes it is right that the distance from the shore to the area of collision is over a thousand yards. It would be beyond the area at which, in the Harbour House Channel, one would have to reduce one's speed to five mph. He agreed that there was still ample time at the location of the collision in open water for the Pepper Jelly to slow down before it entered the Channel.

296. He said that he is not familiar with whether such craft, paddle craft, swimmers, snorkelers or divers use that area. Neither is he familiar with the rules for use by these persons.

297. He said that he would disagree that the speed for both vessels was in comportment with Rule 6, safe speed because of the collision because if they were operating safely, they would have been able to avoid the collision.

298. He said that he did perform a calculation in this case where he showed the distances that the Scarab would have travelled if it was operating at different speeds. He is saying by this that if the Scarab had been going at 45 mph, as opposed to 50 mph, the accident would not have happened. He would assume it would not have occurred based upon the distances travelled.

299. It was put to him that the speed calculations on which he relies serve no logical purpose and does not support his argument that speed was a factor in the crash because if any one of a number of variables is changed, not just speed, the collision would not have occurred. He replied that when they look at a collision, they see the changes that people make. In this particular instance, because it is known there was no change in direction up until the time of the collision, if everything was left the same, they leave the same locations at the same time, they drive the same path at the same time, their light configurations are the same, if speed is taken out, if the speed of either vessel is altered, it becomes a miss. There is no collision.

300. He said in summary that despite his statement as to how far out in a crossing situation there would be a perception of the danger of collision, he still believes that the change in speed is the number one main cause of the collision. He likened it to speeding up if a traffic light turned yellow. He said that he also stood by his conclusion that when the speed of the Scarab Sport was increased to 48 to 50 mph, the collision became almost inevitable. He maintained that Mr. McDonald was in violation of the Rule for maintaining a look-out.

RE-EXAMINATION OF PATRICK MICHAEL NEAL

301. Mr. Neal was re-examined by prosecuting Counsel. He stated that 50 mph is close to 73 feet per second. Rule 6 requires both vessels at all times to proceed at a safe speed. The vessel could take proper and effective action to avoid collision and be stopped within a distance appropriate to the prevailing circumstances and conditions. In response to the question whether 50 mph is a safe speed he said that given the description, what was conveyed that there was no moon, there was minimal lighting, he would not drive his patrol boat at that speed at night even with radar unless they were absolutely responding to an emergency where they have to increase their time.

302. He said that if somebody's GPS is bright on the console and if they are aware that it is bright, that is something they should take into account for the state of visibility. That is something they can adjust and turn that brightness down. If local conditions are that after sunset people are likely to be returning to the same area where many channels are, that is also something to take into account. That would impact on what a safe speed is.

303. He said entrances to channels would be navigational hazards depending on the depth of water. If the water is very shallow around the entrance, which may have been dredged to make it deeper, the operator would have to be focused and paying attention to make sure that they get into that proper place without the risk of running aground. Approaching the area of channels and shoreline and if other boats are heading to that particular place, one would anticipate that there could be other people, whether they be in paddle craft, power boats, or sailboats, because they may be returning to the same place, so that would be a consideration also.

304. He said that he would say in relation to Rule 15 that a risk of collision is different from a likelihood of collision or a certainty of collision. The demonstration he gave was that there can be a crossing situation that in fact turns out to be an overtaking situation or vice versa.

305. He said that it is right that from a greater distance apart there may be all things present. There might be the possibility of crossing and a risk of collision. There might be the possibility of crossing and a greater risk of collision. His opinion is based upon thousands of incidents. When boats are half a mile away that is when operators should be maintaining their course and speed. This is because a half a mile allows operators to perceive other boats, and to start making decisions. They should have time at that distance to determine what the other boat is going to do based upon what they were observing and be able to react accordingly.

306. The risk of collision would change between a mile and a half mile. That does not mean that it is absent when you are one mile away. He said large vessels, for example, such as barges on the Mississippi river may only be travelling at four mph but due to their size or what they are moving on the river, it may take them over a mile to stop, to be able to control it. Thus, at a mile you can start perceiving that there is a potential risk.

307. He said that in the video of Pepper Jelly leaving Camana Bay, he sees the all-round white light which appears to be vertical and on at this time. He said that from the video at Harbour House he cannot positively say that the white light was on, on the Pepper Jelly. When the all-round light is upwards, it is 360 degrees in a horizontal plane. If the white light on Pepper Jelly is actually down, then the all-round white light is in a vertical plane. It appears that the light on the Hurricane was brighter than the light on the Pepper Jelly based on the video.

308. His opinion is that the collision occurs at or around the time of 7:44:46 as shown on Image 9. It could be just prior or can be just after depending on when the GPS recorded the data point. That course 158 degrees is the compass point to point 863, the last recorded location. The GPS would be shut down because of a loss of power. Someone turning the device off or the battery is losing power. It is flooding with water. That is at a point after 863. He believes that the boat could have travelled a distance after the collision of up to 300 or 325 feet. In the staged collision video, we also observed that the boat continued a considerable distance thereafter.

EVIDENCE AT TRIAL - THE CASE FOR THE DEFENCE

EVIDENCE OF DEFENCE EXPERT JAMES CRAWFORD

309. Mr. James Crawford testified that he is an Incident Re-constructionist. He works for Introtech Incorporated in this capacity. Introtech is a company of accident re- constructionists and other staff who are able to investigate and reconstruct what has happened in various crashes. It is an independent agency which handles both defence and prosecution, civil and criminal cases.

310. He has been an officer in the Coast Guard for twenty-nine years. He has a Bachelor of Science in Electrical Engineering obtained in 1974 from the United States Coast Guard Academy and a Master of Science in Aeronautical Engineering obtained in 1987 from the Naval Postgraduate School.

311. After obtaining the Master of Science he was still in the United States Coast Guard. He did avionics, search and rescue and aviation. He retired in 1999. He was then a captain, the rank below Admiral. From 1980 to 1999 he had been preforming incident investigations on a part time basis when he was on leave from the Coast Guard. Since 1999 after his retirement, he has been engaged full time in reconstruction work. He has undertaken comprehensive watercraft related investigations and has had GPS experience while in the Coast Guard and after he retired. He learnt how the system operates, the signals sent and received and how to apply them in cases where vessels have crashed.

312. He has completed various courses at North Coast Polytechnic Institute, in forensic science issues, accident investigation and crash reconstruction. He has teaching experience including teaching

water craft crash/accident investigation and reconstruction to various Universities, Police Academies and other Departments and has taught in Ohio, Florida and New Jersey.

313. He is a qualified Crash Data Retrieval specialist among other qualifications and has professional memberships in the National Association of Professional Accident Reconstruction Specialists and the International Association of Marine Investigations among others[60].

314. He has investigated vessel accidents many times, probably about fifty watercraft accidents. He has testified as an expert in the United States. He was accepted in those Courts in relation to watercraft re-construction.

315. There was no challenge to Mr. Crawfords' expertise. He was received as an expert witness.

316. Mr. Crawford produced three reports and charts and other documentation to which he referred. These were all received in Evidence as **Exhibit 16** - Defence Bundle.

EXAMINATION OF VESSELS BY JAMES CRAWFORD

317. Mr. Crawford testified that he was first approached by the firm of attorneys for the defence in relation to this case in March 2021. He travelled to the Cayman Islands in July 2021. He was afforded the opportunity to examine the two vessels in this case, the Godfrey Hurricane and the Scarab. He first examined each of those vessels at the Marine Base. He also visited areas on the water. He went to Camana Bay and from Camana Bay down to Harbour House Marina and then back to the Marina where the boat that took him out was docked. This was during the day as well as the night-time.

318. He was given the chance to read the reports of Mr. Neal. He prepared his own reports dated the 26th of August 2021, 8th of November 2021 and 18th of February 2022. He had been in Court throughout the trial and had the opportunity to listen to the evidence which was given by Mr. Neal.

[60] Defence bundle – Exhibit 16- Pages 9 and 10 of Curriculum Vitae

319. He said that he has done a similar exercise of plotting the possible courses on a chart of the North Sound. He produced this[61] and stated that one of the lines drawn thereon is from the area of Starfish Point to the area of the collision. There is another one from Camana Bay out along the track line that was taken by the Pepper Jelly to the area of collision. The numbers are the courses of those lines plotted on the chart.

320. He said that as there was no GPS for the Hurricane, he calculated the course for the Hurricane by looking at the damage on the two vessels and putting them back together at the area of impact to see what kind of an angle the Hurricane would have been coming into the crash location. Then he looked at where the Hurricane was coming from and that pretty much corresponded with the angle of the damage going back to about Starfish Point. He said that he agrees with Mr. Neal that this was a crossing scenario.

321. He was asked to give his opinion on the collision assuming that both vessels were properly lit in accordance with the Rules. He said that the stand-on vessel would have been the Pepper Jelly and the give-way vessel would have been the Hurricane. The legal requirements in a crossing situation were for the give-way vessel to keep out of the way of the stand-on vessel and should not pass ahead of the stand-on vessel. These are obligations in relationship to the risk of collision. So that after the risk of collision exists, the stand-on vessel is to maintain its course and speed so that it can be predictable to the give-way vessel, so the give-way vessel can properly keep out of the way.

COLLISION REGULATIONS - RISK OF COLLISION

322. He said that he does not believe that the change in speed of the Pepper Jelly that we see from 35 mph to 50 mph on the GPS one minute before the collision, was a breach of the ***Collision Regulations*** because at that point one minute prior to the collision, no risk of collision existed and therefore there was not a requirement under the Rules for the operator to maintain a course and speed so as to be predictable to the give-way vessel, one minute prior to crash.

[61] Exhibit 16- Defence bundle Tab 7

323. He agreed that in his Third Report he does say that *"even though the lights of both vessels should have been perceptible from over 8/10s of a mile, there was no risk of collision until the vessels approached near enough for a reasonable captain to determine the closure rate and that evasive action needed to be taken. Therefore, for the Wellcraft to change speed by a few knots along the way was not unreasonable.*"

324. He said that he accepts that the change shown on the GPS was a change of 35 mph to 50 mph which was not just a change of a few knots. He agreed that he had continued on in his Report *"to say that the collision was unavoidable if the Wellcraft had maintained a constant speed for 8/10s of a mile was in my opinion overreaching. A true indication of constant bearing and decreasing range cannot be appreciated at such long distances. Furthermore, the requirement under the rules for the stand-on vessel to maintain course and speed does not apply until a risk of collision is deemed to exist. It is not until the risk of collision is deemed to exist that vessels need to abide by rule 8 - action to avoid collision."*

325. He said that he maintains these statements made in his Report.

326. At paragraph 4 of his Report[62] he does say that *"when two vessels are on a collision course at the point where a risk of collision exists and vessels need to take action to avoid the collision, the give-way vessel (Hurricane) would manoeuvre to starboard (right) in order to pass behind the stand-on vessel (Wellcraft). If required in extremis to manoeuvre to avoid collision, the stand-on vessel should turn to starboard, otherwise it would likely turn into the same path that the give-way vessel would take as an evasive action. Therefore, it was appropriate and reasonable for Mr. MacDonald in the Wellcraft to take evasive action and turn to starboard in the few seconds prior to collision as it did in this case, because the Hurricane should have been turning to starboard as well in order to properly pass the stern of the Wellcraft. However, there was no evidence that Mr Emmanuel Brown ever took any action to try to avoid this collision. Even though he was the give-way vessel. If the operator of the Hurricane had reduced his speed slightly and/or turned to starboard, he would have passed safely behind the Wellcraft without a collision."*

[62] Tab 4 - dated 18th February 2022

327. He said that he stands by this statement and that he does not agree with Mr. Neal that had Mr. McDonald maintained the speed the boat was travelling, the two boats would not have collided and that an increase in speed one minute prior to the collision is the main contributing factor in this collision.

328. He said that the three different projected lines of speed by Mr. Neal shown on Image 10 are of no assistance to him at all. Mr. Neal is talking about actions that are taken well before a risk of collision exists, and therefore in open water, open seas like this, there is no requirement for somebody to maintain a slower speed just because there is another set of lights in view if there has not been a risk of collision to be determined.

329. Either vessel could be manoeuvring at any time during that one-minute period which would cause this not to end up being a risk of collision or a crossing situation. One vessel could stop. One vessel could accelerate. One vessel could turn. That applies to either vessel. He said that the point where Mr. Neal has these lines starting, it is way too early to be assessing the effect that any speed would have on this particular collision.

330. His view on whether or not Mr. McDonald took evasive action is that the final course change that is reflected in the GPS data does reflect an avoidance manoeuvre on the part of the Pepper Jelly.

SPEED OF THE HURRICANE

331. He said that he agrees with Mr. Neal that the angle of the first impact was 65 degrees and that the Scarab travels over the top of the Hurricane. When two vessels collide and one is travelling faster than the other, as in this case, the faster vessel is going to ramp up and go over that other vessel, the vessel that it hits, very quickly and there will be a slight change in the angle that you see from the damage and from the course. But not very much at the speeds we are talking about here. He said that the Pepper Jelly was moving faster. The Hurricane was in motion. There is no data to be able to reconstruct the speed of the Hurricane other than the fact that it was likely on plane.

332. Using a model boat to demonstrate, Mr. Crawford said that when a vessel sits stationary in the water it is called displacement mode. As the vessel begins to move, it is moving in displacement

mode, which means it is sitting down in the water. As its speed increases, it gets to a point where it comes into plowing mode where the bow comes up and it is difficult to see over the bow. Then as you continue in speed, the vessel would ride up on top of the water and level out again and therefore now it is in planing mode because it is planing on top of the water. There is no data to determine the precise speed of the Hurricane, but he believes that it is most likely operating in planing mode.

333. He said that the only data point that we have for the Hurricane before the collision is from the Harbour House CCTV. We see a light which reportedly is from the Hurricane and it is moving across the screen, thus we know if that is indeed the Hurricane, that it is not stationary, that it is moving.

334. He said that the damage done to the vessels assists him with the energy that the Hurricane brought to the collision. As the Pepper Jelly is going up and over the Hurricane, the Hurricane is also moving forward. It is below the centre of gravity of the Pepper Jelly. He demonstrated with a model boat and said if a force is put on this boat that is above the centre of gravity, it is going to go in a clockwise direction. If a force is put that is below the centre of gravity, it is going to go in a counterclockwise direction.

335. He said that when the Pepper Jelly was impacted at below the centre of gravity, it is going to be rolling to port as it goes over, and the force of the Hurricane and the hard structures around the helm as it passes over will actually rub against the Pepper Jelly's hull and scrape off some of the gel coat and fibreglass as is seen in the photos of the damaged vessel.

336. He said that this is showing that there is some significant force (demonstrates). As the Pepper Jelly then continues to rotate due to the force of the Hurricane going underneath it, the weight of the Pepper Jelly is coming down on that port side. It pushes in on the hull on the freeboard here and it decaps the fibreglass of the hull from the gunnell. There is actually a gap that comes there as it pulls it apart and that is the reason that we have that decapping from the weight of the Pepper Jelly on its port side as it passes over.

337. Mr. Crawford referred to Image 39 as showing the damage to the Pepper Jelly which he was describing. This is on the port side of the Pepper Jelly and we see that the fibreglass and gel coat

has been ripped off the side right underneath where the words Pepper Jelly are, a little bit forward of that in the Image.

338. He said that Image 41 gives a better view of what he was describing. The upper circle in red is showing the area where there was decapping. In the other oval section, which is at the stern of the vessel, we see where the hull has actually been pulled apart at that location and that was likely as a result of hitting that hard point on the Hurricane as it passes over the top and it hit this hard point. The hard point then would rip that fibreglass away right there making a hole in it.

339. He said that the Hurricane had to have been moving at a very good speed in order to cause that kind of damage to both vessels as it came through.

340. With respect to Image 46 and the relevance of the damage to the anchor to the speed of the Hurricane, Mr. Crawford said that the anchor is bent to the starboard. It is a shank of steel which is a very tough piece of metal to bend and it takes significant force to bend something that is made in the manner that this anchor shank is made. That initial impact is going to have a force from the Hurricane to bend that anchor to the starboard on the Pepper Jelly. So that also assists him in saying that the Hurricane was going at a significant speed. He would estimate something above planing speed but he could not say the precise speed.

341. He said that he agreed with Mr. Neal that the collision caused the Hurricane to yaw. He does not agree with him that the Pepper Jelly heeled to starboard as it was travelling over the Hurricane and this is because of what he just indicated. The fact that the force of the moving Hurricane against the Pepper Jelly is below the centre of gravity, would cause it to tilt up to port, not to starboard.

POINT OF COLLISION

342. He said that he does not agree with Mr. Neal that the collision caused a change of course of the Pepper Jelly from 125 degrees to 158 degrees. It may have changed the course slightly, but not very much at all. This is because of the time of the intersection of the two vessels, when the forces are acting on one another. The time is very short as the Pepper Jelly passes up and over the

Hurricane. It is probably less than or about a second. In his professional opinion what accounts for that change in course would have been a pre-impact manoeuvre on the part of the Pepper Jelly to turn to starboard. He said that all of the damage which he saw was supportive of his re-construction of how the crash occurred.

343. He explained that every vessel, large vessels, small vessels, row boats, has what they call a righting moment that will right the vessel. It is based on the centre of gravity's location on the boat. If the vessel heels or it rolls a little bit, the righting moment will bring it back to a level. As the vessel starts to roll, the force of gravity acting through the centre of gravity on the boat will tend to provide a righting moment. If you get to the point where the centre of gravity of the boat is outside of where the water is, then you no longer have a righting moment. At that point the force of gravity is going to act through the centre of gravity of the boat and cause it to flip.

344. Mr. Crawford said that the GPS works by plotting the average course and speed between two latitudes and longitudes. It is the average between those two points because it knows at the snapshot the latitude and longitude and the time that was taken. Two points are required in order to get the average.

345. As to which data point the collision took place and Mr. Neal's opinion that the collision took place at waypoint 862, and then the GPS shut down at 863, Mr. Crawford said that this was not his view.

346. He testified that his view is that the collision took place at waypoint 863 because as the vessel is travelling along, it has a GPS antenna, which is up on the Bimini top that receives the signals from the satellites in order to determine the positions and the time. When that GPS antenna enters the water, it is no longer going to be able to receive the signals from the GPS satellites and therefore will not give you another position. If it is on its side and the antenna is in the water, the water will be preventing the signal from getting through and even more so if it is upside down, now you have got the hull of the boat between the satellites and the antenna and it cannot receive a signal so it cannot give you another position.

347. He said that while Mr. Neal said that the reason that we have the final signal here is because the GPS ceased to work because water got to the unit or to the battery, this is not his view. He

explained that between 862 and 863, the average course was 158.5 degrees and the average speed between those two points was 44 mph, and the time difference between those two points was five seconds. So if the vessel were to capsize at 862 then it would have had to travel an additional five seconds at an average speed of 44 mph to get to point 863 and that in his view is just impossible.

348. In response to the question whether it was possible for the vessel to have capsized at 863 as Mr. Neal says, Mr. Crawford said that again you have to come back to the laws of physics on that. At the point of collision, there is a force from the Hurricane that is causing this vessel to rotate. If it were to travel some distance, it would not travel on its side because the righting moment is going to tip it over completely. So if it were to travel an additional 325 feet in an inverted position, then we would not have had another signal. If it were to travel by some other means, either a little heeled to the right or to the left for that 125 feet then where is the external force that is required by the laws of physics to cause it to tip over at that point and stop receiving the GPS signals? There is no external force to cause it to turn over if the collision happened earlier.

349. He said that he had measured the distance between waypoints 862 and 863. It is approximately 325 feet. He measured that on a Google Earth chart which accepts latitude and longitude as input. This is the same type of chart that was used by the prosecution in showing the different waypoints on their displays.

350. He said that the 1989 video shown by Mr. Neal provides no assistance to him in reconstruction in respect of conclusions in this case because it was not reasonably similar. That video was completely different from the situations that we have in this crash. The weights of the vessels were not the same. The configurations of the vessel was not the same. One vessel was in motion and the other vessel was not.

351. He was asked to explain the reason that the vessel in the video kept going while the one in this case could not. He replied that in the video the vessel that travelled over the top of the other in that video, continued going, because it landed in a normal position, albeit rocking but it still had its engines running and it ran aground.

CCTV FOOTAGE

352. He said that the CCTV camera at Harbour House is located at least 1300 yards away from where the vessels were at the time that they collided, and so the view from the camera is not going to be focused out that far. It is very difficult to be able to tell what is going on in that video other than you see two lights apparently moving towards each other. You cannot tell what the course is or whether any small changes in course may have been accomplished. He said that he did not see in the video that after the impact that there is a noticeable change in direction of the boat and does not agree that the CCTV footage confirms that the directional change recorded on the GPS unit in Mr. McDonald's boat was as a result of the impact.

RECOVERY OF THE BODY

353. On the issue of where the body of Mr. Brown was recovered from the Sound, and Mr. Neal's position that its location supported his conclusion that the collision took place at waypoint 862, Mr. Crawford said the position of the body that was recovered is not necessarily indicative of the location where it went into the water. He explained this by saying that it is known from other data in this case that the position that the Pepper Jelly was found overturned was some 700 to 900 feet away from either of those two waypoints. It was not right at the waypoint. From this it is known that there are some currents there. This is a tidal section of the coastline and so there are tides and currents there even if the wind is not blowing. Currents will tend to move things that are on top of or underneath the water as long as they are not anchored to the bottom.

REASONABLE CHOICE OF MANOEUVRE

354. He said that if this was a turn by the Pepper Jelly rather than an alteration in course being caused by the collision, this was a reasonable choice to make in the circumstances at the time. At that point, there would have definitely been a risk of collision existing, and the judgement of the captain would be to take some kind of action when it appears likely that the other vessel is not going to be able to avoid the collision by itself. The best judgement of the captain in this case would have been to make a course change to starboard. Because if you made a course change to port you are turning into the vessel that you are trying to allow to keep out of your way. If you

slacken your speed, if the vessel that is trying to keep out of your way is going behind you, and you slow down, then you might be slowing down and putting yourself exactly in the path of that vessel that is trying to keep out of the way. So, the best choice of action is to change course to starboard.

LIGHTING

355. He said that he examined the Hurricane vessel last summer and the collision occurred in 2019. The all-round light was not present at the time neither was the starboard navigational light. From the angle those are the two lights that one would see if it was illuminated.

356. He said that we have no data to be able to plot a precise track or specific course for the Hurricane as it was on its journey from its origin, which was in the vicinity of Starfish Point to the area where the collision occurred. Changes could have been made back and forth. All that is known is the angle that the two vessels came together at the time of collision. Then a line can be drawn back up to Starfish Point and it can be said that in general it would have been following this kind of a course.

357. He said that if the Hurricane had maintained this 65-degree angle, the Pepper Jelly should have been able to see if the starboard light was lit. The Pepper Jelly would not be able to see its port side light. This is because at the angle that they impacted, the port light is on the opposite side of the Hurricane and therefore would not have been in view from the operator of the Pepper Jelly. He said that he did not examine the port side light of the Hurricane. It was not present when he examined the boat.

358. He said also that he did not see the docking light of the boat. The rubble from the bow of the vessel was all piled up on top of the vessel itself and therefore without removing the rubble and laying it around the parking lot of the Marina unit, he was not able to get a view of the docking light itself. He has seen the docking light in the images that were taken before his involvement in the case.

359. He said that docking lights are specifically put on a vessel to shine in a forward direction. In shining forward, the operator can see the dock or any other hazards or objects in the water directly in front of the vessel. In the hull of the Hurricane, the gunnel forms a kind of a wall, which would keep that forward facing light from being viewed at all from the side.

360. He was asked whether given that the CCTV footage from Harbour House Marina appears to show at least one light on each vessel, he could say which of the lights described might have produced the light seen on the Hurricane. He said that on the Hurricane, the all-round white light would appear as white, and it would be more brilliant than a side light would be. So, he would think that if there is a white light, it could be the all-round white light.

361. He said that additionally, the Hurricane would have been coming at an angle towards the CCTV camera and the front dock lights, if they were illuminated, could also produce a white light. From that distance, about 1300 yards away, it would be difficult to split those lights apart and tell that there are two lights rather than one light because of the distance away and the proximity that they are together.

362. He said that he had no data to be able to show hot shock on any of the bulbs because they were not present or available to him when he inspected the vessel.

363. From the angle of the CCTV camera, it would not have been both lights because there is a vertical separation between the two, (all-round white light and docking lights) and that would probably show up as two white lights, one on top of the other. They did not see that. So, it would have to be either the all-round white light or the docking white light. He said that even from such a distance it is likely you could have seen some sort of a separation, if you look closely. Again, he would have to really look at the video to be able to tell. He said that he thinks it would have to be forensically examined to be able to determine how fine a detail you could get in the vertical separation.

364. At that distance the navigational lights would appear as white points of light. If it is the all-round white light, Mr. McDonald should have seen it. If it is not the all-round white light, and it is the docking light again there would be the difficulties which he previously mentioned.

365. He said that he has watched the video of the Pepper Jelly coming into Camana Bay at 7:18 p.m., which was after sunset. Sunset would have been a couple minutes before 7:00 p.m. Civil twilight is for 30 minutes after sunset. At that time, it is starting to get dark, but it is not dark yet. It is still reasonably bright outside, enough so that you can carry on normal activities without the use of artificial lighting.

366. When the Pepper Jelly came into Camana Bay, it appears from the video footage that its starboard navigational light is turned on. He cannot see the Pepper Jelly's all-round light as it comes into Camana Bay at 7:18 p.m. The switches to turn the lights on and off on the Pepper Jelly have been described as a split switch, so you can turn on the all-round white light without having to turn on the red and green navigational lights and vice versa. As the Pepper Jelly leaves Camana Bay, you can see it backing up in the video. You can see the all-round white light, you can see it turning and you can see it proceeding out and you can see the all-round white light at all of those times.

367. He said that he does not see any evidence that the all-round white light might have effectively blown over or back so that it is horizontal or of its flickering, that is, of its coming on and off from time to time.

368. He said that it does appear in the CCTV footage that the white light on the Hurricane appears to be brighter than the white light on the Pepper Jelly. That is all he can say from that.

DAMAGE TO BIMINI TOP

369. He said that in his view the damage to the top of the Bimini on the Scarab was caused when it was being towed into shore. He explained that the support structure on top of the Pepper Jelly is stainless steel tubing and it is very thick, sturdy and strong. It would take a lot of force to bend those as well as the steel tubing around the perimeter of the Bimini top. What we see in the Pepper Jelly is that the Bimini top is askew a little bit. From the front you can see that the forward portion of the top is bent down slightly. It would take a lot of force to do that.

370. Attached to the structure on the top are spotlights, antennas, and the all-round white light. He looked at those stainless-steel attachment points for these and they were bent backwards. That would not happen from the force of water. That would have to happen from some other force.

371. Thus, his opinion is that the damage to the Bimini top and all of those structures on top of it actually occurred as the Pepper Jelly was being towed in an inverted position back to the dock, and at some point along the way or multiple points. It was able to make contact with the bottom and that would supply enough force to be able to bend that structural steel the way it is seen bent in his photos.

COLLISION REGULATIONS - SAFE SPEED

372. As to Rule 6 of the ***Collision Regulations*** which requires a vessel to operate in a safe speed in all the circumstances and Mr. Neal's opinion that Mr. McDonald was in breach of his duty to operate at a safe speed, Mr. Crawford said that his view is that Mr. McDonald was in open waters in the North Sound. There is no speed limit in the open waters of the North Sound.

373. He noted that the conditions on that night were benign. The seas and wind were calm. It was night-time, so you would have to be constantly on look-out for the lights of other vessels. But on a dark night, you ought to be able to see the lights of other vessels, even better perhaps than if there was a moon providing celestial illumination. The state of the moon was relatively low to the horizon. It was not directly overhead, not quite a full moon.

374. As to the density of traffic, he said that he has no other evidence or data that there were more than these two vessels there. The only evidence that he has seen has been based on the footage from the Harbour House CCTV, which shows those two vessels being the only ones in that general vicinity.

375. He calculated the distance of the area of the collision from the shore to be about 1,286 yards. The ***Regulations*** refer to a speed limit within 200 yards of shore. To get from the area of the collision through the channel, down to about 200 yards from shore is 1,337 yards. The operator would have had the opportunity to slow down very quickly if he pulled the throttle back to idle. It would

probably take you in the range of 10 to 15 seconds at the most to bring you back to 3 to 5 mph if you brought your throttles all the way back to neutral. The reason for that is because as you bring your throttles back, you no longer have thrust to keep your boat on plane and it starts immediately to go into plowing mode, and the hydro dynamic forces of the water will slow the vessel down very quickly before it comes down into displacement mode.

376. He referred to a performance bulletin on the Wellcraft Scarab 30 foot sport boat. In this particular case, it has a single 250-horsepower Yamaha engine and can travel at 50 mph.

377. He said that in the crossing scenario, the Wellcraft took proper action, but it was not that effective to eliminate a collision. The manoeuvre that was performed by the captain of the Pepper Jelly was appropriate. It was about the only manoeuvre that he could perform to try and mitigate the circumstances of the crash. He said that it was not the speed of the Pepper Jelly that rendered that manoeuvre ineffective. It was the failure of the Hurricane to keep out of the way, to change its course and/or speed to pass behind the Pepper Jelly. That was what caused the collision. The action was ineffective because the Hurricane was not following its requirement to keep out of the way. The Pepper Jelly was doing its correct requirement.

378. He was asked to give his views as to various lighting scenarios. He said that if both vessels were properly lit in accordance with the Regulations but Mr. McDonald did not see the Hurricane until seconds before the impact Mr. McDonald is not in compliance with his duty to keep a look-out. If the vessel was conspicuous, if it was properly lit, the captain of the Pepper Jelly should be on the look-out for other vessels in the vicinity that might come into conflict with his, and the lights would have been conspicuous enough to be viewed and seen and understood by the captain. However, even if he failed to keep a proper look-out, the operation of the Pepper Jelly was in compliance with Regulations 15 and 17.

379. If the vessels were properly lit, the same situation would apply to the operator of the Hurricane. He is required to keep a look-out. The lights would have been conspicuous. If he was keeping a proper look-out, he should have seen it and then acted accordingly. The operator of the Hurricane operator would not have been in compliance with his duties under Regulations 15 and 16 to give way. The Hurricane should have been well able to keep out of the way of the Pepper Jelly.

380. If the Hurricane was properly lit and the Pepper Jelly was not properly lit, the Hurricane operator would not be in breach of keeping a proper look-out. You cannot avoid what you cannot see. If you cannot see it, then you cannot assess the risk of collision and the rest of the duties that apply to a give-way vessel would not apply. It would not be possible for you to know what you are supposed to do at that point if you cannot see the other vessel.

381. If the Hurricane was properly lit but the Pepper Jelly was not, then the Pepper Jelly operator ought to be able to see that and perform his duty to maintain course and speed in the crossing situation as required by the Rules. Then at the moment where he sees that the give-way vessel alone cannot take action to avoid the crash, he should take some action himself and he did so by turning to the right, so he would be in compliance with the Rules. He would not be in compliance with keeping a proper look-out, if he did not see the Hurricane until the final seconds. You should see it before the final seconds.

382. If the Pepper Jelly was properly lit, the operator of the Hurricane should have been complying with all of those duties regardless of whether his own vessel was properly lit or not. If the Hurricane was not properly lit and the Pepper Jelly was properly lit, Mr. McDonald would not be in breach of any of those Rules and Regulations. If you cannot see it, you cannot assess the risk of collision, so the rest of the rules do not apply.

383. He said that when he said in the final paragraph of his final Report that safety requires both operators to assure the operation of their vessels in full conformity with the applicable rules of the sea, and he agreed that both operators have culpability in the operation of their respective vessels, he was assuming that they were both properly lit.

384. This was also his assumption when he stated that in this case multiple failures on the part of each operator contributed to this collision and any one or more of these failures by either operator, if removed or changed, would have resulted in the collision between the two vessels not occurring.

385. He said that he stands by his opinion that the one failure that was the major causal factor in this collision was that the operator of the Hurricane failed in his duties as the operator of the give-way vessel to keep out of the way of Mr. McDonald as required by Rule 15.

CROSS-EXAMINATION OF JAMES CRAWFORD

386. In cross-examination, Mr. Crawford was asked whether in his opinion there is no risk of collision at a distance greater than a quarter of a mile. He replied that any time you have two vessels out in the water, unless you can determine their movement, then there is always a risk of collision at any point in the water, whether they are three miles away or five miles away. There is a risk of collision if they get close enough for a captain to reasonably conclude that a risk of collision exists. But you will not know that until the vessel gets close enough to be able to appreciate that a risk of collision exists.

387. He agreed that the ***International Collision Regulations*** do not exist as something in isolation, and that they have been around for centuries. He said that he does know that within his field of expertise that the notion of a risk of collision has some sort of a meaning in the ***Regulations***.

388. He said that the risk of collision exists at a point in time when you can appreciate the fact that that you are going to be coming into close quarters with another vessel. So a vessel at two, three, four miles away, while ultimately their courses may cross, you cannot appreciate that there is a risk of collision and there is no requirement for you to follow the rules of maintaining a course and speed for a half an hour before the crash just because that vessel may cross paths with yours.

389. When pressed, he said that he thinks it exists when a reasonable person would appreciate it, and that it is Rule 7 that applies there. Rule 7 and Rule 8 are closely aligned but Rule 7 talks about it a little bit better. He agreed that the test for the existence of a risk of collision is not when someone appreciates it, but it is when someone ought to be aware of a risk of collision and said that is what he had testified to, when a reasonable person would conclude that a risk of collision exists.

390. He expanded on this by saying that at a quarter of a mile, it is not a great risk of collision if the vessels are following the rules. There is a risk of collision, but that requires the vessels to follow the navigational rules, and then a collision would not ensue. It is a judgment call in the view of the captain as to when the necessity exists. He said that based on the unique circumstances of this particular incident, he agrees with Mr. Neal that a quarter of a mile is a reasonable time for a risk

of collision to be likely and therefore the rules would come into play at that point. That is his opinion.

391. He said that the rules always apply at all times, but in order to follow the rules of avoiding a collision, he does not believe under the unique circumstances of this crash that there was an appreciable risk of collision at a half a mile. Then he accepted that at half a mile they were on a course that involved a risk of collision. He agreed that the navigation lights on each boat should be observable at half a mile and that someone keeping a watch on each boat should have appreciated the presence of the other boat's navigation lights if they were illuminated.

392. He said that he disagreed with the angle of impact of 65 degrees following which the Pepper Jelly crossed over the Hurricane at a 90-degree angle. It passed over it at just about a 65-degree angle. The interaction between the two vessels was very brief. He said this was consistent with the damage he saw. He agreed that he was at a disadvantage compared to Mr. Neal who inspected the vessel much earlier and that he did not get an opportunity to look at the striations in detail of any of the pieces that were stacked on the Godfrey Hurricane. He said that he did not produce any images of his own to illustrate his view.

393. Mr. Crawford agreed that in his interview Mr. McDonald appeared to be saying that he had not seen the Godfrey Hurricane and did not have time to take evasive manoeuvres. He was saying that he was going at about 25 mph. Mr. Crawford agreed that on his version, if the Pepper Jelly had carried on at 44 mph or 50 mph in the straight line on course of 125 degrees rather than the evasive manoeuvre taken which changed its course then the collision would never have occurred with the Godfrey Hurricane. He said that while he said that the change was consistent with an evasive manoeuvre, it could also be consistent with a turn in direction.

394. He did not agree that it was an incompetent evasive manoeuvre if it caused the crash. He explained that the way that it is a competent manoeuvre is because the operator cannot turn to the left because that is where the other vessel is. He cannot slow down because the other vessel is required to give way and pass behind him. So the only thing left for him to do is turn to the right if it is an evasive manoeuvre.

395. He was asked whether he sees that if the operator of the Pepper Jelly never makes the evasive manoeuvre and carried on at the same speed at the same course, then he never gets to 863 when the Godfrey Hurricane does. He responded that he did see this but that the collision could have occurred at a different point depending on where the Godfrey Hurricane was when he arrived at 862 to begin to turn to starboard. He said that we have to move the Godfrey Hurricane back in time based on its speed and then we can draw those kinds of conclusions. But without being able to move it back in time along its track line at a reasonable speed, then we cannot make a determination that a collision would not have occurred.

396. He said that it would not surprise him that the North Sound does not get deeper than 13 to 15 feet. It is a relatively shallow area, but it is open water. He said that he understood that there is Camana Bay that is likely to be frequented by boats, Harbour House Marina and those channels that are likely to be frequented by boats and off to the side and up north Starfish Point and Rum Point which again are all likely to be frequented by boats.

397. He said that it is not different from the high seas if there are no other vessels out there. There is no speed limit out there. It is open waters to be able to navigate as you please. He said that he would agree that it is not the high seas and that there is potential for other vessels to be there. But whether there were other vessels in the vicinity, that is what has to be considered when you talk about safe speed under Rule 6(a)(2).

398. He said that what he believes is that the prevailing circumstances are what was prevailing at the time when the incident occurred, and at that time there was not a congestion of vessels around. He said that certainly any time you get anywhere near shore, you can have other vessel traffic. But in this case, there is no evidence that there was a concentration of vessels or any other vessel traffic for that matter as a prevailing condition where this crash occurred.

399. He said for safe speed, you always have to take into account the potential for other vessels to be present at all times, that is why you have to keep a proper lookout. But in this instance, it does not feed into safe speed because we are talking about the prevailing conditions at the time of the incident, and the prevailing condition at the time of the incident was there was no other evidence of any other vessels in the area.

400. He agreed that the North Sound, does have the potential from a variety of angles for there to be background light from shore.

401. Mr. McDonalds' statements in interview were drawn to his attention. He said in response that if what Mr. McDonald is saying in the interview is that a safe speed at this time of night in this area in the direction that he is travelling is no more than around planing speed, 25mph an hour, give or take, he would never disagree with the captain's judgement. If the captain thought that that was a safe speed, then he should be going at that speed. However, if he were operating a boat out in that area in the unique conditions of this particular incident, he does not think that you would need to be going that slowly.

RE-EXAMINATION OF JAMES CRAWFORD

402. Mr. Crawford stated in re-examination that there is no way of telling what the Hurricane was doing half a mile away from the collision point. Other than we can assume it is coming from Starfish Point, and it may be going straight, but we just do not know what it was doing.

403. We cannot pinpoint where it was on the map because we do not have a GPS log for it. There is no way of knowing what angle or course it was going because we do not have GPS data to be able to show. There is no way of knowing what speed it was going other than it was on planing speed, but it could have been going at any speed higher than that. When the Scarab was half a mile from the collision point, there is no way of knowing precisely where the Hurricane was in relation to the Scarab because we do not have the data. It is likely it was further away than the Scarab was to the collision point based on the general course that it would have been taking from Starfish Point, but it is hard to say.

404. In respect of the possible disadvantage that he would have experienced by examining the vessels later than Mr. Neal, he said that he did have the advantage of seeing Mr. Neal's images and the calculations that he made closer to the time. He said that he is not saying definitely it was an evasive manoeuvre he is saying it is consistent with an evasive manoeuvre.

405. He said that he is not saying that the collision happened at waypoint 863. He is saying that the GPS stopped receiving a signal at that point. The collision would have taken place slightly before that latitude and longitude in the waypoint.

OBSERVATIONS

406. For my part I found some of the key areas of Mr. Crawfords' evidence difficult to accept. He said that there would be no risk of collision at a distance greater than a quarter of a mile. It would be a judgment call for the captain. He made repeated references to the prevailing conditions and likened it to the high seas. This was plainly not the high seas. This was an area near to the entrance of a Channel. Mr. Crawford said that what has to be considered is whether there were other vessels in the vicinity and that in this case there was not a lot of traffic at that time. In his view safe speed is dependent on whether there are other vessels in the vicinity.

407. In contrast, Mr. Neal focused on the existing circumstances such as the lighting conditions, there being minimal lighting at night, the background lighting which may pose difficulties, the location and the traffic which might be expected, as being all factors, which are part of the prevailing circumstances and conditions. This is an approach which appears to be more in keeping with the Rules which require a "full appraisal of the situation and the risk of collision". It also appears to be the more objectively sensible approach. Safe speed under the Rules is one which will allow a vessel to be able to take proper and effective action to avoid collision and to stop within an appropriate distance.

408. That Mr. Crawford's approach is seriously questionable is evident from his response in cross-examination to being told of the defendant's account in interview as set out in paragraph 401 above. His approach does seem to be the very opposite of the caution which is at the heart of the Rules. His calculations as to the change in direction being an evasive manoeuvre were strongly presented by him. Yet in cross-examination he seemed to accept that on his account this manoeuvre must therefore have caused the collision rather than avoided it.

409. The following are of import:-

i) From the staged collision, while there are differences in the vessels the impacting boat heeled to the right and travelled for some distance before capsizing. This supports Mr. Neal's opinion in this case.

ii) The CCTV footage provides evidence that the Hurricane was lit. Its light or lights appeared brighter than the lights of the Pepper Jelly which had all three lights on. Both experts agree on this.

iii) If the Hurricane was lit, its light or lights ought to have been visible from a distance.

iv) The Pepper Jelly would have had better visibility because there was less background lighting to affect the view of its operator.

v) Mr. Neal explains the change in his opinion as to the manoeuvre of the Pepper Jelly and provides a plausible reason for the change. I accept his explanation as a truthful one.

vi) The location from which the body of Mr. Brown was recovered is in close proximity to the waypoint at which, on Mr. Neal's evidence, the collision occurred. There are some unknowns, in particular the current in that location but Mr. Neal has had considerable experience in these types of cases. The location of the recovery supports his opinion as to the point where the collision occurred.

vii) The GPS data for the Pepper Jelly shows a substantial increase in speed minutes before the collision. Mr. Crawford says that there was no risk of collision at this time. Mr. Neal's view, which has resonance given the location, is that this is akin to speeding up at a yellow traffic light.

viii) Both experts agree that there is limited information available as to the operation of the Hurricane. This must be borne in mind on the issue of causation.

ix) While there is no evidence of the speed at which the Hurricane was travelling, the position of its throttle on recovery and the measurement conducted by Mr. Neal indicates that it was likely operating at planing speed of about 21.3 mph. It may have been going faster but what is clear is that unlike the Pepper Jelly, it was not being operated at full throttle.

410. Overall, I found Mr. Neal to be the more reliable of the two witnesses. Where the two differ on material aspects, I accept the evidence of Mr. Neal over that of Mr. Crawford as the more plausible and objective evidence. In particular Mr. Neal's evidence as to the critical and central role that speed played in this collision and the import of this speed in the context of the existing conditions. I am mindful that Mr. Neal's evidence as to this has to be considered in light of all the other evidence in the case.

CLOSING SUBMISSIONS OF THE PROSECUTION

411. The Prosecution submitted that it has discharged the burden on it to establish all the elements of the offences to the required standard.

DUTY OF CARE

412. The prosecution submitted that it is established beyond doubt that a duty of care was owed to the three occupants of the Godfrey Hurricane. The defence take no issue with this element of the offence. Indeed, the defence submit that it is uncontroversial that the defendant as the operator of his vessel owed a duty of care to other users of the water.

BREACH OF DUTY/ GROSS BREACH

413. The primary factual circumstances relied on by the prosecution is that the defendant's vessel was approaching the shore and entrance to the Harbour House channel at the material time. The defendant initially accelerated from 35 mph to 42 mph. At 8/10ths of a mile and one minute before the collision he increased his speed to between 46 and 52 mph. The prosecution say that

the manner of his operation in the attendant circumstances showed a reckless disregard for the life and safety of others.

414. As to the mental element, the prosecution say that from the defendant's statements made in interview he knew and was aware that there was a real risk of death, in that:-

(i) he was aware that at that time there would be boats going back home.
(ii) he was aware that he should be attentively watching his surroundings.
(iii) he was aware that he should not be going any faster than he has to at night.
(iv) the pattern of his behaviour throughout the day had been to accelerate within the areas of the shoreline where he should be going at 5 mph.
(v) his conduct in the aftermath of the collision shows an apparent reluctance to summon immediate help.

All these matters say the prosecution support his awareness of his culpable conduct.

415. Additionally, the evidence from the CCTV footage recovered from the Harbour House Marina and the Patrick's Avenue CCTV footage show that the Godfrey Hurricane was lit as it approached the location of the collision. The defendant must have therefore failed to keep a proper look-out. This would be either a distinct breach or an aggravating factor when considering the culpability of his conduct.

416. The submission is that all the evidence taken together demonstrates that he operated the Pepper Jelly at a dangerous and excessive speed when approaching the shore and entrance to a channel during the hours after sunset and that this amounts to a gross breach of his duty of care.

CAUSATION

417. As to proof that the defendants' breach was a substantial cause of death. The prosecution submits by reference to the passage from Archbold noted above that proof need be no more than that the breach was something more than de minimis.

OBVIOUS AND SERIOUS RISK OF DEATH

418. The prosecution submits that the Court can be satisfied so that it is sure that there was an obvious and serious risk of death arising from the defendant's breach of duty of care and that this would have been obvious to the defendant given the information available to him. Counsel points to the statement made in interview by the defendant that a safe speed was no more than that required to reach planing, that is, approximately 20-25 mph.

GROSS/CULPABLE/ RECKLESS - STATES OF MIND

419. Under this heading the prosecution refers to the expected traffic at that time, the defendants' account that safe speed is no more than planing speed and submits that the nature of the serious injuries suffered by the three persons is the almost inevitable consequence of the impact at the speed at which the defendant was travelling.

420. The prosecution also submits that three of the states of mind identified in the cited cases are pertinent to this case and that there is a sufficiency of evidence that the Court may find any of these three states of mind to be proven to the required standard: -

- Indifference to an obvious risk of death arising from potential collision with another vessel while travelling at excessive speed after sunset and when approaching shore or the entrance to the Harbour House Channel;
- Actual foresight of that risk;
- Appreciation of that risk together with an intention to avoid it but to which is added such a high degree of negligence in the attempted avoidance of it as the Court considers justifies conviction.

421. The prosecution places significant reliance on the statements made in interview by the defendant. In these say the prosecution, the defendant said that there was a need for safety at that time of night on the North Sound and said that the speed at which he had been travelling was no more than planing speed which is about 25 mph.

422. The prosecution points to the evidence of the images of the Pepper Jelly on recovery which show that the throttles of the vessel were fully engaged. The active log for the GPS provides evidence that in the 50 seconds before the collision and within 0.3 mph of it, at whichever point that it occurred, he accelerated from 46 to 50 mph. The defendant was therefore travelling twice as fast as the speed he himself considered to be a safe one. The expert evidence of Mr. Neal is that at 50 mph, this would be 73 feet in a second.

423. The prosecution submits that with his qualification and experience, the existence of the risk was obvious to the defendant upon the information available to him at the material time. Nevertheless, he chose to take the risk to operate the vessel at that speed or he was indifferent to the risk.

424. Under the third limb the submission is that even if he took an avoidance manoeuvre it does not mitigate the high degree of negligence in travelling at high speed at night near the entrance to the channel and in any event that the manoeuvre taken ended in the collision.

425. The prosecution says that the speed at which he travelled at the particular time (on a Sunday night), the location where he was speeding (in the vicinity of the channels) carried with them an obvious and serious risk of a collision with another vessel which in itself carries an obvious and serious risk of death. The prosecution also submits that upon the information available to the defendant, the existence of that risk was obvious to him. That nevertheless the defendant chose to take this risk or was indifferent to this risk, thus his conduct in this regard was so reprehensible and fell so far below the standards to be expected of a person in his position with his qualifications, experience and responsibilities that it amounts to a crime.

LOOK -OUT

426. The prosecution submits that Rule 5 as to keeping a proper look-out is no more than "an obvious aspect of reasonable care in the operation of the vessel." From the evidence of the CCTV footage the Godfrey Hurricane was lit. Irrespective of which light was being displayed had he been keeping a proper look-out in the manner he described in interview; he would have seen it before the time when he says that he did.

SAFE SPEED

427. The prosecution submits that in addition to the defendants' own evidence as to what the safe speed would have been, there is also the evidence of Mr. Neal. Mr. Neal's opinion with respect to Rule 6 is that given the defendant's indication of awareness of the potential hazards it is reckless in nature to increase the speed of the vessel as it nears shore. It is also Mr. Neal's opinion that based on the speed of the Pepper Jelly, action to avoid a collision was not made in ample time and with due regard to the observance of good seamanship as is required by Rules 5 and 8 of the ***Collision Regulations***.

428. Mr. Neal gives his opinion that it is more likely that the background lighting would have affected the view from the Godfrey Hurricane than it would the Pepper Jelly.

429. The prosecution submits that the evidence of the defence expert Mr. Crawford as to the manner and angle of the collision of the vessels is in many respects incorrect and that it appears that he did not carry out a detailed examination of the Godfrey Hurricane. This is in contrast to Mr. Neal's evidence on this which is supported by the images showing the nature of the damage sustained by the vessels and by other evidence.

430. As to Mr. Neal's evidence of the location of the collision being at waypoint 862 rather than 863, the prosecution submits that this is supported by the location where the body was recovered, the CCTV footage as to the absence of a change in intensity of the light from the Pepper Jelly and the timing of the GPS shutdown, being shortly after rather than at the very moment of collision.

431. Counsel points to what is said to be the striking similarity of the defendant's behaviour when approaching a hazard and accelerating within such an area during the day of the incident as shown from the GPS data at Images 5, 6 and 7. The pattern appears to be that when in areas where it is more likely to be observed, it decreases its speed. It is said that the observations of Mr. Chris Briggs as to the Pepper Jelly when it was passing his house are inconsistent with the actual GPS evidence. This provides evidence that there was acceleration above 5 mph when the vessel left the Harbour House Channel that day and when it was still within 200 yards of the shoreline.

432. The prosecution submits that any failure on the part of Mr. Brown in operating the Godfrey Hurricane as the give-way vessel does not affect the culpability of the defendant. Counsel refers to the terms of the Regulations and submits that "in anticipating that a "stand-on" vessel may nonetheless be required to take evasive action" as well as requiring the maintenance of a safe speed to avoid collision, both "involve the reasonable anticipation that another vessel may contribute to a risk of collision by its operator's failing to take reasonable care."

433. Counsel submits that:-

> *"Part of the reason why 50 mph is an excessive and dangerous speed is because it destroys the ability of an operator to meet the wholly foreseeable eventuality of a crossing "give-way" vessel failing to see or recognize the "stand-on" vessel, indeed by approaching at 73 feet per second it contributes to that risk."*

434. Counsel submits further that "the doubt regarding the exact course and speed of the Godfrey Hurricane as it neared the site of the collision is not relevant to any issue to be determined". It is argued that whatever course and speed the Godfrey Hurricane approached the collision has no impact on the defendant's conduct in speeding and his mental element in taking the risk to travel at the speed he did. Considerations as to the conduct of the operator of the Godfrey Hurricane and the contribution of each party's negligence would be relevant to a civil trial and to the scale of damages but are not relevant in a criminal case.

CLOSING SUBMISSIONS OF THE DEFENCE

435. The defence submit that in issue are the second and third elements of s.210 of the ***Code***, that is whether the defendant navigated the vessel in a manner that was rash or negligent and if so whether it was rash or negligent to such a degree that it endangered human life or safety.

436. It is submitted that in determining these issues the Court should have regard to the ***Collision Regulations*** which are followed in the Cayman Islands and that these rules will guide the Court in assessing whether and if so, how the defendant fell short of the standard expected of the reasonable operator. In this respect it is submitted that Rules 5, 6, 15, 16 and 17 are the most relevant.

437. Counsel has provided a careful and detailed analysis of the Rules.

RULES 15 AND 16

438. Counsel for the defendant submits that given the two destinations of the vessels a crossing situation arose. The Godfrey Hurricane had the Pepper Jelly to her starboard side and was therefore the vessel which was required to keep out of the way of the Pepper Jelly and to avoid crossing ahead of it. Rule 16 sets out the action required of a give way vessel. The Godfrey Hurricane as the give way vessel was required to keep out of the way of the Pepper Jelly and to take early and substantial action to do so. There is no evidence as to whether or not the Godfrey Hurricane took any action.

439. Counsel notes that the experts agree that the obligation to take action would have arisen if the Godfrey Hurricane could be seen. Both also agree that neither operator could be expected to comply with Rules 15, 16 and 17 where the other vessel was not properly lit. The evidence points to the Pepper Jelly being properly lit.

RULE 17

440. Counsel submits that the rationale for Rule 17 (a) (1) as to maintaining course and speed is for the stand on vessel to be predictable so that the give way vessel can take action and avoid it. Counsel submits that the course of the Pepper Jelly was steady as shown by the GPS evidence[63]. The submission as to maintaining speed is that, in cross-examination Mr. Neal's evidence that change in speed caused the crash and was in breach of Rule 17 was shown to be erroneous. Counsel points to the answers given by Mr. Neal when he said that when boats are within a half a mile of each other they should be focusing on maintaining course and speed. His evidence was that the defendant should have perceived that the vessels were in a crossing situation at a half a mile. Lights are very visible at this distance. He agreed that after seeing a navigation light a mile away, you would need to monitor the other vessel for a period of time to form a view as to which direction it is going. He also said that speed is much more difficult to judge at night. Mr. Neal was asked at what point the defendant should have perceived a risk of collision. He replied that

[63] Documents Bundle page 151, Image Bundle page 9.

anything from a quarter mile to one tenth of a mile the risk is starting to increase and depending on the speeds of boats, it is hard to convey because one has to understand each operator's experience and ability. He said that a highly trained professional can probably be a short distance apart and be in complete control.

441. Rules 15 and 17 require the operator of the stand on vessel to maintain course and speed in a crossing situation that involves a risk of collision. Mr. Neal's distances are that a crossing situation should have been perceived at a distance of a half a mile and at a quarter mile[64], there would be a risk of collision. Counsel's submission is that the GPS data shows that Pepper Jelly's course and speed were maintained from a greater distance than a half mile away.

442. Mr. Neal's evidence was that the change in speed occurred at 8/10th of a mile[65] away from the collision. In summary Counsel's point is that the change in speed was made earlier than a quarter of a mile away so that the defendant is not in breach of Rule 17.

443. The defence submit that Pepper Jelly's change in speed one minute prior to the collision was at a time when a crossing situation let alone one posing a risk of collision was nothing more than a distant possibility.

444. The defence also submit that the prosecution cannot establish that the change in speed from 34 mph to 50 mph between GPS waypoints 854 and 857 was a violation of Rule 15 and 17 of the Regulations[66]. It is also said that the prosecution has failed to prove that the change in speed was a breach of duty and that it was a substantial cause of the accident. There were any number of variables some of which are unknown which could have changed the outcome.

445. Counsel submits that Rule 17 (a) (ii) refers to the duty on the stand on vessel if it notices that the give way vessel was not taking appropriate action. According to Mr. Neal, this would have been at 1/10th of a mile[67] estimated to be somewhere between waypoint 860 and 861. The prosecution does not seek to prove that the actions of the defendant were in breach of this rule which is

[64] 1320 feet
[65] 4,224 feet
[66] Paragraph 36 of defence written submissions.
[67] 528 feet

permissive and not mandatory. In any event this is the point at which the Pepper Jelly starts to alter course from 120 degrees true to 125.2 degrees true. This change is consistent with the vessel taking action as it is entitled to do.

446. As to Rule 17 (b) the mandatory requirement for action to avoid collision if the stand on vessel is so close that collision cannot be avoided unless action is taken, Mr. Neal said this would be when vessels were about 100 yards or more from each other, somewhere between waypoints 861 and 862. On the prosecution's evidence, this is where the Pepper Jelly alters course from 125.2 to 158.5. No breach of this rule is established. The submission is that evidence that evasive action was taken lends support to the defendant's assertion that he was keeping a look-out. Counsel notes that Mr. Neal changed his position two years after his Seventh Report in which he initially said that the course change taken was consistent with an evasive manoeuvre.

447. Mr. Neal relied on CCTV footage to show that the Pepper Jelly took no evasive action. Yet the agreed evidence of Grant Fredericks, a CCTV expert is that it does not show whether or not there was a sudden motion to avoid. Mr. Neal, however, does go on to say that the defendant could have turned into the path of the Godfrey Hurricane[68]. Counsel thus says that breach of Rule 17 (b) is not proven because the prosecution cannot rule out the possibility that the turn to starboard was an evasive manoeuvre to avoid a collision.

RULE 5 – LOOK-OUT

448. Counsel submits that the case for the defence is that the defendant was keeping a proper look-out but he still did not see the Godfrey Hurricane. He states that he is almost certain that the Godfrey Hurricane was not properly lit. Both sides agree that the Godfrey Hurricane should have been seen by a reasonable operator if it was displaying the required lights. Both experts agree that there is no failure on the part of the Pepper Jelly if the other vessel failed in its duty to be properly illuminated.

449. The defence submits that it is agreed that the prosecution must prove that the Godfrey Hurricane was properly lit before it can prove that there was a breach of Rule 5. On the available evidence

[68] Tab 8 page 2, para 3.

the prosecution cannot prove that the Godfrey Hurricane was properly lit. There is insufficient evidence on lighting to be able to determine whether a reasonable operator of the Pepper Jelly should have been able to see the Godfrey Hurricane any earlier than the defendant says he saw it. It thus cannot be established that he failed to keep a proper look-out.

450. As to the lighting of the Godfrey Hurricane, defence Counsel submitted that the Harbour House CCTV footage is the only evidence that shows that it was displaying a light or lights. While the light appears quite bright on the cameras, we do not know whether it would have been visible from the perspective of the Pepper Jelly.

451. The housing for the light shown on Image 65, we do not know whether it was working. The Godfrey Hurricane is a 1998 model. It was not inspected by the Port Authority. The lights were not examined at all. There is no evidence from witnesses that the light was working. If it was working, we do not know whether it was turned on.

452. The second submission is that even if it was on, we do not know its range of visibility and how bright it was. The CCTV camera is looking at its port side light. The colour of the light is not detectable by the cameras. While the port side light displayed hot shock when examined by Mr. Neal, we do not know whether this was from this collision or an earlier collision. In addition, the evidence was that lights may cloud over and go dull over time.

453. Even if the lights were functioning, it would not have been visible to the Pepper Jelly given the course of the Godfrey Hurricane. The operator of the Pepper Jelly would have been facing the starboard side of the Godfrey Hurricane and not the port side.

454. As to the starboard light, the CCTV footage cannot assist because it is the port side of the vessel which would be visible to the CCTV camera. We do not know if the starboard light was working because this was not examined by Mr. Neal. There is no evidence as to whether it was functioning or how bright it was.

455. The Pepper Jelly would have had a different perspective from the CCTV cameras, and it does not follow that the Pepper Jelly would have been able to detect lights on the Godfrey Hurricane.

DOCK LIGHTS

456. Counsel also pointed to the docking lights which are positioned to the front of the Godfrey Hurricane. These are forward facing. The shape of the housing around the lights is such that they are not designed to emit light to the side or rear. Being forward facing they would not have been visible to the Pepper Jelly but may have been visible to the Harbour House CCTV cameras because the bow of the boat may have been facing the cameras. The submission is that if the visible lights on the Pepper Jelly were docking lights, their forward facing emission would explain the reason that they were not visible to the Pepper Jelly.

457. It is further submitted that even if the Pepper Jelly failed to keep a proper look-out, it cannot be proven that it was that failure which caused the collision. The submission is that this is because "there is no evidence that the reasonable operator would have acted any differently than the defendant acted if he had perceived the Godfrey Hurricane for a greater period of time".

458. Counsel submits that the lack of data about the movements of the Godfrey Hurricane prior to the collision means that it is not possible for the Court to say what a reasonable man would or would not have done in the shoes of the defendant. There is nothing against which to measure what he actually did. There is no evidence that the Pepper Jelly was required to manoeuvre in any other manner than it was in fact manoeuvred.

459. Defence Counsel questions Mr. Neal's evidence as to whether or not the Pepper Jelly was displaying lights and suggests that his evidence calls into question his objectivity. The CCTV footage at Camana Bay shows that the Pepper Jelly entered and left with both navigational lights illuminated. The green port side light would have been visible to the Godfrey Hurricane from one mile away had it been keeping a proper look-out. The all-round white light can be seen illuminated 360 degrees as the vessel left Camana Bay. Its entry 15 minutes earlier without the white light illuminated was at twilight and the likely explanation is that the light had not been turned on.

460. The fact that the all-round white light was turned on, on the Pepper Jelly at the material time is supported by the following: -

- The evidence of the defendant in interview.
- Evidence of witness Christopher Briggs.
- Evidence of witness Joshua Hill.
- In the Harbour House CCTV footage one or more lights can be seen on the Pepper Jelly.

461. Mr. Neal could not give the position of the light on the Pepper Jelly when it was first recovered, that is at a point in time before he examined it and could not rule out the possibility that the position of the light was impacted by the collision itself or by the recovery operation in which it was removed from the water and towed to shore. Thus says the defence, there is no credible evidence that the vessel was being operated in breach of the rules as to lighting. Counsel argues that if the Pepper Jelly was properly lit and on the evidence we must accept that it was, then the question is why was it not seen by the Godfrey Hurricane and why didn't the Godfrey Hurricane steer clear of it.

SAFE SPEED

462. The defence submit that the prosecution has failed to prove that the speed was dangerous or excessive against the background of Rule 6.

463. It is submitted that this Rule applies to all vessels at all times. Operators are entitled to operate on the basis that other vessels will also act in accordance with these Rules. An operator cannot be expected to perceive another vessel which is unlit. The operator of a stand on vessel in a crossing situation is entitled to expect that the other vessel will give way.

464. Using the traffic analogy, Counsel said that the reasonable road user is entitled to maintain a permissible 30 mph speed even if he sees a vehicle on a side road or if he sees a vehicle approaching a red light. The reasonable road user is entitled to expect other road users to obey the traffic laws.

465. Counsel made submissions with respect to each of the six factors in Rule 6:-

- There was no lighting from the moon but apart from the dark, the state of the visibility was good. There was no rain, fog or smoke.

- As to density, the defendant in the interview was asked about Sunday nights in general not about the particular night. There was no other evidence about this other than the evidence of Joshua Hill who says "it was very quiet on the waters".
  There was no evidence as to the prevailing circumstances that night being dense such that 50 mph in open waters can be considered excessive.

- As to manoeuvrability and stopping distance, the Pepper Jelly was in open waters, in near perfect conditions, with no discernable vessels in the area. Thus, nothing prevented it from manoeuvring freely.

466. It is submitted that the prosecution cannot prove the alleged Indictment since the Pepper Jelly was still a very long way from shore and the channel entrance. At the time of the collision the Pepper Jelly was 1400 yards from the shore, i.e. the Harbour House Marina, 680 yards from the channel entrance and 1200 yards from the 200 yard marker for the shore line.

467. Counsel notes that the evidence of Captain Crawford is that the Pepper Jelly had ample time to decelerate before it reached the Channel. The evidence of Chris Briggs was that the speed of the Pepper Jelly was always appropriate. It is submitted that the prosecution has not said that if at a lower speed, there would be more manoeuvrability and ability to stop. This says the defence is a fatal omission.

468. Counsel submits that the prosecution has not called a single witness with knowledge and experience of the North Sound to say that it is unsafe to operate a boat at 50 mph. All that Mr. Neal said is that he would not drive his patrol boat at this speed on the lakes at night.

ANALYSIS

469. I have considered all of the evidence and submissions made in this case.

470. In considering the evidence I have reminded myself of the relevant directions, some of which are set out in the ***Crown Court Compendium***. These include the following: -

471. As judge of the facts in this case I am entitled to draw inferences from the facts as I find them to be. Inferences are common sense conclusions based upon the evidence which I accept. I am entitled and should draw inferences if I think that it is a reasonable, proper and common sense thing to do. If the inference which is about to be drawn is adverse to a defendant, I must be sure that that inference is the only correct one. If from a given set of facts, more than one inference is possible, I must draw the inference which is more favourable to the defendant. There is a difference between a reasonable inference and speculation. In respect of any inferences invited to be drawn, care must be taken before a conclusion is reached, to ensure that such is a reasonable inference on the evidence.

472. It is an admitted fact in this case that the defendant has no cautions or convictions for any criminal offence. He is a man of previous good character. This does not mean that the defendant could not have committed the offences with which he is charged but the defendant's good character is something I take into account in his favour in two ways.

473. Firstly, although the defendant did not give evidence, the defendant did give an account to the Police when he was interviewed, and he relies on that account in this case. I take the defendant's good character into account when deciding whether I accept what he said in that interview. I bear in mind however that this account was not given under oath or affirmation and was not tested in cross-examination. Secondly, the fact that he has not committed any previous offence may mean that it is less likely that he would have committed the offences with which he is charged on this Indictment. I take his good character into account in these two ways and will decide what importance is to be attached to it.

474. The defendant provided an account of the incident. The statements made in interview contain admissions, for example, that he was the operator of the Pepper Jelly, but he denies causing the

collision and denies culpability. I must consider the whole of what he said, the incriminating part and the denials in deciding where the truth lies. The prosecution says the incriminating part is true and the denials are not. The defence say he gave a truthful account of what occurred that day and of his state of mind.

475. The question of what weight to give to a statement made in interview is a matter for me as judge of the facts. I bear in mind that the incriminating parts are likely to be true otherwise why say them whereas the excuses/denials do not have the same weight.

476. Expert evidence formed a significant part of this case. Expert witnesses provide the courts with evidence and opinions in specific areas where we do not have specialist knowledge. In this case, it was on water accident reconstruction and seamanship. I am not an expert in these fields. A witness called as an expert witness is entitled to express an opinion in respect of his findings. However as with any other witness, my job as a jury is to weigh up the evidence and opinions of these experts and decide which parts I accept and which I do not. It is important to remember that I do not have to accept the evidence of any of the experts even if it is unchallenged. An expert's view is no more than an opinion. Being an expert witness does not mean that the expert must be correct. I must consider (assess) carefully the reliability of each expert's' opinion and whether it is one which I accept.

477. There was no challenge to the qualifications and experience of the expert witnesses. Each has significant experience and qualifications in this field. There is some challenge to the objectivity of some of the evidence of Mr. Neal. It was suggested to him that he was overreaching on occasion, for example, with respect to the lighting on the Pepper Jelly. I bear this in mind when assessing his credibility and deciding whether he was giving impartial evidence.

478. I remind myself that expert witnesses are only able to give evidence about one element in this case given their field of expertise. This means the expert's evidence is only part of the evidence I have heard in this case. A verdict is to be reached by considering all of the evidence in the case.

479. Much of the evidence in the case was agreed by way of admissions. These are facts which I do not have to decide. A significant number of statements were read, there being no challenge to the evidence contained in those statements.

480. While there are certain important factual matters in dispute there is broad agreement as to the events of the 11th August 2019. The speed at which the defendant navigated the vessel, the Pepper Jelly and the general location of the collision, meaning the vicinity of the Harbour House Marina as distinct from a specific waypoint are not disputed. The defendant had increased his speed from 35 to 50 mph as he approached the Harbour House Marina.

481. The issue in respect of this aspect of the case is whether that speed was dangerous or excessive in the context of all the circumstances. The defence say there was no risk of collision at the time. These were open waters and the speed was a safe one.

482. Other areas of factual dispute include whether the defendant was keeping a proper look-out and whether or not he took evasive action and thus whether he breached any of the ***Collision Regulations***.

483. The evidence of the two expert witnesses is central to these issues and the possible resolution of them.

484. The main areas of disagreement between the experts was as to the manner in which the collision occurred, the location of the collision whether waypoint 862 or 863, whether or not an evasive manoeuvre had been taken by the defendant before the collision occurred and the timeframe within which a risk of collision had occurred.

485. As to the manner in which the collision occurred I prefer and accept the evidence of Mr. Neal over that of Mr. Crawford. In addition to my own assessment of Mr. Neal as a measured and careful witness in relation to his examination of the vessels, the following exchange with Mr. Crawford illustrates the basis for my view of Mr. Neal as the more reliable witness.

486. There were a series of questions and answers in cross-examination as follows:-

"Q: Well, maybe this is graphically the best way of demonstrating this. 59. Sorry. Do you agree that that's the area of initial impact?
A: At the bow? No.

Q: Do you agree that's the initial impact?
A: No. Would you like me to explain?

Q: By all means.
A: Sure. As Mr Neal pointed out, there's conflicting damage patterns here. There's the damage pattern where the two vessels collided from vessel to vessel contact, and then there's the damage pattern when the Hurricane ran into the sea wall at speed, and a lot of the damage that you see on the bow of the -- if not most of the damage that you see on the bow of the Hurricane came from striking the sea wall.

Q: This piece of debris is recovered from the sea in the area of the collision.
A: Oh, it was?

Q: Yes.
A: I did not know that. Okay.

Q: Which is really why I asked you about what you've been able to do in 2021 because perhaps you'd readily agree you were at a significant disadvantage in terms of looking at the boat at that stage.
A: Well, I don't know that I would put it as significant disadvantage but certainly at a disadvantage compared to Mr Neal who inspected the vessel much earlier in time than I did.

Q: Or even what we understand to be a defence expert who was instructed before you who ...?
A: I'm aware there was somebody but I don't know anything about it.

Q: And again doing your best, were you or were you not supplied with images taken by that expert?
A: I don't believe so.

Q: Right.
Q: Right. If we go to your bundle behind tab 9, is that what we see the boat looked like when you inspected it?
A: Yes.

Q: And so it's right that you didn't get an opportunity to look at striations in detail of any of the pieces that we see stacked on the Godfrey Hurricane?
A: Well, that's true. But you can see in that photo that there's a piece of the hull missing there where your striations were in the previous image that you put up there. That piece

that's missing was inside and the reason it's missing is because it was broken off as the vessels collided and folded inside.

Q: I -- just asking you what you had the opportunity to do. You didn't take the pieces off in the way we see that they're piled there.
A: I did not, no, I did not.

487. In this regard I accept the submissions of the prosecution in closing that it appears that Mr. Crawford did not carry out a detailed examination of the Godfrey Hurricane.

488. Mr. Neal produced a number of images of the nature of the damage sustained by the vessels. He placed back into position, pieces of the Godfrey Hurricane which had been torn off during the incident. He said that he observed numerous marks and striations on the underside of the Pepper Jelly which show that it passed over another boat and which also evidence a change in direction. These striations are visible on Image 50. This shows striations in three places and at two different angles. Image 23 shows the direction of the striations. According to Mr. Neal the effect of the passing over was that the Godfrey Hurricane would yaw and the Pepper Jelly would heel meaning that it would roll in a clockwise direction. The Pepper Jelly thus changed direction and the momentum would have caused it to travel a distance before it eventually capsized. Upon its capsizing the GPS would become waterlogged.

489. Mr. Neal's view is also supported to some extent by the evidence of Mr. Hugh Bush and part of his statement which was read. He said that from what damage he observed on both vessels, it indicated that collision occurred between the two vessels with the Pepper Jelly impacting the Hurricane boat just forward of the operators' console and the starboard forward quarter and riding onto and over the vessel. The Pepper Jelly continued riding across the width of the Hurricane. At the same time, the port side of the Pepper Jelly would have been riding across the console area of the Hurricane deck causing the Pepper Jelly to list to her starboard and turn over ejecting the persons on board into the sea.

490. When did the risk of collision arise?

491. Mr. Neal's evidence was that a crossing situation would become apparent at a ½ mile. Operators should be focusing on maintaining their course and speed at that point. While there was an effort

to get him to agree to a specific distance at which a risk of collision arose and he did say that there would be a risk of collision at a quarter of a mile. His evidence was that the risk would increase the closer the boats get to each other, that anything from a quarter of a mile to a tenth of a mile that risk is starting to increase. He was asked this question: -

> *"Q: At that point it's fortune telling. This is your evidence. Your evidence is that if everything is perfect you will only perceive that the vessel is there at a mile and you only get into a crossing situation at half a mile and you only get into a potential collision situation at a quarter of a mile. So when Mr. MacDonald changes his speed he is not in breach of any regulations, not in breach of regulation 15 and he is not in breach of regulation 17. Do you accept that or not?*
>
> *Ans: I think you and I can disagree because I -- and back to going back to a minute, the risk increases the closer we get to each other but the crossing situation was in effect before a quarter mile or a half a mile is when they should perceive each other."*

492. Mr. Crawford's evidence on the other hand appeared to make the risk entirely dependent on the skill and experience of the operator and when the operator perceives there to be a risk. His evidence in chief was that even though the lights of both vessels should have been perceptible from over eight tenths of a mile, there was no risk of collision until the vessels approached near enough for a reasonable captain to determine the closure rate and that evasive action needed to be taken.

493. He appeared to agree in cross-examination that there was a risk of collision from the time of observation and an appreciable risk at half a mile.

> "….
>
> *Q: Yes or no, forgive me. The boats -- were the boats on a course that involved a risk of collision at half a mile?*
> *Ans: Sure, from the time that they left their respective areas, they were on a course that would –*
>
> *Q: I'm only asking you about half a mile. So half a mile they were on a course that involved a risk of collision?*
> *Ans: Yes.*
>
> *Q: The navigation lights on each boat should be observable at half a mile?*
> *Ans: I agree.*

Q: And someone keeping a watch on each boat should have appreciated the presence of the other boats navigation lights?
Ans: If they were illuminated, yes."

494. While the judgement of the operator may well be a factor, it appears not only to be mostly subjective but also impractical. The unintended result of accepting framing of the test in the way suggested by Mr. Crawford is that no risk of collision would exist where there are objective circumstances other than distance which also require to be taken into account. I accept the submission of the prosecution that the approach of Mr. Crawford would reward a careless operator.

495. One example given by Mr. Neal was that of a barge travelling at night and he described the size of such a barge. It may take them a longer period to stop, to be able to control it and he in that case said at a mile, you can start perceiving a potential risk.

496. I have taken note of defence Counsel's point which is that the defendant was not in breach of Rule 17 because the change in speed was made earlier than ¼ mile away. The obligation of the stand on vessel to maintain course and speed arises when there is a crossing situation and is imposed "so as to avoid a risk of collision".

497. Mr. Neal was asked in cross-examination at what point did the defendant change his speed from 35 mph to 47 mph, how far out was he from the collision. The answer was that he was eight tenths of a mile which is beyond a quarter of a mile.

498. Mr. Neal did not agree as to the absence of risk[69]. He said that the risk increases the closer they get to each other but the crossing situation was in effect before a quarter of a half a mile is when they should perceive each other.

499. The change in speed is separate from the rate of speed.

[69] See transcript page 98 – line 15

500. The defence say that Pepper Jelly's change in speed one minute prior to the collision was at a time when a crossing situation let alone one posing a risk of collision was nothing more than a distant possibility.

501. From the evidence of Mr. Neal and the objective circumstances, whether or not this was in fact a distant possibility one minute before the collision, must depend on the speed being travelled, the speed of the other boat, which would be hard to judge at night and the prevailing conditions.

502. It is difficult to accept that the single factor of distance can be isolated from all other conditions. I accept the more conservative view of Mr. Neal that a risk of collision would involve consideration of all the attendant circumstances and not just distance.

503. Defence Counsel in closing submissions provided a careful and detailed analysis of the ***Collision Regulations***. However, much of the conclusions invited to be drawn appeared to be based solely on the GPS evidence without regard to the other evidence in the case. In particular to the account given by the defendant in his interview.

504. The defence submission is that the change in course at 1/10th of a mile or 528 feet from the collision is consistent with the Pepper Jelly taking evasive action and means that there is no breach of Rule 17 (a)(ii). This submission is entirely inconsistent with the defendant's own account. He says that he did not see the other vessel until it was 5 feet away, that it came out of nowhere.

505. There is no other evidence to change or clarify the statement which he gave in interview. As was his right he chose not to give evidence and there is no burden on him to prove anything. This does mean however that there is nothing to gain say his account. All that the GPS can tell us is that there was a change but it can give no reason for the change.

506. Accepting and giving weight to the evidence of the defendant in interview that he did not see the Godfrey Hurricane until it was 5 feet away from him, this must mean that any alteration in course at 528 feet from the collision was not an evasive manoeuvre. The defendant was simply altering course.

507. Additionally, I accept the evidence of Mr. Neal over that of Mr. Crawford that the impact of the collision would have caused the Pepper Jelly to heel to starboard and a significant change in its direction thereby occurred. Mr. Neal's lengthy detailing of the striations shown in the various images provided evidence which I could see as being supportive of his conclusions. His description of the area of impact on the hardest point on the Godfrey Hurricane, the demonstration of the 1989 video although there were some differences, made me sure of the reliability of his evidence. I found him to be thorough and methodical and accept that his ultimate conclusion was arrived at after careful reflection.

508. On this point Mr. Crawford's examination was less extensive and his account of only a slight turn in the Pepper Jelly over a matter of a few seconds, appeared inconsistent with the extensive damage to the structural hard surfaces of the Hurricane as shown in the images and as described by both Mr. Neal and Mr. Bush and with the damage sustained by the Pepper Jelly. In short, Mr. Crawford's' account did not appear to be plausible in light of the physical evidence drawn to the Court's attention by Mr. Neal.

509. I therefore accept Mr. Neal's evidence that the turn to 158 degrees true north was not an evasive manoeuvre by the Pepper Jelly. It was as a result of the collision.

510. I also find this to be in keeping with the account given by the defendant in his interview. The defendant took no evasive manoeuvres because he simply had not seen the Godfrey Hurricane.

511. I therefore find that no action was taken to avoid a collision in accordance with Rule 8 of the ***Collision Regulations***.

LIGHTING

512. The lighting on the Godfrey Hurricane is a material issue. The experts agree that one cannot avoid what one cannot see and that certain obligations in the rules are only triggered by sight of the other vessel.

513. The CCTV footage does provide clear evidence that the Godfrey Hurricane was illuminated. While there is no available evidence as to which lights were illuminated on it, its lights appeared brighter than the light on the Pepper Jelly which the defendant said consisted of all three lights, that is his all-round white light and the two navigational lights.

514. The defence elicited in cross examination the fact that if the lights which were on, on the Godfrey Hurricane were the port navigation light or the docking lights, the defendant from the vantage point of the Pepper Jelly would have had difficulty seeing them. The port light would have been on the opposite side away from the Pepper Jelly while the docking lights face forward. There is no evidence that the starboard light which would have been closer to the Pepper Jelly was on.

515. Many of the suggestions as to the possible difficulty faced by the Pepper Jelly presupposes that no attempt was made to see the Godfrey Hurricane at a distance to the left of the Pepper Jelly.

516. The evidence of Mr. Crawford in examination in chief is in part: -

> *"Q: We have all seen the CCTV footage from Harbour House marina and it appears to show at least one light on each vessel. Staying with the Hurricane, can you say which of the lights we've just talked about might have produced that light?*
>
> *Ans: On the Hurricane, the all-round white light would appear as white, and it would be more brilliant than a side light would be. So I would think that if there's a white light, it could be the all-round white light. Now, additionally, the Hurricane is coming at an angle towards the CCTV and as it's coming towards the CCTV, the front dock lights, if they were illuminated, could also produce a white light, and from that distance, about 1300 yards away, it would be difficult to split those lights apart and tell that there are two lights rather than one light because of the distance away and the proximity that they are together.*
>
> *Q: So can you give an opinion as to whether one or both of those two lights were on?*
>
> *Ans: I have no data to be able to show hot shock on any of the bulbs because they just weren't present or available to me when I inspected the vessel."*

517. Mr. Crawford also said that it would not have been both, the docking light and the all-round white light, it would have to be either of the two because likely there would be a separation and that the navigational lights would show up as points of white lights.

518. In cross-examination he agreed with Mr. Neal that it does appear in the CCTV footage that the white light on the Hurricane appears to be brighter than the white light on the Pepper Jelly.

519. I find that there was sufficient lighting on the Godfrey Hurricane that it could have been seen by someone who was keeping a proper look-out.

520. The evidence of Mr. Neal as to the lighting on the Pepper Jelly appeared to me to be questionable and to be speculative in some respects. He appeared in this case to be transposing cases which he has seen previously to this case without a proper factual background. He suggested that the all-round white light may not have been in operation during the journey because of flickering, the speed at which the vessel was going and the horizontal position it was in when he examined the vessel. He accepted that the position in which he saw it, may have been impacted by the towing operation. He also appeared to accept that he had no positive evidence that it was not operational during the journey.

521. I accept that the Pepper Jelly was illuminated as said by the defendant and by the witness Joshua Hill and as seen on the CCTV footage.

SPEED

522. There is additional evidence to the GPS on the Pepper Jelly as to the speed at which both the Pepper Jelly and the Godfrey Hurricane were travelling. The Godfrey Hurricane when recovered, was found at about to a third to a half throttle and appeared to have been travelling at planing speed. This is estimated by Mr. Neal to be about 21.3 mph but it could have been doing more.

523. The Pepper Jelly was found with the throttle in the full position and photographs were taken of this. One of the statements read suggests that the next morning, one of the persons who went on the boat interfered with the throttle.

524. Was the Pepper Jelly travelling at a safe speed?

525. Rule 6 of the ***Collision Regulations*** provides as follows:-

> "Every vessel shall at all times proceed at a safe speed so that she can take proper and effective action to avoid collision and be stopped within a distance appropriate to the prevailing circumstances and conditions. In determining a safe speed the following factors shall be among those taken into account:-
>
> > The state of visibility, the traffic density, the manoeuvreability of the vessel. At night, the presence of background lights such as from shore lights and backspatter lights, the state of the wind, the sea and current and the proximity of navigational hazards and the draught in relation to the available depth of water.

526. Defence Counsel submits that the prosecution has not called a single witness with knowledge and experience of the North Sound to say that it is unsafe to operate a boat at 50 mph. It is also said that speed alone does not make the travel unsafe. There were a number of other variables any of which could have changed the outcome.

527. For this Court the answers given in interview by the defendant are of significance. He is an experienced boat captain of many years. Unlike Mr. Neal and Mr. Crawford he is familiar with the North Sound.

INTERVIEW OF THE DEFENDANT

528. In the course of the interview of the defendant, he said the following:-

> *'Q: What is the North Sound like in relation to traffic, boat traffic density, can you speak to that?*
>
> *SM: In general?*
>
> *Q: Yes. Particularly on Sunday nights.*
>
> *SM: On Sunday nights I – Usually around dark there's lots of boats going back home.*

Q: *When you say lots?*

SM: *Well, [inaudible] at Rum Point. It could be ten, it could be fifty, it could be a hundred.*

Q: *On a Sunday night, hundred – could be ten, could fifty, could a hundred boats?*

SM: *Well, it depends how many people at Rum Point on a Sunday.*

Q: *No, but –*

SM: *It's just that people when they leave they leave in the dark so –*

NB: *Okay.*

SM: *-- [inaudible] at Rum Point on a Sunday.*

529. He was asked:-

Q: *-- all right, as [inaudible] by the Port Authority Law, so can you tell me – tell us anything about your responsibility whilst operating a motor vessel at night or even in restricted visibility as according to those rules to prevent collision [inaudible].*

SM: *Um, well, basically, you just have to have all the relevant lights on and be watching, be attentively watching your surroundings. Don't operate at excessive speeds as usually and it's pretty much the same in the day time except you have the lights really.*

…

Q: *And what was your – your speed whilst travelling towards the –*

SM: *I was just –*

Q: *-- the Harbour House Channel?*

SM: *The boat -- The boat was just on a plane so like I said I -- twenty/going twenty-five because if the boat is on a plane the bow is [inaudible] high so you can't see above the bow so it's harder to see, so the boat was just on a plane, so it was flat –*

Q: *So –*

SM: *-- [inaudible]*

Q: *What is required to get the vessel on plane?*

SM: *Usually -- Usually power.*

Q: *Pardon?*

SM: *Power. I don't know – I don't know the exact RPMs, um, but usually [inaudible] nobody on board its going twenty-three to twenty - twenty-three to twenty-six miles an hour usually once you're on a plane because I had to work it out to work of my fuel mileage. So that's how I know that. And I usually don't go any faster than I have to at night because [inaudible] there's – there's a lot of buoys and lot of other crafts [inaudible] to possibly hit, so I always stick to [inaudible] at nighttime. My boat is my livelihood, so I like to [inaudible].*

…

Q: *Um, you said in your statement that you felt something hit you, are you absolutely sure that something hit you and not you hit something?*

SM: *Yes, Yeah I was attentively watching – I was watching ahead for buoys and I was watching. If – If it was in front of me I would have seen it and I wouldn't have missed it because --*

Q: *What if it was not directly ahead of you but at an angle?*

SM: *If it had been at an angle but if you think about a field of vision like what – I mean if it was anywhere at an angle that I -- that I could have seen, I would have seen it if they had lights on but I'm almost positive they didn't have lights on anyway, so um, that's why I was so surprised by the whole thing because I don't know where that boat came from. Like it -- it was going so fast and it just like it came out of nowhere. Nowhere. I almost seem like [inaudible]."*

530. The defendant knew the conditions of the North Sound that there were likely to be other boats travelling to get home on a Sunday night. His answers in interview make clear his awareness of the risks involved in speeding at night on the North Sound. His answers also make clear that he was aware that travelling at a speed above 40-42 mph to use his words "starts to get scary".

531. He said that on that night he was travelling at 20-25 because "if the boat is [ ] on a plane, you can't see above the bow so it is harder to see, so the boat was just on a plane, so it was flat". He said that he does not go any faster than he has to at night because there are lots of buoys and other craft to possibly hit.

532. The reasonable and inescapable inference is that he was saying that travelling at higher speeds was dangerous at night because it would affect visibility. The bow of the boat would come up rather than remain flat.

533. The fact is that he was travelling at about twice the speed which he himself as an experienced captain considered safe and a speed which on his own account would have affected his visibility means that I am sure that he was travelling at an unsafe speed.

534. Joshua Hill testified that he frequently travels at such speeds in the North Sound and feels safe.

535. I found him to be a patently partial witness. He disavowed the earlier statement he had made as to the circulation of alcohol on the boat and was in demeanor clearly reluctant to answer any question adverse to the defendant. His account of the incident on the night must also be viewed in light of his own account that he was drunk. According to him he was at the point where his comprehension would be affected. Stephanie Hicks according to him was "black drunk". Yet this is the person who the defendant says he asked to assist him to keep a look-out.

536. The evidence is that the Pepper Jelly was operated at full throttle, meaning as fast as it could go. The significance of the pattern of the earlier conduct of the defendant throughout the day of speeding as he neared the entrance to the Channel is that the defendant made no adjustment for the changed circumstances of visibility. He was aware, he said of the need to keep a close look-out and he even sought help in doing so. While he was not at the 200-yard marker or within the Channel, he was about 1400 feet from shore nearing the vicinity of the area. This was the very place where he expected boats to be returning on a Sunday afternoon from Rum Point. According to the evidence of Mr. Hill there were other boats at Rum Point that day.

RULE 5

537. Rule 5 of the ***Collision Regulations*** states that every vessel shall at all times maintain a proper look-out by sight and hearing as well as by all available means appropriate to the prevailing circumstances and conditions so as to make a full appraisal of the situation and of the risk of collision.

538. I am satisfied so that I am sure that on his own account coupled with the reality of the speed at which he was travelling, the defendant failed to do so.

539. I am satisfied so that I am sure that the Godfrey Hurricane was illuminated and had the defendant been keeping a proper look-out, he would have seen it approaching to his port side well before the collision.

540. Even if the lights of the Godfrey Hurricane was positioned in such a way to make it difficult to see it, the speed at which the defendant was travelling would on his own account have made it difficult to see it above the bow of the boat and in the night.

ADVERSE INFERENCE

541. I remind myself of the appropriate direction as set out in the ***Crown Court Compendium.*** The defendant chose not to give evidence. That is the defendant's right, but it has these consequences. He has not given evidence in the trial to contradict or undermine the evidence of the prosecution witnesses that he travelled at an unsafe speed, failed to keep a proper look-out and took no steps to avoid a collision. He did give an account to the Police which he stands by. That interview is part of the evidence, but it was not given on oath and tested in cross-examination.

542. When I asked the defendant's attorney whether he was going to give evidence I was advised that the defendant understood that if he failed to do so I would be entitled to draw inferences from that failure; in other words that I would be entitled to conclude that the defendant did not feel that he had an answer to the prosecution's case that would stand up to cross-examination.

543. It is my decision whether or not the defendant's failure to give evidence should count against him. I remind myself that I can only hold the failure to give evidence against the defendant if I am sure that the prosecution case is so strong that it calls for an answer and I am sure that the true reason for not giving evidence is that he did not have an answer that he believed would stand up to questioning.

544. In this case he did not give evidence, but he chose to call an expert witness to put forward his case. I do in this case draw an adverse inference from his failure to give evidence against him.

545. I remind myself that it is for the prosecution to prove the guilt of the defendant and while the defendants' failure to give evidence can provide support for the case, I cannot convict the defendant wholly or mainly because of that failure.

CONCLUSIONS

546. These are my conclusions considering the whole of the evidence in the case and all the submissions made.

547. I find as a fact that the defendant owed a duty of care to other users of the water.

548. I find as a fact that the defendant was in breach of the Rules in particular Rule 7. He was travelling at an unsafe speed for the prevailing circumstances, in particular the state of visibility.

549. Additionally, he failed to keep a proper look-out.

550. In travelling at an unsafe speed at night approaching a Channel, he was in breach of his duty of care owed to other users of the water.

551. His breach created an obvious and serious risk of death. A reasonably prudent person would have foreseen this. Given the statements made by him, he was aware of this risk. I find that his state of mind was such that he had actual foresight of that risk or was at the very least indifferent to an obvious risk of death arising from potential collision with another vessel while travelling at a dangerous and excessive speed after sunset and when approaching shore or the entrance to the Harbour House Channel.

552. That breach caused the deaths of Mr. Turner and Mr. Brown in the sense described in the case of ***R. v. Hennigan***.

553. I consider that the breach of duty in this instance or omission amounts to culpable negligence in the sense described by the Court in ***Adomako***. In that, having regard to the risk of death involved, the conduct of the defendant in navigating the vessel as he did was so bad in all the circumstances

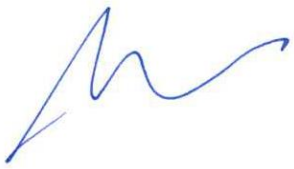
as to be criminal in nature. I find that his conduct in navigating that vessel fell so far below the standards to be expected of a person in his position with his experience and responsibilities as to be criminal in nature.

554. In operating the vessel at the speed at which he did, he did so in a manner which can only be described and which I find to be rash or negligent such as to endanger human life.

555. Having considered all the evidence and each count of the Indictment separately although the evidence is overlapping, I find that I am satisfied so that I am sure that each required element has been made out on the prosecutions' case in respect of each count of the Indictment.

556. I therefore find that the defendant is guilty as charged.

Dated this the 2nd of August 2022



The Hon. Justice Cheryll Richards QC
Judge of the Grand Court